| Chapter 3 |

International Criminal Law III: The Legacy of the ICTY and the ICTR

Ondřej SVAČEK

ABSTRACT

This chapter focuses on the legacy of the ICTY (International Criminal Tribunal for the former Yugoslavia) and the ICTR (International Criminal Tribunal for Rwanda), the ad hoc international criminal tribunals. It explores its creation, functioning, and termination and assesses the role given here to the UN Security Council. The contribution analyses the jurisdictional framework of both tribunals, their structure and procedural characteristics. It also stresses their importance for the development of international criminal law and points out the relevance and effect of their jurisprudence for the practice of their successors, namely the International Criminal Court. The contribution refers to the selected leading cases of the ICTY and the ICTR.

KEYWORDS

ICTY, ICTR, UN security council, jurisdiction, war crimes, crimes against humanity, Tadić, development of IHL (international humanitarian law), development of ICL (international criminal law), joint criminal enterprise, superior responsibility, article 21 Rome Statute

1. Introduction

The aim of this chapter is to provide readers with a basic overview of the law concerning the ICTY and the ICTR. It explores their relationship with the UN Security Council (UN SC), defines the jurisdictional framework, describes their structure, outlines basic features of their procedure, evaluates their contribution to the development of international law, and assesses how far their work is transferrable or has already been transferred to the practice of their successors, namely the International Criminal Court (ICC or Court). The text refers to the selected leading cases of both tribunals.

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2. The *Ad Hoc* Tribunals and the UN SC

The ICTY and the ICTR owe their existence to the UN SC. They both were created in response to two ongoing conflicts in the 1990s, related to the dissolution of the former Yugoslavia and genocide in Rwanda, which the UN SC qualified as threats to the international peace and security what enabled it to employ its powers under Chapter VII of the UN Charter. Other options for the creation of international criminal tribunals were not available at that time,[1] and in particular, the possibility of creating the tribunal through international treaty was rejected as it was expected that the process would be too long and there was no guarantee that the relevant states (e.g., the successor states of the former Yugoslavia) would join any such treaty.[2]

Under paragraph 2 of the UN SC (Security Council) Resolution 827 (1993), the SC, acting under Chapter VII of the UN Charter:

> 'Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the SC upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the report [of the Secretary General pursuant to paragraph 2 of the UN SC resolution 808 (1993)].'[3]

The UN SC reiterated this procedure 18 months later in relation to the ICTR. Under paragraph 1 of Resolution 955 (1994), the SC, acting once more under chapter VII of the Charter:

> 'Decides hereby [...] to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto.'[4]

The fact that both the ICTY and the ICTR had been established to act under the SC coercive authority led to important legal consequences. Firstly, both tribunals benefited from the stronger, vertical, 'supra-state' model of cooperation with states

1 For these options see O'Keefe, 2015, pp. 89–98.
2 Cryer et al., 2014, p. 128.
3 UNSC Res. 827, 1993.
4 UNSC Res. 955, 1994.

(see infra part 4).[5] Secondly, there is a wide consensus in theory and practice of the international criminal law (ICL) that the SC-based international criminal tribunals are exactly those "certain international criminal courts"[6] where the personal immunity of troika is unavailable and is not a bar for international criminal prosecution. This conclusion derives from the fact that the SC resolutions are legally binding[7] and takes precedence over other international legal obligations, here the obligation to respect personal immunity of troika.[8] Thirdly, the function and powers of the SC towards the *ad hoc* tribunals were significantly stronger compared to the ICC, where the drafters of the Rome Statute endowed the SC only with the capacity to refer the situation to the ICC and trigger its operation,[9] and eventually defer it for a period of maximum 12 months, with the possibility of a renewal.[10] Speaking about the ICTY and the ICTR, the SC not only created these tribunals, but predetermined and defined their jurisdictional framework.

From the perspective of the accused person, the process of creation of the ICTY and the ICTR might be assessed through the prism of human rights guarantees, namely the fair trial guarantees. As provided under Art 14 of the International Covenant on Civil and Political Rights, in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The process of the establishment of any international criminal tribunal must therefore be closely scrutinised, because potential unlawfulness, or excess of powers (*ultra vires* act) – typically given had the UN General Assembly (UN GA) decided to establish an international criminal body – would bring the tribunal to closure virtually before the commencement.[11] Unsurprisingly, the authority of the SC to set up an international criminal court/tribunal[12] was challenged in the very first case before the ICTY (*Tadić*) and led to the seminal decision of October 1995.[13] The Appeals Chamber (AC) decided it had competence-competence and ruled in favour of the legality of the ICTY creation, invoking Article 41 of the UN Charter. The AC also rejected the argument that the accused person's fundamental right to be tried

5 Cassese and Gaeta, 2013, p. 302; O'Keefe, 2015, p. 111.

6 ICJ, *Democratic Republic of Congo v. Belgium*, Judgement of 14 February 2002, para. 61.

7 UN Charter, art. 25.

8 UN Charter, art. 103. See also discussion concerning the precedence of the UN Charter obligations over the international customary law obligations. Study Group of the ILC, 2006, p. 72, para. 345.

9 ICC Statute, art. 13:b.

10 ICC Statute, art. 16. Discussion on the eventuality for the SC to extend the jurisdictional framework of the ICC, especially through the denial of the personal immunity, exceeds the subject matter of this chapter; Cf. Svaček, 2025.

11 The conclusion that the UN GA cannot create an international criminal body relates to the impossibility for the UN GA to adopt coercive measures. It is only the SC which can require enforcement by coercive action. Cf. ICJ, Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, p. 163.

12 These terms are treated here as synonyms. See O'Keefe, 2015, p. 85.

13 ICTY, *Tadić*, AC, Decision of 2 October 1995.

by his national courts under his national laws was breached and concluded that 'this principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations'.[14]

The SC accompanied the *ad hoc* tribunals throughout their whole lives. Neither the ICTY nor the ICTR were established to be permanent. Quite to the contrary, already in 2000, the SC started to emphasise the idea of a 'completion strategy' with the aim to ensure that tribunals will conclude their mission successfully, in a timely manner and in coordination with the domestic level. The SC extended the number of judges: it established a pool of *ad litem* judges in the ICTY and increased the number of judges in the AC (common to both tribunals) in order enable the tribunals to expedite the conclusion of their work at the earliest possible date.[15] The same measure was later taken also in relation to the ICTR.[16] The SC endorsed a three-phase plan in Resolution 1503 (2003) which envisioned completion of investigations by the end of 2004, completion of all first instance trials by the end of 2008, and completion of all work in 2010. The completion strategy was later expanded as the SC called on the ICTY and the ICTR Prosecutors[17] to review the case load of the ICTY and the ICTR, respectively, in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, based on respective Rules 11 *bis* of the Rules of Procedure and Evidence (RPE).

In the next step, the SC decided to establish the International Residual Mechanism for Criminal Tribunals (Mechanism), with two branches that commenced functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY).[18] By the same resolution, the SC requested the ICTY and the ICTR to take all possible measures to expeditiously complete all their remaining work no later than 31 December 2014, to prepare their closure and to ensure a smooth transition to the Mechanism. During the initial years of the Mechanism's existence, it operated in parallel with the ICTR and the ICTY. The deadline for the completion of the tribunals' mandate envisaged in the resolution was not met. The closure of the ICTR became effective on 31 December 2015, and of the ICTY only on 31 December 2017. After these dates, the Mechanism continues to operate as a stand-alone institution whose purpose is to continue the jurisdiction, rights and obligations and essential functions of both tribunals and maintain their legacy.

Until its closure, the ICTY indicted 161 individuals, secured arrest of them all, sentenced 90, and transferred 13 for trial to countries of the former Yugoslavia.[19]

14 Ibid., para. 62.
15 UNSC Res. 1329, 2000.
16 UNSC Res. 1431, 2002.
17 The position of the Prosecutor was originally unified for both institutions and was separated only by the SC resolution 1503.
18 UNSC Res. 1966, 2010.
19 ICTY, Infographic: ICTY Facts and Figures.

The statistics of the ICTR show that until its closure, it indicted 93 individuals, with six remaining fugitives, sentenced 61, and referred 10 mostly to Rwanda.[20]

3. Jurisdictional Framework of the *Ad Hoc* Tribunals

Traditionally, jurisdictional framework encompasses (a) subject matter jurisdiction (jurisdiction *ratione materiae*), (b) temporal jurisdiction (jurisdiction *ratione temporis*), (c) personal jurisdiction (jurisdiction *ratione personae*), and territorial jurisdiction (jurisdiction *ratione loci*). These respective heads of jurisdiction will be analysed in relation to each of the tribunals separately.

3.1. Jurisdictional Framework of the ICTY

The founding document of the ICTY, the SC resolution 827, and also the opening provision of the ICTY Statute defines the subject matter jurisdiction of the tribunal by reference to serious violations of international humanitarian law (IHL). The Statute then establishes jurisdiction over grave breaches of the Geneva Convention of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5).

The Statute of the ICTY includes two distinct categories of war crimes, as a serious breach of IHL, criminalised by international treaty or customary international law.[21] Article 2 penalises grave breaches, a category applicable only in International Armed Conflict (IAC). The following Article 3, as interpreted by the ICTY, serves as a general clause covering all violations of humanitarian law not falling under the scope of grave breaches, crime of genocide, or crimes against humanity, regardless of whether the violation occurs within the context of an IAC or Non-International Armed Conflict (NIAC).[22]

This latter conclusion of the AC in the *Tadić* case adopted as early as in 1995 contributed to the discussion about the international criminalisation of violations of IHL committed in NIAC (in relation to common Article 3 to the Geneva Conventions) whose outcome was not entirely clear at that time. The ICTY subscribed under the so-called assimilation thesis and concluded that criminal responsibility for serious violations of the laws or customs of war arises also in NIAC and considered that this rule stems from general/customary international law.[23] The ICTY built this conclusion on a presumption that ‘what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’.[24] These findings were greeted with some controversy and hesitation. According to W. Schabas, the

20 ICTR, Key Figures of Cases.
21 Schwarz, 2017, p. 1303.
22 ICTY, *Tadić*, AC, Decision of 2 October 1995, para. 89.
23 Ibid., paras. 126–132. In relation to common Art 3 to the Geneva Convention, see: para. 134.
24 ICTY, *Tadić*, AC, Decision of 2 October 1995, para. 119.

ICTY 'stunned international lawyers by issuing a broad and innovative reading of [...] war crimes'.[25]

Both provisions concerning war crimes contain the essential element requiring that the relevant criminal conduct must be connected to an armed conflict (war nexus). Therefore, the *Tadić* AC rightly defined the substantive, geographic and temporal bounds of an 'armed conflict' for jurisdictional purposes of the tribunal.[26] It stated:

> '[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.'[27]

The Appeals Chamber (AC) in the *Tadić* (1999) later issued a groundbreaking judgement regarding the classification of armed conflicts, particularly the distinction between IAC and NIAC. It overturned the Trial Chamber's (TC) judgement that had acquitted the accused of charges related to grave breaches of the Geneva Conventions (Article 2 of the ICTY Statute) and found that the armed conflict in Bosnia and Herzegovina, involving the armed forces of the Republika Srpska (VRS) under the command of Ratko Mladić, and the central authorities of Bosnia and Herzegovina should be classified as an IAC, even after the formal withdrawal of the Yugoslav People's Army from Bosnia and Herzegovina on 19 May 1992. The crucial issue here at stake was whether the VRS acted as *de facto* organs of the Federal Republic of Yugoslavia (FRY). The AC famously rejected the effective control test for the establishment of the link between a state and non-state actor confirmed by the International Court of Justice. It ruled that

> 'The "effective control" test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised [...] this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting

25 Schabas, 2024, pp. 22–23.
26 Gustafson, 2009, p. 945.
27 Gustafson, 2009, para. 70.

on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.'[28]

The AC defined a less stringent 'overall control test' with respect to military or paramilitary groups to establish necessary factual link as between a state and non-state actor which stresses out (mere) equipping, financing, but also the coordinating or helping in the general planning of non-state actor's military activity.[29] Based on this test, the AC concluded that the VRS was controlled and acted on behalf of the FRY what made the conflict in Bosnia Herzegovina to be an IAC even after 19 May 1992. The AC therefore established the first requirement for the prosecution of the grave breaches of the Geneva Conventions.[30]

The ICTY's case law later also clarified the meaning of the war nexus. The first aspect refers to the temporal and geographic context and dictates that the crimes occur during an armed conflict and on a territory in which there is an armed conflict. In the *Kunarać*, the AC explained that there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war,[31] meaning that the crime can be temporally and geographically remote from the actual fighting. This conclusion is unproblematic given the broad geographical and temporal bounds of an 'armed conflict' elaborated in the aforementioned Tadić definition. The second aspect of the war nexus dictates that crime must be closely related to the conflict.[32] This part of the test serves the purpose to exclude from the scope of war crimes those criminal activities that are not committed under the guise of the armed conflict (e.g., murder of a neighbour purely out of jealousy, or a bank robbery perpetrated out of personal greedy motives).[33] In determining whether or not the act in question is sufficiently related to the armed conflict, the AC stressed the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.[34]

The requirement of the war nexus is the well settled legal ingredient of the war crimes, but restriction of crimes against humanity under Article 5 of the ICTY Statute to those 'committed in armed conflict, whether international or internal in character' appears to be the anomaly.[35] As explained (once again) in *Tadić*, by incorporating the requirement of an armed conflict, the SC may have defined the crime in Article 5

28 ICTY, *Tadić*, AC, Judgment of 15 July 1999, para. 124.
29 Ibid., para. 131.
30 For the second requirement, concerning the status of protected person, cf. infra part 5.1.
31 ICTY, *Kunarać*, AC, Judgement of 12 June 2002, para. 57.
32 Ibid., para. 58.
33 Cryer, 2014, pp. 281–282.
34 ICTY, *Kunarać*, AC, Judgement of 12 June 2002, para. 59.
35 International Law Commission (ILC), A/74/10, 2019, p. 52, para. 16.

more narrowly than necessary under customary international law, since customary international law no longer requires any nexus between crimes against humanity and armed conflict. Therefore, Article 5 of the ICTY Statute was intended to reintroduce this nexus for the jurisdictional purposes of the ICTY and not to codify customary international law.[36] Accordingly, despite this departure from customary international law, in the prosecution of crimes against humanity before the ICTY, the existence of an armed conflict must have been proved, as well as the link between the crime charged and the armed conflict.

Temporal jurisdiction of the ICTY is open-ended and defined by a period beginning on 1 January 1991 and a date to be determined by the SC upon the restoration of peace.[37] Nevertheless, the SC never determined this ending date. It means that the jurisdictional framework was circumscribed only factually and indirectly through the aforementioned dates provided for in the completion strategy.

Personal jurisdiction encompasses only natural persons.[38] Theoretically, the ICTY might have prosecuted minors as well, as there was no expressed requirement limiting the individual responsibility at the age of 18 years, similarly to that in Article 26 of the Rome Statute. Nevertheless, the youngest individuals to be prosecuted before the ICTY were Anto Furundžija and Dražen Erdemović, both 23 years old at the time the crime was committed.[39] In the case of the death of the accused, the proceeding terminates.[40]

Territorial jurisdiction of the ICTY extends to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.[41]

3.2. Jurisdictional Framework of the ICTR

The subject matter jurisdiction of the ICTR is formulated different compared to the ICTY, given the non-international character of the conflict in Rwanda. Under its Statute, the ICTR has jurisdiction over genocide (Article 2), crimes against humanity (Article 3), and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II (Article 4). As already referred to earlier, at that time, in 1994, these provisions concerning the criminalisation of Common Article 3 and Additional Protocol II had been an innovative and important contribution to the debate on prosecution of war crimes committed in NIAC. The seminal *Tadić* AC decision described in the previous part was adopted only one year later, in 1995. With respect to crimes against humanity provided in Article 3 of the ICTR Statute, the AC in the *Akayesu* clarified that despite the wording in chapeau which defines crimes against humanity to be crimes committed as part of a widespread or systematic attack against

36 ICTY, *Tadić*, TC, Judgement of 7 May 1997, para. 627.
37 UNSC Res. 827, 1993.
38 ICTY Statute, art. 6.
39 Quénivet, 2017, p. 446.
40 Cf. ICTY, *Milosević*, TC, Order Terminating the Proceedings of 14 March 2006.
41 ICTY Statute, art. 8.

any civilian population on national, political, ethnic, racial or religious grounds, this provision does not require that all crimes against humanity – except for the crime of persecution – enumerated therein be committed with a discriminatory intent.[42] This conclusion is compatible with customary international law.[43]

Temporal jurisdiction is already defined in the founding document of the ICTR, the SC Resolution 955 and extends to the period from 1 January to 31 December 1994.[44] In the *Nahimana*, case concerning the prosecution of the director of the RTLM, the infamous radio that played a significant role in inciting the Rwandan genocide, the AC confirmed that the ICTR may only convict an accused for criminal conduct having occurred in 1994 and stressed that the existence of continuing conduct is no exception to this rule. It reversed the TC's opposing findings and ruled that where such conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994.[45]

Similarly to the ICTY, the ICTR has personal jurisdiction over natural persons.[46] Even if it was possible to prosecute minors, the ICTR Prosecutor ruled this possibility out.[47]

Territorial jurisdiction of the ICTR encompasses both the territory of Rwanda, and also the territory of neighbouring states given – in the latter case – that they were committed by Rwandans.

4. Structure and Procedural Characteristics of the *Ad Hoc* Tribunals

The structure of both tribunals is very similar and comprises the Office of the Prosecutor, the Registry, and the Chambers.[48] Originally, both tribunals shared a Prosecutor whose office was split only in 2003 into two separate positions related to each of the tribunals. It is the organ which conducts investigations, issues indictments and brings the case to trial. The Registry serves an administrative function. The judicial role is represented by the Chambers, including three TCs in each tribunal and one joint AC based in The Hague. Each TC is composed of three judges, hears and conducts trial proceedings initiated against the accused persons by the Prosecutor. These chambers are responsible for issuing judgements, and if the accused is found guilty, for imposing sentences. The AC, comprised of five judges, hears appeals from the accused or from the Prosecutor relating to a decision or judgement and/or a sentence by a TC. The AC is the final authority on matters of law. In the *Aleksovski* case, the AC concluded

42 ICTR, *Akayesu*, AC, Judgement of 1 June 2001, para. 469.
43 Cryer, 2014, p. 234.
44 ICTR Statute, art. 7.
45 ICTR, *Nahimana*, AC, Judgement of 28 November 2007, para. 317. Case cited in O'Keefe, 2015, p. 496.
46 ICTR Statute, art. 5.
47 Quénivet, 2017, p. 446.
48 ICTY Statute, art. 11; ICTR Statute, art. 10.

that in the interests of certainty and predictability, the AC should follow its previous decisions but should be free to depart from them for cogent reasons in the interests of justice. At the same time, given the hierarchy between the AC and the TC, it ruled that the *ratio decidendi* of its decisions is binding on TCs.[49]

The criminal procedure before the *ad hoc* tribunals, as established by the RPE, is a unique blend of the adversarial and inquisitorial models.[50] The key procedural stages concern the investigation and indictment, the pre-trial, the trial, and the appeal phase, accompanied – if applicable – by the enforcement of the sentence. It is not possible to analyse the course of proceedings in any detail in this contribution, only to present the following brief summary:[51]

a) Investigation is initiated by the Prosecutor who has complete discretion and independence in this decision; once the Prosecutor establishes a prima facie case and is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the tribunal, he/she issues the indictment and submits it for confirmation;
b) the confirming judge then reviews the indictment and confirms it or returns it to the Prosecutor;
c) at this point in time, the Prosecutor may issue an arrest warrant;
d) after the accused is transferred to the tribunal, or voluntarily surrenders, he/she will have his/her initial appearance at which he/she may plead guilty or not guilty;
e) if the accused pleads not guilty, a hearing will be held; a pre-trial judge is appointed from the TC judges to coordinate communication between the parties to the proceedings;
f) at the trial, the evidence is presented; the trial follows a traditional adversarial model whereby each party, the prosecution and the defence, presents its "case" to the tribunal: first the prosecution case and then the defence case;[52]
g) an accused person benefits from the human rights guarantees during the trial;[53] the Statutes specifically provide that the accused person has a right to be tried in his/her presence, thus excluding the possibility of trials *in absentia*;[54]

49 ICTY, AC, *Aleksovski*, Judgement of 24 March 2000, paras. 107, 113.
50 For the distinction between these models, cf. Cryer, 2014, p. 424.
51 ICTY, Criminal Proceedings.
52 Friman, 2009, p. 366.
53 In the *Nikolić* case, the ICTY held that in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. In this particular case, the assumed facts did not show that the accused, abducted from the territory of the FRY by some unknown individuals, was subjected to such egregious treatment and his objection concerning the lack of jurisdiction was rejected. Cf. ICTY, *Nikolić*, TC, Decision of 9 October 2002, paras. 111–115.
54 ICTY Statute, art. 21(4)(d); ICTR Statute, art. 20(4)(d).

h) at the end of the trial, the prosecution may present closing arguments, followed by the defence, the accused person has his/her right to the final words;
i) after the trial is closed, the TC deliberates and renders judgement by a majority;
j) the convicted person may be sentenced to life-imprisonment at maximum; those convicted will serve their sentences in states that have concluded respective agreements with the tribunals; in case of acquittal, the accused is released immediately;
k) as a part of human rights guarantees, the judgement on guilt and the sentence is subjected to the appeal; if a new fact is discovered which was not available through either the trial or the appellate proceedings, and could not have been discovered through the exercise of due diligence, either party can ask for a review of the judgement;
l) the Statutes of the ICTY and the ICTR do not authorise victims to participate in the proceedings, they are only allowed to be heard as witnesses and generally speaking, their position is significantly weaker compared to the proceedings before the ICC;[55] although both tribunals offer the possibility of compensation and restitution, they never made a reparation order and never paved the way for the concept of restorative justice, available in the proceedings before the ICC.[56]

The mutual relationship between the ICTY, the ICTR, and domestic judiciary is defined through the principle of concurrent jurisdiction with primacy over national courts assuring that at any stage of the domestic procedure, the tribunal may formally request national courts to defer to the competence of the tribunal.[57] Neither one of the two tribunals were obliged to exercise this primacy that is supported by the practice of referral under Rule 11*bis* of their respective RPE, which formed part of the completion strategy.

The ICTY and ICTR scheme of cooperation was cleared up in the famous *Blaškić* subpoena decision in 1997.[58] Due to the fact that both tribunals were set up by the SC resolutions, the cooperation scheme can be described as vertical and is built on the following basis. The ICTY and the ICTR can issue binding orders to any states and subpoenas to individuals acting in private capacity. Obligations arising from the Statutes prevail over any legal impediment which may exist under national law or extradition treaties. Next, the ICTY/ICTR Prosecutor is authorised to undertake investigation and collect evidence directly on the territories of the former Yugoslavia and Rwanda, on the territories of those states which have passed implementing legislation authorising such prosecutorial/investigative activity, and, finally, also on the

55 De Hemptinne, 2009, p. 562.
56 ICTY Statute, art. 24:3; ICTR Statute art. 23:3; Moffett, 2013, p. 371.
57 ICTY Statute, art. 9; ICTR Statute, art. 8.
58 ICTY, *Blaškić*, AC, Judgement of 29 October 1997.

territories of states whose authorities prevent international tribunal from fulfilling its functions (e.g. states which have not enacted implementing legislation and are not willing to assist). Lastly, although states may invoke national security as a ground for refusing the cooperation, it is the international tribunal which has the final say on the matter. The obligation to cooperate with the *ad hoc* tribunals encompassed virtually every member of the international community.

5.1. Contribution to the Development of ICL/IHL

The contribution of the ICTY and the ICTR to the development of IHL and ICL can hardly be contested. It is enough to mention the *Tadić* definition of the term "armed conflict" as a prerequisite to the prosecution of war crimes that was missing in the corpus of IHL until its pronouncement by the ICTY. This *Tadić* formulation is accepted to reflect customary international law and was also accepted by the subsequent international criminal tribunals, including the Special Court for Sierra-Leone (SCSL) and the ICC.[59] The ICTY authoritatively ended debate by affirming that individuals can be held responsible for committing war crimes in NIAC.[60] It confirmed that the war nexus requirement in the definition of crimes against humanity is an anomaly that paved the way to the adoption of warless definition of this category of crimes under international law in Article 7 of the Rome Statute. To give at least one similar example from the practice of the ICTR, it is possible to refer to the definition of rape. The ICTR's definition of rape in the *Akayesu* case was groundbreaking for the development of IHL/ICL as it responded to the fact that despite the prohibition of this act by Article 27 of the Geneva Convention IV there is no definition included in this provision.[61] The ICTR filled in this gap. The practice of *ad hoc* tribunals then proved that rape is not only a war crime, but also *actus reus* of other crimes, such as torture, or also genocide (as the infliction of serious bodily or mental harm, or as a measure to prevent birth).[62] The clarification of these basic concepts, accompanied by the introduction of innovative procedures designed to protect vulnerable victims,[63] prompted the prosecution of sexual offences at international level. Simply put, without the ICTY and the ICTR, ICL and IHL as it currently stands, would not be the same.

In his analysis of the ICTY's contribution to the development of IHL, T. Hoffmann points out that the practice of this tribunal shows examples of a clear judicial

59 Bradley, 2024, p. 176.
60 See: ICTY, *Tadić*, TC, Judgement of 7 May 1997.
61 Bradley, 2024, pp. 181–184.
62 ICTR, *Akayesu*, TC, Judgement of 2 September 1998, paras. 597, 706, 731. It goes without saying that it is specifically the practice of the ICTR that 'transformed the Genocide Convention from a mere registration of protest against Nazi crimes to the source of one of the most significant developments in international criminal law jurisprudence'. Cf. Akhavan, 2016, p. 79. Starting out from the *Akayesu* case, the jurisprudence of tribunals (and predominantly that of the ICTR) tested each term of the definition of genocide, be it specific intent (*dolus specialis*), extent of destruction, specification of protected groups, depersonalisation of victims, and the means of destruction (elements of underlying offences).
63 ICTY, Crimes of Sexual Violence.

law-making and observes that this judicial activism was disguised by the extensive reliance on customary law that should have demonstrated that the tribunal's conclusions are already rooted in practice and *opinio juris* of states.[64] Despite the ICTY's mandate to apply only those rules of IHL that were beyond any doubt part of customary international law,[65] it regularly put forward rather innovative and liberal readings of customary international law, i.e. interpretations that hardly achieved the legal status required by the mandate. The ICTY regularly adopted two techniques to achieve this outcome.

Firstly, the ICTY provided remarkably few instances of state practice to prove the existence of customary international law. This implies that it used a very relaxed methodology in the identification of rules of customary international law. Very illustrative is the example on the prohibition of perfidy in NIAC, which was deemed to have a customary status by the ICTY citing only a single Nigerian judicial decision in support, which in turn was based on the Nigerian Criminal Code.[66] The same holds true with respect to the ICTY's findings concerning the extended form of joint criminal enterprise (JCE III) in which one participant commits "excess" that goes beyond the common plan. The *Tadić* AC established that each participant may be held responsible if the consequence (excess) is a natural and foreseeable consequence of the common plan and the respective participant by its participation willingly took the risk of its occurrence.[67] In this case, the AC relied only on a rather small number of post-war trials to support its finding on the customary character of the JCE III what led the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the *Sary and others* case to conclude – after a review of the same materials as the ones ICTY relied upon – that these materials do not constitute a sufficiently firm basis for subjecting the JCE III under the realm of customary international law between 1975 and 1979.[68]

Secondly, the ICTY's judicial activism expanded the protective scope of IHL through the purposive/teleological interpretation of applicable law. This approach 'allowed the ad hoc tribunals to steer a necessary development in broadening

64 Hoffmann, 2024, p. 23.
65 Secretary-General, 3 May 1993, S/25704, para. 34.
66 ICTY, *Tadić*, AC, Decision of 2 October 1995, para. 125. Case cited in Hoffmann, 2024, p. 23.
67 ICTY, *Tadić*, AC, Judgement of 15 July 1999, para. 228. The JCE is a form of co-perpetration inferred from art. 7(1) of the ICTY Statute, including the following elements: a) involvement of the plurality of persons; b) existence of a common plan; c) participation of the accused in the form of a significant contribution, and (di) shared intent for the basic form of JCE – JCE I; (dii) knowledge of the criminal system and intent to further its criminal purpose for the systemic form of JCE – JCE II; and (diii) indirect intent (*dolus eventualis*) described *supra* for the extended form of JCE – JCE III. In the *Karadžić* case, regarding the trial of the former leader of Bosnian Serbs, the TC found that the accused was (among else) member of the Srebrenica JCE established as Srebrenica fell on 11 July 1995, with a common plan to eliminate the Bosnian Muslims in Srebrenica, later through the killing of the men and boys (ICTY, *Karadžić*, TC, Judgement of 24 March 2016, para. 5741).
68 ECCC, *Sary and others*, PTC, Decision of 20 May 2010, para. 83.

individual criminal responsibility to respond to modern international inter-ethnic conflict'.[69] The best-known example concerns the ICTY's case law on nationality requirement in Article 4 of Geneva Convention IV. This provision states:

> 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it.
> Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.'

At the first look, the text of the provision clearly stipulates that its protection applies only to nationals of the adversary party to the conflict. Nevertheless, the ICTY held that in the context of present-day inter-ethnic conflicts Article 4 should be given a wider construction so that a person may be accorded protected status even if he or she is of the same nationality as his or her captors.[70] The AC concluded that the requirement of nationality is less adequate to define protected persons, because

> 'in such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.'

The AC clarified that the determinative factor of national allegiance is ethnicity.[71]

This approach was later found compatible with the principle of legality (*nullum crimen sine lege*) and expressly sanctioned by the AC in the *Aleksovski* case which confirmed that 'this principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime'.[72] This means that potential arguments of critiques pointing out to the unacceptable transgression of the ICTY's mandate through the judicial creativity might have been rebutted by the counter-argument of what the tribunal actually does is nothing else but the routine interpretation of (customary) international law.

Finally, concerning the assessment of the *ad hoc* tribunals' contribution, it is possible to recap a metaphor of fish in water: the legacy of the tribunals is like the water

69 Viswanath, 2024, p. 82.
70 Dörmann, 2004, p. 28.
71 ICTY, *Tadić*, AC, Judgement of 15 July 1999, paras. 166–168.
72 ICTY, *Aleksovski*, Judgement of 24 March 2000, para. 127.

in which we swim every day and thus cease to notice.[73] The tribunals' impact on the development of ICL/IHL is today taken for granted because some of their originally innovative interpretations now form part of the well settled canon of ICL/IHL.

5.2. Practice of the ICTY and ICTR Before the ICC

Already at the time of the adoption of the ICC Statute, there were opinions in the literature that the ICC could benefit from the experience of its predecessors, in particular the ICTY and the ICTR.[74] Given the importance of the two *ad hoc* international criminal tribunals for the development of ICL (see *supra*) and the scope of their agenda, it is therefore not surprising that the arguments of the defence and the prosecution in proceedings before the ICC contain numerous references to the case law and practice of the ICTY and the ICTR. Finally, the decisions of the *ad hoc* tribunals are also used by the judicial organs of the ICC from the very beginning of its existence, be it PTC, TC, or AC.[75] It is therefore relevant to address the position of external judicial decisions in the system of law applicable to the ICC.[76]

Looking at Article 21 of the ICC Statute, it is clear that external judicial decisions are not explicitly mentioned in the system of applicable law, which limits their application from the outset. It is true that the decisions of the ICC's predecessors are not binding on this court, and there is no institutional link between the ICC and the *ad hoc* international criminal tribunals. The Rome Statute does not contain a rule similar to Article 20(3) of the Statute of the SCSL stipulating that the judges of the AC of the SCSL shall be guided by the decisions of the AC of the ICTY and ICTR.[77] Prior judicial decisions coming from the external jurisdiction have a status before the ICC similar to the status of an external decision (e.g., the judgement of the Nuremberg and Tokio Tribunal) before the ICTY and ICTR, i.e., the court may use them as a source of inspiration in tracing the normative content of the ICC Statute [Article 21(1)(a) of the ICC Statute] or the principles and rules of international law [Article 21(1)(b) of the ICC Statute]. In the words of Judge Kaul, 'the ICC does not exist in autistic isolation from developments in international criminal law'.[78] Careful reading of Judge Kaul's reasoning might imply to some extent that judicial decisions are given a weaker status than in the ICJ Statute. Whereas the ICJ Statute speaks of judicial decisions as a means of determining the content of primary rules (international treaties, customary international law, general principles of law),[79] Judge Kaul gives judicial decisions importance only for the purpose of determining the content of secondary rules, i.e. rules that

73 Robinson and MacNeil, 2016, p. 191.
74 Pejic, 1997, pp. 841–860.
75 ICC, *Lubanga,* TC I, Judgement of 14 March 2012, paras. 533, 603.
76 Cf. Svaček, 2017, pp. 124 et seq.
77 ICC, Situation in Kenya, PTC II, Dissenting Opinion of Judge Hans-Peter Kaul to Decision of 31 March 2010, paras. 29–30.
78 ICC, Situation in Kenya, PTC II, Dissenting Opinion of Judge Hans-Peter Kaul to Decision of 31 March 2010, para. 30.
79 ICJ Statute, art. 38.

apply only when the primary rules, with the Rome Statute at the top of the hierarchy, are *lacunae*. However, ICC practice shows that external judicial decisions can also be used to interpret primary sources. In any case, formally speaking, external judicial decisions are of limited value for the ICC.[80]

This methodology is already presented in the early practice of the ICC. In the decision on the confirmation of charges in the *Lubanga* case, the PTC I dealt with the classification and definition of armed conflict in *Ituri*, what was essential for the prosecution of the crime of conscription or enlisting children under the age of 15 years into the armed forces or their use for active participation in hostilities. The PTC noted that the definition of armed conflict is not contained in the ICC Statute or in the Elements of Crimes (EoC). Subsequently, referring to Article 21(1)(b) of the ICC Statute, the chamber analysed the applicable international treaties, principles and rules of international law and referred to the ICTY/ICTR AC's seminal decision in the *Tadić* case, which – as discussed earlier – provides a widely accepted definition of armed conflict, both of international and internal character.[81] The TC I then followed the approach of the PTC and also referred to the jurisprudence of the ICTY, though unlike the PTC, it qualified the conflict in *Ituri* as non-international.[82] Elsewhere, referring to SCSL case law on the use of child soldiers, it was stated that the 'SCSL's case law potentially assists in the interpretation of the relevant provisions of the Rome Statute'.[83]

In the decision on the confirmation of charges in the *Ruto, Kosgey and Sang* case, the PTC I had to deal with the defence argument that the form of responsibility proposed by the Prosecutor, namely the indirect co-perpetration, was not part of customary international law and as such, was rejected by the ICTY (*Stakić*).[84] In its consideration of the case, the PTC reiterated the thesis set out above: the jurisprudence of *ad hoc* tribunals does not constitute a separate category of law applicable before the ICC; it can only be used to illustrate the content of relevant principles and rules of international law. Moreover, external case law should be allowed to step in only where the ICC Statute is not applicable.[85] However, since the ICC Statute can be interpreted in a way as to establish the specific form of indirect co-perpetration,[86] the PTC did not take the ICTY jurisprudence into account even in the indicated subsidiary role.

Obviously, the case law of the ICTY and ICTR cannot be transferred into the legal framework of the ICC mechanically. Its application must conform to the hierarchy of rules applicable in proceedings before the ICC, with the Rome Statute at its peak.[87]

80 ICC, Situation in Kenya, PTC II, Dissenting Opinion of Judge Hans-Peter Kaul to Decision of 31 March 2010, para. 30.
81 ICC, *Lubanga*, PTC I, Decision of 7 February 2007, paras. 208 et seq.
82 ICC, *Lubanga*, TC I, Judgement of 14 March 2012, paras. 533, 567.
83 Ibid., para. 603.
84 ICC, *Ruto, Kosgey and Sang*, PTC I, Decision of 23 January 2012, para. 288.
85 Ibid., para. 289.
86 Ibid., para. 287.
87 ICC Statute, art. 21.

Deviations from the established practice of international tribunals are therefore not surprising, as they were already instructed by the adoption of the Rome Statute itself. A good example is the explicit rejection of the JCE doctrine (as a form of co-perpetration – see *supra*). In the *Lubanga*, the PTC held that the JCE as a form of commission (co-perpetration) of crime under international law is based on a subjective approach focused on the culpability (state of mind) of the perpetrator. In contrast, according to the PTC, the co-perpetration envisaged in Article 25(3)(a) of the ICC Statute is based on the concept of control over a crime. Control over a crime is manifested by the fact that the contribution of each of the co-perpetrators to the commission of the crime must be absolutely essential, i.e. each of them may, by failing to perform his or her task, frustrate the commission of the crime as a whole.[88]

Another example is the concept of superior responsibility.[89] Even here, variances between the ICC's and *ad hoc* tribunals' case law can be explained by differences in the text of the Rome Statute and the ICTY/ICTR Statutes. The first difference – not yet elaborated in the ICC's practice – concerns the mental element of civilian superior under Article 28(2)(a) of the Rome Statute which is clearly a higher standard than employed by the ICTY and ICTR. In the *Bemba* case, concerning the application of the doctrine towards a military commander, the PTC II was also 'mindful of the fact that the "had reason to know" criterion embodied in the statutes of the ICTR, ICTY and SCSL sets a different standard to the "should have known" standard under Article 28(a) of the Statute'.[90] The relationship between the standards of mental elements applicable before *ad hoc* tribunals and the ICC in relation to military commanders is nevertheless far from being settled.[91] The same holds true with respect to the causality requirement introduced by the Rome Statute that provides that the crime of subordinates be committed as a result of the superior's failure to exercise control properly over subordinates. The case law of *ad hoc* tribunals entirely rejected this element. The practice of the ICC is still blurred, even after the involvement of the ICC (including the AC) in this issue in the *Bemba* case. In the opinion of the PTC II, this requirement should in any case apply only to the omission of preventive measures, being sufficient that the superior's failure to act increases the risk that the subordinate will commit the crime.[92]

88 ICC, *Lubanga*, PTC I, Decision of 7 February 2007, para. 347. In contrast, the concept of JCE required only a qualitatively lower significant, and not the more demanding essential contribution. Cf. Wirth, 2009, p. 332.
89 Although there is still some disagreement about the doctrinal classification of this concept (Werle and Jessberger, 2020, p. 266), its requirements include: a) superior/subordinate relationship; b) mental element encompassing actual or at least inferred knowledge about crimes under international law committed by subordinates; and c) failure to take preventive or repressive measures.
90 ICC, *Bemba*, PTC II, Decision of 15 June 2009, para. 434.
91 O'Sullivan, 2022, pp. 668–671.
92 ICC, *Bemba*, PTC II, Decision of 15 June 2009, paras. 424–425; Cf. Werle and Jessberger, 2020, p. 276.

The practice of the ICC reveals that the external judicial decisions are adopted with considerable caution and always on the basis of careful analysis. This cautious approach has clearly been evident in the application of certain procedural institutes that have been consistently used in the practice of international criminal tribunals. As early as in 2005, the ICC Prosecutor responded with a position paper to the PTC's decision to remove certain factual information (e.g. dates, locations, nature of the attack) from the arrest warrant against the accused persons in the Ugandan situation and, through an accompanying motion sought reconsideration of the conclusion reached. The Prosecutor's arguments were based, *inter alia*, on the practice of *ad hoc* international criminal tribunals which allowed similar submissions. In its decision, the PTC II first analysed the relevant provisions of the ICC Statute and the RPE. It concluded that neither of the documents provided for a remedy in the form of a motion for reconsideration of decision. The Chamber referred to the remedies expressly provided in the legal framework of the ICC.[93] Given the lack of legal support in the sources applicable before the ICC, the Prosecutor's procedural action was dismissed. The reference to the practice and decisions of *ad hoc* tribunals was simply refuted by summarising the aforementioned methodology of Article 21 of the ICC Statute. The PTC expressly stated that 'the law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute'.[94]

The ICC followed a similar approach in relation to the witness proofing.[95] The scenario is identical to the previous case, but the result is quite different. The issue of witness preparation was first addressed before the ICC by the PTC in the *Lubanga* case in 2006, then by the TC in the same case in 2007, and further at the same level in the *Katanga* (2009) and *Bemba* (2010) cases.[96] In neither case was the institution of witness preparation used, primarily citing the fact that it is not enshrined in the ICC Statute. The Prosecutor's arguments, which referred to the established practice of international criminal tribunals, were repeatedly rejected. For example, in the *Lubanga*, the TC I emphasised, along the lines of the reasoning used in the previous cases, that the practice of international *ad hoc* tribunals is in no way precedential and is not binding on the ICC.[97] The TC stated that

> 'in the instant case, the issue before the Chamber is procedural in nature. While this would not, ipso facto, prevent all procedural issues from scrutiny

93 ICC, *Situation in Uganda*, PTC II, Decision of 28 October 2005, para. 18. The PTC referred to arts. 15:5, 19:10, and 61:8 of the ICC Statute. It emphasised art. 82 of the ICC Statute particularly, which regulates interlocutory appeals against decisions other than final decisions on guilt and sentence.

94 ICC, *Situation in Uganda*, PTC II, Decision of 28 October 2005, para. 19.

95 Witness proofing/preparation consists of the witness meeting with the party calling the witness shortly before giving evidence. The purpose of the preparation is to discuss the witness testimony. Example is given in Bitti, 2009, pp. 298–299.

96 IBA, 2013.

97 ICC, *Lubanga*, TC I, Decision of 1 December 2007, para. 44.

> under Article 21(l)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.'[98]

The TC then gave its reasons for not considering the practice of international criminal tribunals. This is because the ICC Statute creates a procedural framework that differs substantially from that of its predecessors. Proceedings before the ICC are built on specific premises not found in, for example, the ICTY Statute or the ICTR Statute. In particular, the TC referred to a greater objectivity on the part of the ICC Prosecutor, who is obliged to investigate both aggravating and mitigating circumstances (Article 54 of the ICC Statute), or an accentuated status of victims (Article 75 of the ICC Statute).

Subsequent decisions, however, have completely reconsidered this established line of the ICC practice concerning witness proofing. In the *Ruto and Sang*, the TC V agreed that the witness preparation is implicit in Article 64 of the ICC Statute, which should be interpreted expansively. In the words of the TC V, 'silence on a particular procedural issue does not necessarily imply that it is forbidden'.[99] The TC V then referred to the practice of *ad hoc* tribunals that have approved the preparation of witnesses, despite the fact that their founding documents, like that of the ICC, do not expressly provide for this procedural action. The TC V concluded that, despite the non-binding nature of the jurisprudence of *ad hoc* international criminal tribunals, their conclusion was meaningful for the evaluation of the analogous provision of the ICC Statute.[100] This decision of the TC V departed from the previous jurisprudence of the ICC, gave an expansive interpretation of the ICC Statute and, most importantly in terms of the topic at hand, gave considerable space to the jurisprudence of *ad hoc* international tribunals.[101] However, this does not change the above methodology. Even in this last case, the ICC primarily relied on the wording or interpretation of the ICC Statute.

In addition to clarifying the primary and subsidiary rules set out in Article 21 of the ICC Statute, the jurisprudence of *ad hoc* international criminal tribunals can also be applied to resolve potential normative conflicts between the ICC Statute and the

98 Ibid.

99 ICC, *Ruto and Sang*, TC V, Decision of 2 January 2013, para. 27. art. 64:3(a) of the ICC Statute provides: Upon referral of a case for a main trial under the present Statute, the Trial Chamber to which the case has been assigned shall: a) after consultation with the parties, take such measures as may be necessary to facilitate a fair and expeditious hearing of the case.

100 ICC, *Ruto and Sang*, TC V, Decision of 2 January 2013, para. 29.

101 Similarly cf. ICC, *Lubanga*, TC I, Judgement of 14 March 2012, para. 603. The jurisprudence of the ICTY has been extensively applied in the interpretation of art. 28. of the ICC Statute (superior responsibility), cf. ICC, *Bemba*, ICC-01/05-01/08-424, PTC II, Decision of 15 June 2009, paras. 404 et seq. This heavy reliance on the case law of the ICTY/ICTR is clearly visible also in the TC judgement on the merits. Cf. ICC, *Bemba*, TC III, Judgement of 21 March 2016, paras. 170 et seq. Still, as argued in the previous part, differences in the wording of respective statutes must be taken into account.

EoC. While cases of conflicts between these two documents are unlikely to be very frequent and are ultimately resolvable by reference to Article 9(3) of the ICC Statute confirming that the EoC and amendments thereto shall be consistent with this Statute, they cannot be entirely ruled out. This is evidenced by the arrest warrant decisions issued by the PTC in the *Al-Bashir* case.[102] Simply put, the PTC considered the consistency between the definition of genocide contained in Article 6 of the ICC Statute and the definition provided in the EoC, which adds a so-called contextual element. Under the EoC, the underlying offence must take place in the context of a manifest pattern of similar conduct directed against the protected group or can itself effect destruction of this group. Nevertheless, the definition of genocide, enshrined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, in the Statutes of *ad hoc* tribunals, customary international law, and the Rome Statute itself, does not deal with the contextual element. In both decisions on the arrest warrant, the PTC concluded that there is no irreconcilable conflict between Article 6 of the ICC Statute and the definition contained in the EoC. What is important, the PTC interpreted the two definitions as being consistent, and supported its conclusion by reference to the jurisprudence of *ad hoc* tribunals.[103]

The preceding considerations lead to the following conclusions: the ICC has from the very beginning of its judicial existence consistently held that prior external judicial decisions are not part of the system of law applicable before it. A possible departure from the practice of *ad hoc* international criminal tribunals, as long as it is based on the wording of the ICC Statute, is formally unproblematic and the only correct one. The basic source of regulation for the ICC is its founding document, the Rome Statute. On the other hand, since the ICC does not exist in the autistic isolation, it can grant the external case law relevance by using it to justify and to give reasons to its own conclusions. However, without the existence of at least an implicit mandate in the ICC Statute, argumentation by the previous *ad hoc* tribunals' jurisprudence is insufficient. It can simply be summarised that the ICC has dealt with the earlier jurisprudence of external jurisdictions in a manner similar to that of the ICTY and the ICTR (in relation to post-World War II cases): *non exemplis, sed legibus iudicandum* est.[104] The added value is the possibility of using external case law to resolve any inconsistencies between the wording of the ICC Statute and other rules, which form the primary rules of law applicable before the ICC. Here again, however, external jurisprudence only balances the normative conflict, as the solution is primarily enforced by the weight of the ICC Statute, specifically Article 9(3) thereof. While it is true that ICC's decisions that do not refer to the case law of the previous *ad hoc* tribunals are still rather the exception, it is also true that the decisions of the ICC's predecessors are in no way binding on this

102 In these decisions, the ICC for the first time revealed its understanding of applicability of personal immunity with respect to sitting head of states of the third states what gave rise to (in) famous Al-Bashir saga; ICC, *Al-Bashir,* PTC I, Decision of 4 March 2009.
103 ICC, *Al-Bashir,* PTC I, Decision of 4 March 2009, para. 119.
104 ICTY, *Kupreškić,* TC, Judgement of 14 January 2000, para. 540.

court. It can be expected that, as the ICC's own jurisprudence develops, references to external jurisprudence will gradually diminish.

6. Final Thoughts

This chapter explores issues concerning the relationship between *ad hoc* tribunals and the SC, analyses the jurisdictional framework of both tribunals, the basics of their procedure, and also assesses their contribution to the development of ICL/IHL, including possibilities and limits on transfer of their practice into the practice of their successors, namely the ICC. The summary of conclusions would be redundant here as they are clearly drafted in the text. The author of this contribution limits to conclude with the general reflection that "all roads lead to The Hague and Arusha" to mean that any discussion in ICL as it now stands would be incomplete without the proper analysis of the respective practice of the ICTY and the ICTR. Despite some legitimate critique (concerning e.g. the length of the proceedings), in whole, both tribunals gained their moment in the history of ICL. As rightly observed by Robinson and MacNeil, without both tribunals, '[i]t is most likely that ICL would, by comparison, be greatly impoverished: thinner in details, weaker in scope, and perhaps still in its post-Nuremberg hibernation'.[105]

105 Robinson and MacNeil, 2016, p. 209.

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