Chapter 2

From Nuremberg to the Hague: The Novelties of Establishing the Permanent International Criminal Court

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Abstract

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

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

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

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

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

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

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

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

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

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

1 Bring, 2001, p. 11.
2 Bassiouni, 1999, p. 3.

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

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

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

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

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

3 Malekian, 1999, p. 162.
4 Buergenthal, Doehring, Kokott, and Maier, 2000, p. 160.

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

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

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

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

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

5 Wakaki, 1996, p. 13.

6 Ibid.

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

8 Ahlbrecht, 1999, pp. 46–53.

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

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

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

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

6. The Nuremberg/Tokyo War Crimes Trials

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

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

9 Bassiouni, 1998, pp. 10–11.
10 Ahlbrecht, 1999, p. 57.
11 Möller, 2003, p. 75.

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

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

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

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

12 Jescheck, 2004, p. 38.
13 Škulić, 2022a., p. 20.
14 Taylor, 1951, p. 11.

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

6.1. The Nuremberg Trials

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

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

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

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

15 Gründler and Manikovsky, 1967, p. 13.

16 Bassiouni, 1992, p. 21.

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

18 Ahlbrecht, 1999, p. 93.

6.2. The Tokyo Trial

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

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

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7. *Ad hoc* International Criminal Tribunals after WWII

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

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

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

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

20 Schabas, 2017, pp. 12–13.

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

There are also specific international criminal courts/tribunals that are hybrid in their nature. In the theory of international criminal law, these tribunals are also referred to as "mixed", emphasising that they arise as a consequence of the 'internationalization of criminal prosecution for serious human rights violations'.[22] A typical example of hybrid international criminal courts/ tribunals are the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.[23] The U.N. and the Sierra Leone government jointly established the Special Court for Sierra Leone in 2002, with the mandate to try persons bearing the greatest responsibility for serious violations of both international humanitarian law and Sierra Leonean law, committed in the territory of Sierra Leone since 30 November 1996.[24] The Extraordinary Chambers in the Courts of Cambodia was established in 2004, through an international agreement between the U.N. and Cambodia, to try persons responsible for crimes committed under the Khmer Rouge regime from 1975 to 1979.[25]

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

21 Ibid.

22 Ambos, 2018, p. 146.

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

24 Schabas, 2017, pp. 12–13.

25 Ibid.

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

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

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

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

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

26 Shaw, 2014, pp. 286–309.

8.1. Jurisdiction of the International Criminal Court

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

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

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

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

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

28 Bantekas and Nash, 2003, p. 377.

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

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

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

8.2. Principle of complementarity in the Rome Statute

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

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

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

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

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

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

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

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

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

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

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

8.4. Stages of Proceedings before the International Criminal Court

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

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

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

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

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

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

31 Škulić, 2022b, p. 674.

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

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

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

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

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

9. Conclusion – the Future of the International Criminal Court

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

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

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

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

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

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

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

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

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

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

33 Škulić, 2020., p. 78.

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