| Chapter 8 |

The International Criminal Court in the Context of International Criminal Law[1]

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ABSTRACT

There was a long path to the establishment of a permanent international criminal tribunal, from 1474 through the so-called Versailles Peace Treaties, the International Military Tribunal of Nuremberg and the International Military Tribunal of Tokyo, and the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide to the text of the Rome Statute, which was adopted in 1998. Although the circle of international crimes is much larger than that of the crimes covered by the Rome Statute, it cannot be denied that it covers most international crimes. The jurisdiction of the International Criminal Court is based on the satisfaction of the preconditions settled in the Rome Statute. The jurisdictional competence of the International Criminal Court is based on two hypotheses: It is competent when the crime is committed on the territory of a States Party to the Rome Statute or by a national of a States Party. The main organs of the International Criminal Court are the Judiciary, the Office of the Prosecutor, the Registry, and the Assembly of States Parties. The International Criminal Court must use different evidentiary standards when rendering its decisions.

KEYWORDS

Rome Statue, international crimes, jurisdictional competence, evidentiary standards

1. From early thoughts and promises to their realization: The long road to establish a permanent international criminal tribunal

1.1. Historical antecedents

While war, cruelties, and atrocities are interrelated in the history of mankind, only a few historical examples can be found of genuine, concerted international action to set up at least *ad hoc* mechanisms to investigate war crimes and if possible, to punish their perpetrators. The best-known historical example is Peter von Hagenbach's condemnation and execution in 1474 for crimes committed during his rule in Breisach as bailiff instated by Charles the Bold, Duke of Burgundy.

1 This contribution was written in his personal capacity. The thoughts expressed herein cannot be attributed to the International Criminal Court.

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The Imperial War Council of Emperor Leopold von Habsburg had to open an investigation in order to clarify why some commandants and officers of the troops of the Holy League had engaged in a massacre of the Jewish population as well as Turkish children, women, and surrendered soldiers when liberating Buda from the Ottoman yoke in 1686. Moreover, a good number of Jewish survivors were kept as slaves of the Christian officers, who engaged in the slave trade or ransom business until the well-off Oppenheim, supplier of the army and the emperor's creditor, arranged their freedom and, as a counterpart, reduced the huge imperial debt.

Nor were the following two centuries void of actions that today can be considered war crimes. See, e.g.: *i*. Napoléon's order to massacre his Arab and Albanian prisoners of war at Jaffa[2] during the Egyptian campagne; *ii*. the execution of surrendered Hungarian generals by Julius von Haynau[3] after the defeat of the Hungarian War of Independence of 1848/1849; *iii*. the Battack massacre by the Ottomans in the uprising in Bulgarian territories[4]; *iv*. the attacks against native American women and children in the Wild West[5]; and *v*. the establishment of British concentration camps during the Boer wars.[6]

Even if the second half of the 19th century saw the birth of what we can rightfully call international humanitarian law in the form of several multilateral conventions (see e.g., the Saint-Petersburg declaration[7], the Geneva Convention,[8] and The Hague Conventions[9]), which was followed by similar or complementary treaty-making at the beginning of the 20th century,[10] World War One broke out and ended four years later in a context where rules of warfare could be considered well known but no previously

2 Siege of Jaffa.
3 The 13 Martyrs of Arad.
4 Batak Massacre.
5 Wounded Knee Massacre.
6 Second Boer War concentration camps.
7 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868.
8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1866; Additional Articles relating to the Condition of the Wounded in War, 1868.
9 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1899; Declaration (IV,2) concerning Asphyxiating Gases, 1899; Declaration (IV,3) concerning Expanding Bullets, 1899.
10 Convention on Hospital Ships, 1904; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1906; Convention (III) relative to the Opening of Hostilities, 1907; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 1907; Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 1907; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 1907; Convention (IX) concerning Bombardment by Naval Forces in Time of War, 1907; Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 1907; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 1907; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 1907.

established international sanctioning mechanism existed to give them effect. Although the observation of elementary rules of humanitarian law can be considered as rather satisfactory in 1914–1918 (which is certainly true if we take into account their observation during World War Two), this does not mean that outrageous crimes did not occur, committed equally by soldiers of the Central Powers and soldiers of the Entente Cordiale. (It is to be noted that there was an important legal weakness hidden in a good number of the above conventions, i.e., the so called "*clausula si omnes,"* liberating the contracting parties from their obligations if at least one of the enemy belligerents was not bound by the given convention.)

However, the peacemakers of the so-called Versailles Peace Treaties intended to establish only one international tribunal having jurisdictional competence over a single, emblematic person, the German Emperor William II. As we know, this international tribunal never came into being because the Netherlands granted asylum to the abdicated emperor and refused to surrender him.

A German tribunal established and working in Leipzig was mandated by the Allied and Associated Powers to probe German officers charged with war crimes, and this institution delivered a handful of judgments, some of which pronounced imprisonments.[11] Concerning other alleged war criminals of the former Central Powers, no penal procedure was engaged and e.g., the genocide committed against Armenians living in the Ottoman Empire[12] was left without genuine persecution even if 3 such persons were among the 18 sentenced to death during the period between the Sèvres and the Lausanne Peace Treaties.

It is also to be emphasized that war crimes committed by the armies of the victorious Entente Cordiale were at once forgotten and left without consequences. This was parallel to the lack of trial concerning the military use of poisonous and asphyxiating gases, a form of warfare used on the frontline by both sides.

Law-making after WW I tried to address the shortcomings of the previous Hague and Geneva Conventions as observed in the war. The adopted humanitarian law conventions dealt *inter alia* with the protection of the wounded and the sick[13] and that of prisoners of war,[14] the prohibition of gas weapons,[15] without touching upon, however, the *si omnes* rule or the status of resistants not belonging to the regular armies.

Interlinked with the political climate created by Yugoslav King Alexander's murder in 1934 in Marseille by extremists of the VMRO and Oustashi movements,[16] where politicians and media suspected the involvement of governments of several countries, the League of Nations' treaty making activity took a turn that Romanian international

11 Leipzig Trials.
12 Armenian genocide.
13 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1929.
14 Convention relative to the Treatment of Prisoners of War, 1929.
15 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.
16 Kovács, 2022; Monier, 2012; Müller, 2015.

lawyer Vespasian Pella[17] had already suggested in 1925. However, neither of the two conventions[18] drafted by experts commissioned in 1934 by the League of Nations and finalized by a diplomatic conference in 1937—whose text, contrary to Pella's original idea, focused only on terrorism—received enough ratifications to enter into force.

The 1930s had already witnessed mass cruelties during Japan's aggression against China (e.g., the Nanking massacre,[19] 1937) and Italy's aggression against Abyssinia (e.g., use of mustard gas at least at three battles and against 13 cities or villages[20] in 1936), but World War Two revealed once again the problems of a deliberate will to violate the well established rules and the discrepancy between the technical capacities of modern armies and the lack of adequate protection of the civilian population. The Hitlerian racial policy aiming at the extermination of Jews in Europe by units of the SS and the Wehrmacht as well as with the complicity and even active collaboration of governments and administration in the occupied territories and the selective, racially, or politically based denial of the rights of prisoners of war[21] after the launch of the Barbarossa Plan are all terrible examples of the violation of basic rights of victimes of armed conflicts. The Japanese warfare in South-East Asia and the Pacific was also marked by extreme cruelty arising from another version of a feeling of racial superiority as manifested vis-à-vis the local civilian population and prisoners of war.

The trilateral declaration on atrocities,[22] focusing only on crimes committed by Germans in Europe, warned already in 1943 of the *in personam* serious legal and judicial consequences of these acts without being able to stop their commission.

17 "(...) la peine doit s'étendre à toutes les personnes physiques qui ont participé à la préparation des actes criminels ou qui ont eu l'initiative de leur accomplissement. Par conséquent, il faut punir les dirigeants politiques qui, par leur action, ont sciemment précipité les événements et ont occasionné ainsi un conflit armé entre leur Etat et un autre Etat." Pella, 1925, pp. 183–184.

18 Convention for the Prevention and Punishment of Terrorism, 1937; Convention for the Creation of an International Criminal Court, 1937.

19 Nanjing Massacre.

20 Grip and Hart, 2009, pp. 3–4.

21 The order called "Kommissarbefehl" denied POW status to the Communist political officers of the Soviet Army (see the English translation e.g., at https://en.wikipedia.org/wiki/Commissar_Order). POWs of Jewish origin were also often killed after capture or in camps.

22 "(...) three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows:
At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. (...) Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done. The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies." (Moscow Conference, October 1943).

The declaration also emphasized deterrence and, although in an obscure manner, it evoked a joint prosecution of the most responsible parties and those whose acts cannot be linked to a single state.

After the surrender of Italy (1943), followed progressively by the surrender of satellite states of the Axis (1944/1945), ending in Germany's and then Japan's capitulation, the victorious powers realized their solemn promise and established the International Military Tribunal of Nuremberg (IMTN) and the International Military Tribunal of Tokyo (IMTT). These instances enjoyed competence over top German and Japanese war criminals. Occupying tribunals enjoyed penal jurisdictional competence on the basis of a separate regulation[23] over Germans suspected and charged with war crimes or crimes against humanity not falling under the jurisdiction of the IMTN. As to Italy and the satellites (Bulgaria, Finland, Hungary, Romania), they had already engaged in surrender agreements, and in their peace treaties undertook to put their own war criminals to trial at home or to extradite them to their victims' countries.

A procedure for eventual violations of the law of warfare by the Allies[24] was out of question at that time, even if some issues incidentally emerged[25] during the Nuremberg trial.

On the basis of the London Agreement,[26] Article 6 of the Statute of the IMTN enumerated the following crimes[27] as falling under the jurisdiction of the International

23 Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, December 10, 1945.

24 The bombing policy ("carpet bombing") practiced by the British-American air forces, the destruction of Hiroshima and Nagasaki by atomic bombs or the mass expulsions, spoliation, and rapes committed by troops of the Soviet Army, conditions and abuses in Soviet POW camps as well as ethnic vengeance targeting minorities, etc., were evidently hardly compatible with internationally accepted humanitarian legal rules.

25 The International Military Tribunal of Nuremberg had to strike out the *Katyn massacre* from the list of German's war crimes, and Admiral Dönitz's defence successfully evoked the "*tu quoque*" principle in order to have his client acquitted of one of the charges. See Karl Doenitz.

26 Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republic for the Prosecution and Punishment of the Major War Criminal of the European Axis, London Agreement of August 8th 1945.

27 Article 6.

"The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or

Military Tribunal of Nuremberg: crimes against peace, war crimes and crimes against humanity. The same structure with *grosso modo* the same content appeared in the Control Council Law No. 10 and in the peace treaties. (The Control Council Law added a fourth pillar[28] covering membership in the Gestapo, SS, SA, SD, the Oberkommando of the Wehrmacht, the Nazi government, and the leadership of the NSDAP, all determined to be criminal organizations in the judgments of the IMTN.) The peace treaties referred to the same three pillars, without containing any enumeration, focusing mostly on the arrest and the extradition of those who were under investigation for crimes committed elsewhere.

As to the IMTT, established by an order of January 19, 1946. issued by Douglas McArthur, Supreme Commander for the Allied Powers,[29] the enumeration of the crimes was nearly identical, but war crimes were covered by a general definition without any example[30] and the religious motif was absent from the crimes against humanity.

1.2. From Nuremberg to Rome

After the sentences[31] pronounced by the IMTN and the IMTT, the world had to think on how to continue. The famous philosophy of "*Never again!"* was legally reinforced by the incorporation of the Nuremberg principles into a resolution of the United Nations' General Assembly, which solemnly recognized their customary law character and called for the International Law Commission

persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. Nuremberg Trial Proceedings Vol. 1. Charter of the International Military Tribunal."

28 Article II/1 (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

29 International Military Tribunal for the Far East, 1946.

30 Article 5 (b): Conventional War Crimes: Namely, violations of the laws or customs of war.

31 The IMTN condemned to death by hanging Hermann Göring (who succeeded in committing suicide before his execution), Joachim von Ribbentrop, Wilhelm Keitel, Alfred Jodl, Hans Frank, Arthur Seyss-Inquart, Alfred Rosenberg, Wilhelm Frick, Fritz Sauckel, Julius Streicher, and *in effigie* Martin Borman. Rudolf Hess, Walther Funk, and Erich Raeder were condemned to life imprisonment, and imprisonment sentences were pronounced on Albert Speer, Baldur von Schirach, and Konstantin von Neurath, while Hjalmar Schacht, Franz von Papen, and Hans Fritzsche were acquitted. The IMTT pronounced capital punishment on Doihara Kenji, Hirota Koki, Itagaki Seisiro, Kimura Heitaro, Macui Ivane, Muto Akiri, and Todjo Hideki, and 18 indictees were condemned to imprisonment of different terms.

> "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal."[32]

In a subsequent resolution, it gave a precise mandate to the International Law Commission to prepare a code for crimes against peace and humanity.[33]

However, the decades following these solemn engagements showed a rather slow development characterized by recurring obstacles and renewed activity.

It is true, however, that the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), prepared by the way by an *ad hoc* expert committee and not by the ILC, could be considered a genuine success and the realization of the solemn promises.

In Article I of the Genocide Convention, "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." The forms of perpetration, as enumerated in Article II, are practically *verbatim* identical with those listed in the London and Nuremberg documents focusing on the Holocaust as *crimes against humanity*. This article stipulates that

> "[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

However, although it closely followed the London and Nuremberg definitions, the draft code of crimes against peace and security of mankind, submitted in 1954 of the table of the General Assembly by the ILC,[34] was not discussed *in merito*. Even if it was put, e.g., on the G.A. agenda in 1954, 1968, and 1974, governments were satisfied with short, formal discussions and promised future study of the question.

Governments generally referred to the lack of a legal definition of aggression in order to avoid detailed discussion of the draft. They were also divided whether it is useful to amend the classic Nuremberg principles with dispositions penalizing other—contemporary well spread and largely used—actions and behaviors. Moreover,

32 Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal.
33 Formulation of the principles recognized in the London Charter of the Nuremberg Tribunal and in the judgement of the tribunal.
34 Draft Code of Offences against the Peace and Security of Mankind, 1954.

several governments questioned the feasibility of the project without an expressed will to establish a specialized international tribunal. (It is to be noted that the Genocide Convention alluded to the establishment of a tribunal having jurisdiction to adjudge individual cases,[35] but States did not do too much to realize this commitment.)

An initiative submitted by Trinidad and Tobago put an end to this "Cinderella dream" in the 1980s, and the ILC finally put two drafts on the table of the governments: a Draft Statute for an International Criminal Court[36] (1994) and a Draft Code of Crimes against the Peace and Security of Mankind[37] (1996). The International Law Commission made the right step in the right direction.

The international jurisdiction—as suggested by the ILC in the draft-statute—would have embraced four (traditional) crimes i.e., a) genocide, b) aggression, c) violation of the laws and customs of warfare, and d) crimes against humanity, complete with a fifth one i.e., e) crimes constituting the violation of different international conventions, enumerated in an annex.[38]

Surprisingly, these ILC drafts received a much warmer welcome than before. The openness of the States was probably due to the political and psychological impact of the recent armed conflicts in ex-Yugoslavia and Rwanda and to the experiences of the functioning of the two international tribunals, established respectively in 1993 and 1994 by the Security Council *acting under Chapter VII* through Resolutions 827 (1993) and 955 (1994).

According to its statute, which was annexed to the report of the Secretary General of the United Nations and approved by Resolution 827(1993), which later underwent several modifications and was reissued in other resolutions,[39] the International Criminal Tribunal for the former Yugoslavia (ICTY) was competent over *i.* war crimes, differentiated as grave breaches of the 1949 Geneva Conventions[40] or as breach of laws

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

36 Draft Statute for an International Criminal Court, 1994.

37 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996.

38 The annex referred to the following conventions: the four 1949 Geneva Conventions on the protection of victims of armed conflicts and their 1977 Additional Protocols; International Convention on the Suppression and Punishment of the Crime of Apartheid, 1974; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; Convention for the suppression of unlawful seizure of aircraft, 1970; Convention for the suppression of unlawful acts against the safety of civil aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1971; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988.

39 E.g., SC resolutions 1166 (1998), 1329 (2000).

40 Here, there was an exemplicative enumeration going from *a* to *h*.

and customs of war,[41] *ii.* genocide (with the 1948 components), and *iii.* crimes against humanity (enumerating in a representative manner murder, extermination, slavery, deportation, imprisonment, torture, rape, persecution on political, racial, or religious grounds, and other inhuman treatment).

In the statute of the ICTR, the same crimes were mentioned (though in a slightly different order), but war crimes were defined as breaches of Common Article 3 of the 1949 Geneva Conventions and its Additional Protocol II. Terrorist acts were added thereto.

The minor conceptual differences in the statutes of the ICTY and ICTR are due to the fact that while states were very divided whether the ex-Yugoslav conflict should be classified as an international or a non-international armed conflict, the nature of the Rwandan tragedy as a civil war was never contested. As to the ICTY, the war crimes that were enumerated can legally be understood in the context of international as well as non-international armed conflicts.

1.3. Rome and the adoption of the Statute of the International Criminal Court

The text of the Rome Statute,[42] where one may discover at the same time the original proposals of the ILC and the experiences of the ICTY and ICTR, had to be adopted by governments with different views and interests as manifested at the preparatory negotiations and at the Rome Diplomatic Conference.

The states remained divided concerning the jurisdictional competence over the crime of aggression (whether with or without a definition) as well as concerning the proposal to attach new crimes to the classical Nuremberg ones. Moreover, the question of the practicality of the precision adopted in defining the different crimes and the identical or different nature of certain crimes committed in an international or non-international armed conflict emerged repeatedly.

The preparatory works (*travaux préparatoires*) reflect rather well the conflicting and concurring proposals put forward until the very end of the discussions—see especially the Triffterer Commentary[43]—but the outcome of the final days was due to the heroic activity of the committee of the whole chaired by the Canadian Philippe Kirsch of devising a suitable text from the very conflicting proposals. The result was submitted with the philosophy of "*take it or leave it*." The text they drew up contains many formulas, either consensual or backed by a great majority, and is definitely a genuine and fantastic backbone, but, on the other hand, it is not easy to understand in all particulars and is not void of lacunae or illogical textual positions of dispositions on closely related institutions and their respective procedural roles and competences.

The text of the Rome Statute was finally adopted on July 17, 1998, with 120 votes in favor, 7 against, and 21 abstentions, while 12 States did not participate in the voting. The adoption opened the way to signatures and ratifications. (As of 2021, 123 States

41 Here an exemplificative enumeration going from *a* to *e*.
42 International Criminal Court, 2011 (hereinafter: Rome Statute).
43 Triffterer and Ambos, 2016.

are bound by the Statute, but unfortunately some very important States are still missing.[44])

Concerning aggression, the Rome Diplomatic Conference opted for a pragmatic-diplomatic solution by postponing the real decision, saying that the jurisdiction of the International Criminal Court over aggression could only be materialized when States Parties agree upon a precise and legally binding definition of the crime of aggression.

Contrary to skeptics' prognosis, this approach seemed useful, and in Kampala in 2010, the States Parties were surprisingly able to agree on the definition by adopting *quasi verbatim* the formulas contained in the famous Resolution 3314 (XXIX) of the General Assembly. (It is, however, true that the French text shows a number of differences between the 2010 and the 1974 versions, but none of them is materially important.)

Consequently, some new articles[45] had to be inserted into the Rome Statute and their entry into force had to be decided by the Assembly of States Parties after the submission of the 30th instrument of ratification. Finally, in 2017, the Assembly decided to activate the competence over aggression if committed after July 17, 2018. [46]

As to the other crimes penalized by the Rome Statute, their formulation and position may be summarized as follows:

The crime of genocide with all its five traditional forms is the subject of Article 6. Crimes against humanity are enshrined in Article 7 with a similar content as that of the ICTY and ICTR, but without the crime of terrorism, although apartheid was added thereto.[47]

War crimes are inserted in Article 8 in a very precise manner and treated separately considering whether they were committed in an international or a non-international armed conflict. (This method, however, resulted in a considerable textual repetition.)

44 The most important ones are the following: China, Russia, USA, Israel, India, Pakistan, Indonesia, and Malaysia. Excepting Jordan and Tunisia, Arab States did not join either.

45 Rome Statute, Articles 8bis, 15bis, and 15ter.

46 International Criminal Court, 2015.

47 Rome Statute (hereinafter Rome Statute), Article 7, Crimes against humanity.

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

War crimes committed in the context of an international armed conflict are treated in two parts: Article 8, § 2, *a* and *b*.

While Article 8, § 2, *a* concerns so-called grave breaches of the 1949 Geneva Conventions, Article 8, § 2 *b* in its 26 subpoints enumerates the violations of the law and customs of war. Several of these points reflect the impact of different conventions forbidding the use of certain types of weapons or a certain manner of warfare.

Article 8, § 2 *c* and *e* are devoted to non-international armed conflicts, casually called civil wars. Article 8, § 2 *c* repeats the four grave breaches of commun Article 3 of the Geneva Conventions, while Article 8, § 2 *e* incorporates 15 forms of violations of laws and customs to be applied during a civil war.

Nearly all the crimes hereby enumerated are defined with such a precision that might remind the reader of national military criminal codes. They are thus very different from the proposals submitted by the preparatory committee of the diplomatic conference (the "*PrepCom*") between 1995–1998 which emphasized precise descriptions of the three or four most important crimes. The finally adopted version—as already mentioned—is due to the *ad hoc* committee chaired by Philippe Kirsch, who explained that in the approach they had chosen, the committee tried to synthetize the proposals of the national delegations and cite the core formulas of the convention provisions accepted unanimously or by a huge majority banning some types of weapons of some types of warfare.

As a result, beside the breach of the most important conventions contracted on the protection of victims of armed conflicts (i.e., the so-called *Geneva Law*), the ICC's jurisdiction was also established over violations of the commitments of the conventions on the manner of warfare[48] (i.e., the so-called *The Hague Law*). However, as a consequence of this approach, the list of crimes falling under the ICC's jurisdiction became much longer than those considered by the Geneva Convention or their Additional Protocols as "grave breaches" of their dispositions. The adopted formulas became more precise than those proposed originally by the International Law Commission; moreover, the Assembly of States Parties adopted a special, *de jure* non-binding but very important interpretative document entitled "*Elements of crimes*," which explains the constitutive elements of the different crimes one by one.

1.4. The possibility of enlarging the ICC's scope of jurisdiction?

It had already become clear during the preparatory works and later in Rome that states are so divided concerning the acceptance of the ICC's jurisdiction over illegal trade of drugs[49] or terrorism that it was decided provisionally to set them aside with

48 E.g., *i.* Declaration (IV,3) concerning Expanding Bullets, 1899; *ii.* Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954; *iii.* Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

49 Recall that Trinadad and Tobago put the idea to create an international criminal tribunal on the table of the General Assembly precisely to strengthen the fight against forbidden trade of drugs through the enhancement of international cooperation and the deterrence of the offenders (1989); History of the ICC.

a statement, however, in the Final Act of the Rome Diplomatic Conference that the Assembly of States Parties may consider in the future whether the ICC's competence can be extended to these crimes as well.

Currently, international crimes can be symbolized by two concentric circles that can be enlarged. Most international crimes belong under the jurisdictional realm of the International Criminal Court. Prosecuting and jurisdictional power are exercised by the states as well as by the ICC. The principle of complementarity is the tool that helps to decide whether the ICC or the State(s) are entitled to act and to punish.

We have just mentioned that some crimes (e.g., drug smuggling, terrorism) are not covered by the Rome Statute, but of course this does not hamper the States' right to retaliate on the basis of the principle of the universal jurisdiction, confirmed by many international conventions to which they are contracting parties.

There are also examples of other international tribunals or the so-called hybrid (mixed) international judicial bodies acting against perpetrators of crimes not included in the Rome Statute. This happened *inter alia* in Lebanon in the procedure initiated against alleged perpetrators of the terrorist bombing killing PM Rafik Hariri and some of his colleagues. (Special Tribunal for Lebanon (STL), *see below*).

It goes without saying that the circle of international crimes is much larger than that of the crimes covered by the Rome Statute. It cannot be denied, however, that most international crimes—and especially the most important ones—are there. Their list can certainly be enlarged and the Rome Statute, putting emphasis on the procedural rules of how to amend, does not contain any material precondition for new crimes as the object of a future amendment. Taking into account the realities and customs of international diplomacy, one might assume that chances depend first and foremost on the importance of the crime and the quasi-unanimuous will to punish it.

Three amendment packages have been adopted so far by the Assembly of States Parties.

The first package was adopted in Kampala (2010) where, beside the definition of aggression, States agreed to also criminalize the use of poisonous or asphyxious gases and bullets that flatten easily in human body in the case of internal armed conflicts.

The second package was adopted in 2017 and it penalizes the use of *i*. microbiologic and toxic weapons and poisons, *ii*. weapons the primary effect of which is to injure by fragments that in the human body escape detection by X-rays, and *iii*. lasers and other similar weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. These are crimes irrespective of whether they were committed in an international or non-international armed conflict.

The third package dates back to 2019 and concerns the prohibition of starvation as a method of warfare in a non-international armed conflict as well.

Even if adopted by the Assembly of States Parties, states still must ratify these amendments in order to be binding on them. In 2021, the ratio of ratifications is unfortunately not very promising.[50]

2. The procedure of the International Criminal Court

2.1. Which are the most serious crimes and what is complementarity?

The jurisdiction of the International Criminal Court is based on the satisfaction of the preconditions settled in the Rome Statute. The ICC does not *per se* enjoy competence over the above outlined four main crimes: The Rome Statute placed great emphasis on the "most serious crimes" and the observation of the rule of "complementarity" in its Preamble and Article 1,[51] but these expressions and their technical details reappear several times in the subsequent articles.

The qualification as "most serious" shall not be understood as only referring to the extreme cruelty of a criminal act but *inter alia* the large scale of crimes, their organized patterns, and their planning can substantiate its evocation, as the reader may find in the introductory part ("chapeau") of the articles on crimes against humanity[52] and war crimes.[53] The realization of the criteria of the *chapeau* constitutes the contextual elements of the crime.

Complementarity means that the International Criminal Court steps in if the state is apparently *unable or unwilling* to exercise the criminal prosecution. If the prosecution was engaged in on a national level and is managed diligently, or if it is fully accomplished and, in case of condemnation, the sanction pronounced is adequate for

50 As of May 26, 2021, the amendment on aggression had been ratified by 41 States, but the other elements of the first package only by 15, the second by 9, and the third by 6. See https://asp.icc-cpi.int/en_menus/asp/RomeStatute/Pages/default.aspx.

51 International Criminal Court, 2011, Preamble
The States Parties to this Statute, (...) Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,
Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, (....) have agreed as follows:
Article 1 The Court An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute and shall be complementary to national criminal jurisdictions (...).

52 Rome Statute, Article 7, Crimes against humanity
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (....).

53 Rome Statute, Article 8, War crimes
1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or
policy or as part of a large-scale commission of such crimes (...).

the crimes committed, under both hypotheses the principles of the rule of law and fair trial were duly observed and the ICC does not need to proceed because the double jeopardy principle (*ne bis in idem re*) forbids a second condemnation for the same act. The same rule applies also in case of an acquittal, pending its pronouncement solely on the scrupulous observation of the fair trial requirements.

However, if the state knowingly does not proceed or if the procedure amounted to a condemnation but the sanction seems to be manifestly mild, the ICC enjoys jurisdictional competence, providing the *ratione loci* or *ratione personae* preconditions (see below) are met. The ICC is also empowered to adjudge when the state is unable to prosecute and punish, which could be the effect of a prolonged civil war, the total or partial collapse of the public administration, or the lack of staff and/or truly independent judiciary.

2.2. Competence based on territory or nationality and the importance of the peculiar timeframe (Jurisdictio ratione loci, ratione personae, and ratione temporis)

The jurisdictional competence of the International Criminal Court is based first and foremost on two hypotheses: The ICC is competent when the crime is committed *i.* on the territory of a States Party to the Rome Statute or *ii.* by a national of a States Party.[54]

Huge continuous debates surrounded the formulation of these two pillars, and one of the main issues was whether the State's consent is needed or not, or under what conditions. The other difficulty was whether the ICC may enjoy competence over nationals of States that did not ratify the Statute, and if it does, under what conditions.

The finally chosen solution was at the same time legal and political/diplomatic.

As the idea of the need for the States Party's consent as precondition of proceedings was continuously rejected by most of the participants of the diplomatic conference, it was not included in the adopted text.

Concerning the question of the impact of the Rome Statute on non-States Parties, there are two alternative solutions.

On the one hand, if a non-States Party accepts *in concreto* the ICC's competence,[55] we meet a well-known exception to the rule of the *pacta tertiis nec nocent, nec pro sunt*.

54 Rome Statute, Article 12, Preconditions to the exercise of jurisdiction
1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national. (...).

55 Rome Statute, Article 12, Preconditions to the exercise of jurisdiction (...) 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

The second exception, however, is related to competences attributed to the Security Council by Chapter VII of the United Nations' Charter: The Rome Diplomatic Conference agreed to recognize certain competences to the Security Council in the context of the jurisdiction under the Rome Statute.[56] Even if this is absolutely correct legally, it is obvious—and the ca. 75-year long history of the UNSC has proved it abundantly—that most of the permanent five members of the top organ of the United Nations too often act (or more precisely, miss taking an obviously needed step) following their own geopolitical interests instead of observing their responsibility under the Charter and general international law.

The Security Council was also granted other prerogatives[57] in the Rome Statute, and the jurisdiction over aggression was also adjusted with special rules[58] aiming to ensure harmony with Chapter VII of the UN Charter.

It should be emphasized, however, that from a truly theoretical point of view, the legal situation is not at all easy to understand and to match with classic rules of international law. On the one hand, as a result of the interplay of the above-mentioned *ratione loci* and *ratione personae* rules, if the crimes are committed on the territory of a States Party, the ICC's competence is established over perpetrators, irrespective of whether their citizenship is of a States Party or a no-States Party. On the other hand, it is to be asked why such a solution, while definitely settled in the Rome Statute *inter partes*, should have a binding impact on non-States Parties whose nationals are allegedly involved and whose cooperation is crucial for an expeditious procedure. (It should be pointed out nevertheless that the "hot potato" issue of the eventual jurisdiction over nationals of non-States Parties did not prevent the continuous participation of States advocating for a *sine qua non* consent to this form of jurisdiction, even though this position was defeated in indicative and real voting during the negotiations.)

56 Rome Statute, Article 13, Exercise of jurisdiction
The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

57 See e.g., Rome Statute, Article 16, Deferral of investigation or prosecution
No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions. See also Article 53(2), (3), Article (5)(b), (7), Article 115.

58 See Rome Statute, Articles 15*bis* (Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)) ad 15*ter*. (Exercise of jurisdiction over the crime of aggression (Security Council referral)).

The *ratione temporis* principle should be understood *i*. first, as a general rule,[59] excluding the retroactive effect of the Rome Statute on facts prior to its entry into force, i.e., July 1, 2002. *ii*. It is equipped with a secondary rule, that if a State becomes bound only later by the Rome Statute, the entry into force of its instrument of ratification prevails.[60] *iii*. Third, a State may mandate the ICC to exercise its jurisdiction on events having occurred prior to this date.[61] *iv*. Fourth, the *ratione temporis* rule applied with the date July 17, 2018, on States Parties having by that date ratified the Kampala Amendment on Aggression; *v*. Fifth, if a State becomes bound only later by this Amendment, the precise date of the entry into force of the instrument of ratification prevails. *vi*. In case of minor amendments concerning additional crimes to the Rome Statute, the date of the entry into force of the amendment should be taken into consideration or the date of the entry into force of the instrument of ratification if it is posterior in the case of the given State Party.

2.3. The main organs of the International Criminal Court

The main organs of the International Criminal Court are the following: *i*. the Judiciary, *ii*. the Office of the Prosecutor (OTP), *iii*. the Registry, and *iv*. the Assembly of States Parties (ASP).

Due to its importance and special autonomous status, I think that the Trust Fund for Victims should *de facto* be considered one of the main organs as well.

Eighteen judges, elected for a single nine-year term by the Assembly of States Parties, work in Pre-Trial Chambers (PTC), in Trial Chambers (TC), or in the Appeals Chamber (AC). They elect their president from themselves for a three-year term. The election of judges is organized in such a manner that—except for a judge's death during his or her term or eventual demission, etc.—every three years, the Assembly of States Parties elects six judges who have extensive practice in criminal law or are recognized international law experts of the academic world.[62] The judges are elected

59 Rome Statute, Article 11, Jurisdiction *ratione temporis*
1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. (...).

60 Rome Statute, Article 11, Jurisdiction *ratione temporis* (...)
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only
with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

61 See Rome Statute, Article 11 (2), last part of the paragraph. (The reference to the previously cited Article 12(3) means the *mutatis mutandis* applicability of the rule of consent as it works in case of a non-State Party).

62 Rome Statute, Article 36, Qualifications, nomination and election of judges
1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court. (...)
3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
(b) Every candidate for election to the Court shall:
(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

with a two-third majority and an equitable geographical representation and fair representation of female and male judges should also be taken into consideration during the election process. The candidates presented by States Parties are auditioned and evaluated by an Advisory Committee on nominations, established by the ASP and composed mostly of former ICC judges. The candidates are also auditioned by representatives of NGOs in a public hearing.

The control that the three-member *Pre-Trial Chambers* perform over the activity of the prosecutor is similar to the task of the *juge d'instruction* in national systems. However, the PTC does not investigate; its most important duty is to assess the OTP's materials and decide whether they can be considered sufficient for sending a person under investigation to trial: This decision is the confirmation of charges. The Rome Statute defines with precision all the fields where the Pre-Trial Chambers check and counterbalance the prosecutor's activity. The three-member Trial Chambers deal with the first instance trials and the five-member Appeals Chamber has to adjudicate interlocutory and *in merito* appeals.

The *Office of the Prosecutor* carries out the investigations, submits the charges, and represents them before a Trial Chamber if confirmed by a Pre-Trial Chamber.

The *Registry,* beside the general housekeeping management of the daily work of the ICC, deals—through its different specialized units—*inter alia* with *i*. the representation of witnesses and assistance to them, *ii.* the custody of detainees arrested and transferred to The Hague, *iii*. the assistance given to the defence, and *iv*. some aspects of foreign relations and judicial cooperation with national authorities.

The *Assembly of States Parties* elects the judges—as already mentioned above—and the Prosecutor, whose term of office is nine years. The ASP approves the budget and adopts and modifies the Rules of Procedure and Evidence and the related statutory documents. It can amend the Rome Statute (sometimes in the framework of a review conference). The Rome Statute enumerates the issues that must be adopted with a 2/3 majority or a 7/8 majority and those that require ratification by States.[63]

The *Trust Fund for Victims* enjoys a special autonomous status in the system. It handles the reparation and assistance due to victims from the assets resulting from the confiscated property of convicted persons and voluntary contributions on behalf of states, legal persons, and individuals.

2.4. Referrals, Situtations and Selection of Cases

In terms of the Rome Statute, the International Criminal Court can adjudge crimes that were committed on the territory of a States Party or by a national of a States Party. Any States Party may call the Prosecutor's attention to such crimes, irrespective of

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

63 Rome Statute, Articles 121–123.

whether it was "territorially" or "nationally" involved in their commission. It might even take this step without being directly linked to the crimes.

When a State submits a *situation* to the ICC, it falls upon the Prosecutor to decide which is or are the precise *case*(*s*) that will be investigated. When making his choice, the Prosecutor takes into consideration the character and gravity of the crimes, the number of victims, the impact of the crimes on the given state or on its neighborhood, etc.

However, the Prosecutor is also entitled to step in *ex officio* (or according to the language of the Rome Statute: *proprio motu*) on the basis of acquired or commonly known information or individual communications, etc., but only vis-à-vis States Parties. The above enumerated elements of case selection and prioritization must be observed in this case as well. Preliminary examination is automatically granted, but if the Prosecutor would like to enter in the actual investigations, he should ask the Pre-Trial Chamber for approval. The PTC grants the request only when the submitted materials prove, support, or justify that there "is a reasonable basis to proceed."[64]

A third possibility is when the referral comes from the Security Council acting under Chapter VII. Such a referral may concern States Parties but also non-States Parties.

The Prosecutor enjoys a great margin of freedom of appreciation during these procedures: He is not bound by any legal or factual position expressed either in the State or in the UNSC referral.

The Prosecutor should check whether both the jurisdiction criteria (subject matter jurisdiction analysed *ratione loci, ratione personae, ratione temporis*) and the admissibility criteria are met. A case is inadmissible if it runs against the *ne bis in idem re* principle[65] or if it is not of "sufficient gravity to justify further actions by the Court."[66]

64 Rome Statute, Article 15, Prosecutor
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

65 Rome Statute, Article 20, *Ne bis in idem*
1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which
formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise, were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

66 Rome Statute, Article 17, Issues of admissibility, 1(d).

The Prosecutor does not initiate an investigation if the admissibility criteria are not met or if "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[67]

Contrary to the procedure of the *proprio motu* referral, if the referral comes from states or from the Security Council, the Prosecutor exercises his investigative competences without the permission of a Pre-Trial Chamber. The proceedings in this case follow a reversed logic, i.e., if the OTP stops its inquiries within the preliminary examination phase and does not continue the investigations, the referring party may ask the PTC to exercise a kind of revision of the well-foundedness of the OTP's decision not to investigate. If the OTP's decision is based solely on the reference to the interests of justice, the PTC may review it *ex officio*.

If the PTC concludes that the OTP's position—in the above matters—is not substantiated, it may order the OTP to reconsider its position. Nevertheless, after reconsideration, the Prosecutor may arrive at the same conclusion as before, i.e., there is no need to investigate. The Prosecutor enjoys thus a huge margin of independence. (Nonetheless, such a reconsideration may take a long time and could be subject to litigation concerning the elements that can be examined when assessing gravity, the appreciation of a genuine reconsideration, and the precise competences of a PTC when reviewing the assessments, etc., as seen in the so-called situation of Registered Vessels of Comoros, Greece, and Cambodia.[68])

As to the touchy issue of the "*interests of justice*," it is enough to point out that here—as the Appeals Chamber clarified in a judgment rendered regarding the situation in Afghanistan—a PTC may not stop the procedure by referring *proprio motu* to the interests of justice if this was not put on the table *expressis verbis* by the OTP.[69]

As the choice of a *case* (or some *cases*) from the submitted situations has received great criticism on the part of governments as well as non-governmental organizations, the OTP has delivered several public documents explaining different aspects of its case selection policy.[70]

67 Rome Statute, Article 53, Initiation of an investigation
1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
68 International Criminal Court, 2017.
69 International Criminal Court, 2020a; International Criminal Court, 2020b; International Criminal Court, 2020c.
70 International Criminal Court, Office Of The Prosecutor, 2016a; International Criminal Court, Office Of The Prosecutor, 2014; International Criminal Court, Office Of The Prosecutor, 2016b; International Criminal Court, Office Of The Prosecutor, 2021; etc.

The Prosecutor must check whether genuine national prosecutions have not been lauched or accomplished in the case under selection, and must pay attention to the eventual home procedures when dealing with the given case(s). The OTP's assessment is verified by the Pre-Trial Chamber or, if the charge has already been confirmed by a PTC, this question may emerge before a Trial Chamber as challenge of jurisdiction. The challenge of complementarity can be submitted by the person against whom a decision of arrest warrant has been submitted or charges have been formulated, waiting for their confirmation by a PTC. Governments are also entitled to submit a challenge of jurisdiction based on the principle of complementarity. Even if complementarity is to be examined *ex officio,* if a challenge is submitted, the onus of the proof of the satisfaction of the criteria of *ne bis in idem re* is on the shoulders of the challenging government or person.

All this means that if national governments open investigations and put perpetrators on trial at the latest during the preliminary examination period or in the investigation phase of the proceedings of the International Criminal Court and the home procedures satisfy the criteria of fair trial and rule of law, and in case of condemnation the sentenced punishment is adequate for the crime committed, the conditions of the ICC's jurisdictional competence are not met in the given case.

2.5. Imprescriptibility, irrelevance of immunity and fair trial rights

The crimes listed in detail in the Rome Statute cannot be subject to prescription,[71] and the immunities attributed constitutionally to some high state officials cannot prevent the International Criminal Court from exercising its jurisdiction.[72]

The International Criminal Court shall not only prosecute and punish at all costs, but it is imperative that it carry out this task through the scrupulous observation of human rights, especially concerning those who are already in the confirmation or in trial phase. These rights are the classic human rights enumerated in similar terms in the different human rights instruments of the world. They were also inserted in the Rome Statute, although, surprisingly, they do not appear in one block but emerge at different parts of the document.

71 Rome Statute, Article 29, Non-applicability of statute of limitations
The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

72 Rome Statute, Article 27, Irrelevance of official capacity
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

One may find the *nullum crimen sine lege*,[73] the *nulla poena sine lege*,[74] and the non-retroactivity[75] principle as well as the principle of individual responsibility[76] under Part 3, among the "General principles of criminal law."

The other traditional procedural rights are mentioned in the context of the different procedures, like the rights of persons during an investigation[77] and the rights of the accused.[78] The presumption of innocence makes part of the rights related to the

73 Rome Statute, Article 22.
74 Rome Statute, Article 23.
75 Rome Statute, Article 24.
76 Rome Statute, Article 25.
77 Rome Statute, Article 55, Rights of persons during an investigation
1. In respect of an investigation under this Statute, a person:
(a) Shall not be compelled to incriminate himself or herself or to confess guilt;
(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.
78 Rome Statute, Article 67, Rights of the accused
1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses

investigation phase,[79] but was granted a distinct article in the articles devoted to the trial phase.[80]

2.6. The three evidentiary standards

During its proceedings, the International Criminal Court must use different evidentiary standards when rendering its decisions.

In order to grant the Prosecutor's request to open *proprio motu* an investigation, the Pre-Trial Chamber should be satisfied that there is a *reasonable basis* to proceed.[81] This standard is generally considered as being the same as that of the *reasonable ground* that is required to issue an arrest warrant.[82]

against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(h) To make an unsworn oral or written statement in his or her defence; and
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

79 Rome Statute, Article 55 2 (b) (cited *supra*).

80 Rome Statute, Article 66, Presumption of innocence
1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

81 Rome Statute, Article 15, The Prosecutor (...)
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. (...).

82 Rome Statute, Article 58 Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear
1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; (...).

However, a considerably higher legal conviction, i.e., the *substantial reason to believe*, is required for the confirmation of charges by the PTC.[83]

Furthermore, when it comes to condemning the accused for the commission of the charged crimes, the classic rule of necessity to have a conviction *beyond any reasonable doubt* applies.[84]

2.7. Sentencing

If the culpability is established, the International Criminal Court may pronounce a penalty of imprisonment for up to 30 years, depending on the gravity of the crime. Exceptionally, even a sentence of life imprisonment can be delivered. Moreover, confiscation of property and obligation to participate in the covering of the costs of reparation can also be constitutive elements of the judgement.

The ICC has no prison of its own. Instead of building or buying one, it was decided to keep people under provisional arrest in an annex rented within the Scheveningen Detention Center of The Hague, together with other international criminal tribunals (ICTY, ICTR, etc.) established in the city. A sentenced perpetrator stays in this compound until the presidency of the ICC comes to an agreement with a state that is ready to offer its institutions for the rest of the imprisonment, from which the time elapsed in provisional arrest is to be deducted.

Before the end of 2021, condemnation judgments were pronounced in the following cases: *i.* recrutement and use of child-soldiers during the civil wars in Congo (Thomas Lubanga case[85]); *ii*. the murder and pillage of the civil population and recruitment and use of child-soldiers during the civil wars in Congo (Bosco Ntaganda case[86]); *iii*. the massacre of Bogoro during the civil wars in Congo (Germain Katanga case[87]); *iv.* the destruction of religious and historical monuments in Timbuktu (Mali) that were on the UNESCO World Heritage List (Al Mahdi case[88]); *v.* pillage, destruction, and rape during the civil war in the Central African Republic (Jean-Bemba Gombo case[89]), and *vi*. the related Bemba et al. case,[90] which concerned offenses against at the adminis-

83 Rome Statute, Article 61, Confirmation of the charges before trial, (...)
5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. (...)
7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. (...).

84 Rome Statute, Article 66, Presumption of innocence (...).
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

85 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.

86 The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06.

87 The Prosecutor v. Germain Katanga, ICC-01/04-01/07.

88 The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15.

89 The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08.

90 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13.

tration of justice, during the main procedure of the ICC; and *vii*. murder, pillage, rape, and sexual slavery during the armed conflict in Uganda (Dominic Ongwen case[91])

As to the precise length of the sentence of imprisonment, the different trial chambers took into consideration the specifics of the crimes, the character of the contribution of the condemned perpetrator to the crime, the condemned person's eventual repentance, and the impact of the crimes on victims, communities, the country, and eventually also in the neighboring countries.[92]

Currently, the following procedures are under trial: *i*. the responsibility of the deputy commandant of the Islamic Police of Timbuktu for torture, rape, sexual slavery, condemnation without fair trial, destruction of historical and religious monuments, etc., during the rule of the Islamists (Al Hassan case[93]); *ii*. murder, torture, and the destruction of civilian property during the civil war in the Central African Republic by units of the (Christian) Anti-Balaka militias (Yekatom and Ngaïssona case[94]). (Because charges were recently confirmed against Mahamat Said Abdel Kani.[95] alleged leader of Seleka militias, composed mostly of Muslims, the crimes of the other side of the civil war of the Central African Republic will also be examined in trial. The background of the Yekatom and Ngaissona case and Abdel Kani case is related to the fact that it was predominantly the believers of the other religion who were targeted by militias, each of them advocating for self-defence and retaliation); and *iii*. another offence against the administration of justice (Paul Gicheru case).[96] This case had to be stopped because the accused had died in Kenya.

The trial against a leader of the Janjawed militia, with confirmed charges of crime of murder, rape, destruction of property, and forcible transfer of the population committed in the Darfur region of Sudan (Abd-Al-Rahman case[97]) will open in 2022.

It is to be noted that the International Criminal Court has acquitted several indictees or pronounced a decision of a "stay of the proceedings." These are the following: *i*. the Bemba case, where the Appeals Chamber acquitted the indictee as to the crimes committed in the CAR while approving the condemnation and sentence for offence against the administration of justice; *ii*. the massacre in Bogoro, where one of the

91 The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15.

92 Thomas Lubanga: 14 years; Germain Katanga: 12 years; Jean-Pierre Bemba Gombo (in first instance, overruled by the acquittal in appeal): 18 years; Ahmad al-Faqi al Mahdi (guilty plea): 9 years; Dominic Ongwen (in first instance, under appeal still pending): 25 years; Bosco Ntaganda: 30 years. In the case of Bemba et al., Jean-Pierre Bemba Gombo was sentenced to 1 year; Aimé Kilolo Musamba: 3 years; Jean-Jacques Mangenda Kabongo: 2 years; Narcisse Arido: 11 months; Fidèle Babala Wandu: 6 months. However, taking into account that these sentences had to be deducted from the time effectively spent in the ICC's detention center, these penalties did not need to be served after their pronouncement.

93 The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18.

94 The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18.

95 The Prosecutor against Mahamat Said Abdel Kani, ICC-01/14-01/21, International Criminal Court, 2021c.

96 The Prosecutor v. Paul Gicheru, ICC-01/09-01/20.

97 The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman, ICC-02/05-01/20.

accused was condemned but the other was acquitted because the OTP's evidence was not considered as proven beyond a doubt (Ngudjulo case[98]); *iii.* the head of state and his deputy in a case related to crimes against humanity perpetrated during post-electoral violences in Kenya, (Kenyatta case[99] and Ruto case[100]); and *iv.* the head of state and one of his ministers in a case also related to crimes against humanity perpetrated during post-electoral violence in Côte d'Ivoire (Laurent Gbagbo and Charles Blé-Goudé case[101]).

Moreover, several investigations did not lead to a trial case, e.g., because the person under investigation died in the meantime or the charges were not confirmed by the given Pre-Trial Chamber and the OTP did not produce more solid evidence.

Besides the already mentioned trial and pre-trial cases, it is worth mentioning that in a good number of situation countries, whether in Africa,[102] the Middle East,[103] Asia,[104] South America,[105] or Eastern Europe,[106] preliminary examinations or investigations have been launched if needed, with the approval of a Pre-Trial Chamber.

2.8. Cooperation with the ICC challenged by local realities of situations and turbulences of great politics

"International law is based on the cooperation of states": Every law student will learn this basic statement in the first lecture on international law. The sentence will be repeated later at nearly all conferences, thus contributing *nolens volens* to the well-known skepticism of non-international lawyers vis-à-vis the *jus gentium*.

Cooperation is especially important for the work of the International Criminal Court, which has no special enforcement mechanism to impose its will on governments.

The Rome Statute devotes a special chapter (Part 9) to cooperation with States Parties and with non-States Parties. The rules on the cooperation with States Parties are based on the Rome Statute itself, while special agreements need to be contracted with non-States Parties. However, if the given "situation" was put on the ICC's agenda *via* referral by the Security Council, when the state in question is member of the UN, special agreement is not required.

In the framework of the Rome Statute, the organ designated to act in case of failure to cooperate is the Assembly of States Parties, which however is not empowered with

98 The Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12.
99 The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11.
100 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
101 The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15.
102 International Criminal Court, 2014.
103 International Criminal Court, 2021d.
104 International Criminal Court, 2019; International Criminal Court, 2021b; International Criminal Court, 2020a.
105 International Criminal Court, 2021a; International Criminal Court, 2021e.
106 International Criminal Court, 2016; International Criminal Court, 2022; International Criminal Court, 2019; International Criminal Court, 2021b; International Criminal Court, 2020a; International Criminal Court, 2021d.

hard competences in the matter. (In case of a UNSC referral, on the ICC's demand, the Security Council is entitled to assess the failure and eventually sanction with all its powers under the Charter of the United Nations.)

Even if States Parties are generally keen to cooperate, one may identify some typical problems and difficulties. *i*. The first is the internal situation of the state where the crimes were committed, which might be afflicted with an ongoing armed conflict, epidemics, or the dilatoriness of the public administration. *ii*. The second problem is of a political nature. In spite of the fact that most of the cases thus far adjudged were put on the ICC's table through self-referral (i.e., the territorial state referred the situation to the ICC), the false perception was created and artificially reinforced that the ICC is "biased" and targets only Africa. This perception also resulted in a certain regional solidarity within the African Union in favor of Omar Hassan Ahmad Al-Bashir, the—since then already destituted and arrested—Sudanese head of State, against whom a warrant of arrest was delivered in the context of the investigation of the genocide allegedly committed in Darfur, a situation referred by the UNSC to the ICC. On the other hand, States denouncing, not ratifying, or not signing the Rome Statute regularly invoke the issue of *pacta tertiis nec nocent, nec pro sunt,* especially when the investigation could concern their nationals.[107] There was also a time when the then ICC Prosecutor Fatou Bensouda and one of her collaborators were targeted with *in personam* sanctions for investigating the Afghanistan situation against American personnel.[108]

But as always, there are also examples of good cooperation: From time to time, depending on the recognition of common interests in a given "situation," a certain cooperation was realized between the ICC and the USA[109] that resulted *inter alia* in Dominic Ongwen and Bosco Ntaganda's arrest and transfer to the Hague.

There are also agreements about the technical details of the cooperation with States Parties, *inter alia* about field-offices in some of the situation countries and modalities of interactions. We must also mention cooperation agreements contracted with the United Nations and the European Union and memoranda of understanding with Interpol, Europol, etc.

There is generally good cooperation between the ICC and most of the situation countries, as well as with countries hosting victims or witnesses, such that the transfer of documents of national investigations, the search for and eventual freezing of indictees' foreign assets, and cooperation in securing witnesses' travel to The Hague or in long-distance video-hearings proceed smoothly and with great facility. The same can be said about the offer of imprisonment facilities for the condemned to serve the sentence pronounced by the ICC, etc.

107 International Criminal Court, 2021d; International Criminal Court, 2016; International Criminal Court, 2022.
108 These sanctions imposed by US president Donald Trump were revoked by President Joe Biden.
109 This happened under Barack Obama' presidency.

2.9. The victims' participation during the proceedings and the importance of assistance and reparation to victims

One of the main novelties of the Rome Statute is the victims' institutionalized position during the whole proceedings: They are no longer just people that the parties are speaking about or who are eventually listened to as witnesses of their own case, but enjoy a *sui generis* status during the investigation, pre-trial, and trial. While the status of "party" is reserved at these stages to the OTP and the defence, victims, through their chosen common representatives (private lawyers or lawyers of the Office of Public Counsel for Victims (OPCV) belonginging to the Registry), have access to the submitted documents, may react to them, may submit their own views, and may ask the witnesses questions or even call witnesses of their own. In the meantime, it should be borne in mind during trial that they cannot act as a prosecutor-*bis*; their interventions should not be related to the actual facts (i.e., what happened, why did it happen?) but to their perception of these facts and the impact they had on them as victims, on their families or their communities.

If the accused's culpability is established at the end of the procedure, victims are entitled to reparation. During the reparation phase, the parties are the "defence" and the "victims." At this stage, the OTP does not need to play any role.

Even if the condemned perpetrator is obliged to assume the full reparation of the harms caused, in most cases—according to the experiences—this would not help *in concreto* because most perpetrators are indigent. Moreover, the case policy of the OTP and the importance of the contextual elements of the crimes against humanity and war crimes target mostly—and understandably—crimes with a huge number of victims. As a consequence, full reparation is reasonably impossible even if the condemned person is supposedly wealthy.[110]

All this means that the simple promise of reparation is not enough and intervention is needed on behalf of the international community. As already touched upon in Subsection 2.3, this activity is realized through the Trust Fund for Victims (TFV) under the judicial control of a trial chamber. The budget of the TFV is supplied by imposed fines ("*own resources*") and voluntary contribution from States and individuals ("*other resources*"). Theoretically, the TFV only advances the costs of the reparation, and ICC's Presidency could initiate a procedure for reimbursement if the condemned perpetrator's financial situation has changed and he is no longer indigent.[111] The amount of the due reparation is established by a Trial Chamber, and on the basis of the reparation judgement, the TVF should prepare a precise plan for implementation on collecingt the necessary amount of money for the programs. The planning, collection, and implementation are organized under the "*reparation mandate*" and are supervised by the judges.

110 To date, the only really wealthy indictee was Jean-Pierre Bemba Gombo, condemned at first, but acquitted at second instance.

111 No such change has occurred so far that would render a reimbursement appropriate.

The Trust Fund for Victims can take care of the victims of the situation prior to the perpetrator's condemnation when medical or other humanitarian actions are urgently needed. It can also happen that not all the victims concerned in a situation will be eligible for reparation, e.g., because the crimes committed against them do not make up part of the case (see for example an enduring civil war where only some special years or some precise attacks were chosen or when the person under investigation and allegedly responsible for given atrocities died in the meantime during battle). In case of acquittal, there is no condemnation, and consequently there is no obligation of reparation even if there is a huge number of victims in need.

The "*assistance mandate*" was established to provide for such cases. It is also performed by the TFV within a considerable margin of freedom and financed from the "*other resources*."

However, despite the theoretical importance of the distinction between "*assistance mandate"* and "*reparation mandate*," considering the limited available resources, in practice the actual services are very similar under both mandates, with priority given to necessary medical and psychological intervention and schooling, eventually complemented with help to rebuild a destroyed dwelling or to relaunch a micro-agricultural or artisanal activity.

3. The ICC and the other international criminal tribunals and hybrid tribunals

3.1. Other international criminal tribunals

Even if the presentation of the long way to the establishment of the ICC as a permanent international criminal tribunal might give the impression that one single court should be enough to put an end to impunity, this is not the case.

The ICTY[112] and the ICTR[113] could accomplish most parts of their original mandate by condemning the most important perpetrators of crimes during the ex-Yugoslav and Rwandan armed conflicts, but even the execution of judgments necessitates judicial supervision and decision making. However, the ICC could not step in because of the strict time limit enshrined in the Rome Statute (i.e., the *ratione temporis* competence). As a consequence, the Security Council decided to set up the Mechanism for International Criminal Tribunals[114] in order to deal with judgments under appeals and issues of execution of the imprisonment penalties.

112 Of the 161 indictees, 83 were condemned e.g., Radovan Karadjic, Ratko Mladic. Slobodan Milocevic, the mastermind of the ethnically colored armed conflict died in the detention center, in the middle of his procedure. The indictees and the condemned persons include not only Serbian but also Croat and Bosniak politicians, officers, and soldiers.

113 Of the 93 indictees, 62 were sentenced to imprisonment, e.g., Jean Kambanda, Jean Paul Kayesu, Jean Bosco Barayagwiza.

114 Statute of the Mechanism for International Criminal Tribunals, 2010, Annex 1.

3.2. The hybrid tribunals

Similarly, the prosecution by the ICC for the atrocious crimes committed under the Khmer Rouge in Cambodia in 1975–1979, by Charles Taylor in Sierra Leone in 1996–2003, or by Hissène Habré in Chad in 1982–1990 would have run against the *ratione temporis* principle. For this reason, special so-called hybrid tribunals like *i.* the Special Tribunal for Sierra Leone (STSL), *ii.* the *Extraordinary Chambers in the Courts of Cambodia* (ECCC), and *iii. Extraordinary African Chambers* (EAC) were set up concerning the crimes committed in these countries through agreements contracted by Sierra Leone[115] and Cambodia[116] with the United Nations or Senegal[117] (hosting the destitute president Habré) with the African Union. Their common element was the simultaneous presence of national judges and international judges, and their budget was mostly covered by the United Nations.

The *Special Tribunal for Lebanon* (STL) was created in order to put to trial the perpetrators of the murder by bombing of PM Rafik Hariri and some of his colleagues. The legal difficulties of putting the case before the ICC were numerous: Neither Lebanon nor Syria (the country where the perpetrators arrived from and returned to) is a States Party, and terrorism or terrorist acts are enumerated neither in Article 7 (crimes against humanity) nor in Article 8 (war crimes) of the Rome Statute and the "*chapeau*" of these two articles (see Subsection 2.1 above) could also be considered as not totally fitting in this case. In answer to these difficulties, the UNSC decided to establish a special court[118] for the purpose and an agreement was subsequently contracted between Lebanon and the United Nations. [119]

The ICTY was competent – as we have seen above – on war crimes and crimes against humanity committed during the ex-Yugoslav conflict and the indictees were mostly Serbian, Bosniak, and Croat soldiers, officers and politicians. Later, it became clear that the organization called UÇK, which was first a paramilitary formation set up in order to protect Kosovars from their massive deportation or forced expulsion and became later a political party, also seemed to be involved in the commission of crimes, partly war crimes but, according to alarming reports, illegal trading of human organs as well.[120]

The jurisdictional competence of the ICTY was, however, prevented by the decision already taken by the UNSC to close it by transforming it into the residual mechanism. However, there was an even more important obstacle, i.e., the lack in its statute of a crime of illegal trade in human organs. The same lacuna can be observed in connection with the Rome Statute. Moreover, the *ratione temporis* rule would also have excluded the ICC's competence.

115 United Nations, 2002.
116 United Nations, 2003.
117 Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.
118 S.C. Res. 1757, 5685th mtg, May 30, 2007, S/RES/1757 (2007), Annex.
119 Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Beirut, 29 January 2007 & New York, 6 February 2007.
120 Marty, 2011.

Under these circumstances, the European Union agreed with Kosovo about the establishment of a special tribunal called *Kosovo Special Chambers* (KSC),[121] whose content was promulgated also by the Parliament of Kosovo.[122]

In addition to the trade in human organs, the formulation of the different other crimes follows rather closely the text of the Rome Statute, and the time frame is three years from 1998 to 2000. The construction of the judiciary is also based on a "hybrid" composition (national and international judges) and on the observation of Kosovar (and prior Yugoslav) legislation and judicial practice. The budget is mostly covered by the European Union.

4. Conclusions and remarks

It would be naive to expect that humanity will never again commit crimes or that the pure establishment and the functioning of the International Criminal Court are in themselves sufficient for punishing all the perpetrators of war crimes or crimes against humanity.

The trials before the ICC contribute, however, to discouraging potential perpetrators of these horrible crimes and make them realize that they can easily be brought to justice. Even their own state could conclude that solemn speeches about the determination of the national judiciary to punish militaries having committed war crimes are not enough if the results of the proceedings are not openly accessible to the public. The main philosophy behind complementarity is that beside the importance of the principle *ne bis in idem re*, the real solution is punishment at the national level, an international legal commitment enshrined in several international conventions.

Today's young lawyers or young military officers may easily become directly involved in regional armed conflicts when participating in different peacekeeping or peace-creating missions close to or far from their own country. They can encounter difficult situations where different elements of multinational forces are fighting together when their home countries are not forcibly bound by the Rome Statute: The conflict between the obligation to obey their superior's orders and the individual criminal responsibility for having committed a war crime is an issue that no soldier, whether sub-officer, officer, or general, would ever like to experience.

The lawyer, as a police or border guard officer or as a state attorney, can easily meet in the near future a transmitted ICC warrant and the notification that according to some confidential information or common knowledge, an alleged perpetrator is probably on the territory of the given state. Judges working on the national level can meet such a litigation when the alleged perpetrator contests the legality of his arrest.

In order to be able to pass the right decision against or in favor, lawyers should be familiar with the basic rules of the Rome Statute and should also take into

121 Kosovo Specialist Chambers, Specialist Prosecutor's Office, 2014.
122 Kosovo Specialist Chambers, Specialist Prosecutor's Office, 2015.

consideration that all these rules are continously interpreted in line with a rather coherent judicial practice, which is, however, an evolving jurisprudence like that of the other international tribunals.

This is by far not an easy job, but it is feasible if truly challenging for an ambitious lawyer, state administrator, or attorney at law.

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