| Chapter 4 |

International Criminal Law IV: The International Criminal Court

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ABSTRACT

This study does not have the ambition to cover all the issues related to the functioning of the International Criminal Court. It is devoted only to selected elements considered to be the most important in the context of the purpose it is supposed to serve. The focus was therefore on the creation of the first permanent international criminal court, pointing to this event as the result of a long process of evolution. This work is mainly focused on issues related to the scope of the ICC jurisdiction and the mechanisms of its activation. Of course, this approach also forces us to deal with issues related to the principle of complementarity, and the rules of universal jurisdiction. The final part of the work is devoted to the discussion of core crimes under the Rome Statute, and this approach is more informative. The volume of the study does not allow for an in-depth analysis of all the material elements of international crimes, nor the contextual elements. Beyond the scope of consideration are also – as a rule – issues related to the forms of committing crimes provided for in the Rome Statute.

Procedural issues were completely omitted; this certainly deserves a separate study, in particular bearing in mind the legacy of the ICC in shaping standards of protection of individual rights. Only marginally, when discussing the process of creating the ICC, was the created system of applied sources of law mentioned, which is of key importance for decoding the rules governing proceedings before the ICC.

In the end, three very important blocks of issues were omitted. The first one concerns constitutional issues, i.e. the structure of the Court and the rules of its functioning, the election of elected officials, the relationship of the Court to the UN, the role of the Assembly of State Parties, etc. The second concerns the rights of victims in proceedings before the ICC and their right to reparations. In the latter area, the Rome Statute brought revolutionary and, most importantly, effective solutions. Thirdly, the whole issue of international cooperation, the effectiveness of which is of key importance for the functioning of the entire system of the Rome Statute has remained outside the scope of consideration.

KEYWORDS

international criminal court (ICC), jurisdiction of the ICC, universal jurisdiction, complementarity principle, triggering mechanisms, core crimes, genocide, crimes against humanity, war crimes, crime of aggression

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1. Introduction

Many argue that the establishment of the International Criminal Court (hereinafter referred to as the ICC) was a natural consequence of the international community's prior need to respond to the crises in the Balkans and Rwanda, which led to the establishment of the UN special (*ad hoc*) criminal tribunals. This finding is not without reason, because it was justified and logical to think that we must be prepared for similar crises in the future. Responding to each new crisis with the creation of new structures would not only be illogical, but also extremely costly.

Bearing the above in mind, however, it must be emphatically emphasised that the establishment of the ICC took place using a historical moment. Before this point the international community would never have agreed to such a step. Unfortunately, this would not be possible today in the face of the tense state of international relations.

However, the victory of 1998[1] was not complete, as indicated by the scope of the Court's jurisdiction and the way it was exercised. For many participants of the Intergovernmental Conference, solutions were adopted that were not radical enough, and in the case of others they even go too far. Thus despite the agreement on the text of the Rome Statute, not everyone left Rome satisfied, and as a result, the scope of ratification of the negotiated treaty was ultimately smaller than expected. It is not about the number of ratifications itself, since in just over two years 60 ratifications were collected, opening the way to the constitution of the Court in July 2002. The point is that the biggest world players did not decide to deposit ratification documents, despite the fact that they have previously signed a negotiated treaty. This applies to countries such as the USA, China, India and Russia. This, as it will turn out, will be of key importance for the functioning of the entire system of the Rome Statute.

The International Criminal Court is not a human rights court. However, this book could not have missed an opportunity to discuss this institution, because in three important aspects it affects the level of protection of individual rights in the world:

1. The Rome Statute (hereinafter: RS) provides for a punitive response to the most drastic violation of human rights imaginable. There is empirical evidence that the very existence of the ICC limits the use of violence to resolve escalating social and political conflicts.
2. In its jurisprudence, the ICC makes extensive use of the case law of the European Court of Human Rights and the Inter-American Court of Human Rights, and thus, thanks to its authority, disseminates and consolidates the highest standards of protection of individual rights.
3. The entire system of the Rome Statute is focused on the victims of international crimes, giving them not only the right to participate in proceedings before the

1 On 17 July 1998, the Rome Statute of ICC was adopted at the United Nations Diplomatic Conference of Plenipotentiaries in Rome.

ICC, but also the right to reparations. In this way, it effectively protects those whose fundamental rights have been drastically violated.

2. The Establishment of the First Permanent International Criminal Court

The idea of creating an international court took shape after World War I, when the Treaty of Versailles stated that '[t]he Allied Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties'.[2] It also provided for the establishment of military tribunals for violations of the laws and customs of wars and obliged Germany to hand over war criminals.[3] Despite the advancement of the preparatory work[4] however, no international tribunal was established, and Kaiser William managed to avoid accountability thanks to the asylum granted to him by the Dutch.[5]

The issue of the creation of a permanent international criminal tribunal returned in the work of the League of Nations in the 1930s in the context of the Convention on the Prevention of Terrorism.[6] The text of the convention on the establishment of an International Criminal Court was even adopted,[7] but it was only signed by 13 countries and never entered into force.[8]

However, the attempt to create international tribunals to adjudicate crimes committed during World War II, the International Military Tribunal at Nuremberg[9] and the International Military Tribunal for the Far East at Tokyo[10] ended in success. These tribunals undoubtedly laid the foundations for the development of international criminal law, and their legacy, particularly the Nuremberg Judgment of October

2 Versailles Peace Treaty of 28 June 1919, art. 227:1.

3 Ibid., arts. 228:1, 229:1–2.

4 The Commission appointed by the Paris Peace Conference prepared a draft of the Elements of Crimes, which provided for four groups of crimes: crimes against sanctity of treaties, crimes against international morality, violations of the laws of humanity and war crimes. The list of international crimes proposed at that time then influenced the content of Article 6:b of the Nuremberg Charter; Werle and Jessberger, 2020, p. 3.

5 Schabas, 2018.

6 League of Nations, Convention on the Prevention and Punishment of Terrorism, 1937.

7 League of Nations, Convention for the Establishment of an International Criminal Court, 1937.

8 Bassiouni, 2012, pp. 540 et seq.

9 It was created by the London Agreement of 8th August 1945 by four victorious powers, i.e. the USA, Great Britain, France and the Soviet Union. The Nuremberg Charter was an annex to this agreement.

10 The Court was established on 19th January 1946 by a directive from the commander-in-chief of the Allied forces. That directive also established the Court's law.

1st 1946, was an inspiration for further projects undertaken by the international community.[11]

The need for further reactions to the atrocities was not long in coming. It appeared in connection with crimes that took place during the conflict in the former Yugoslavia in the early 1990s[12] and in Rwanda in 1994.[13] This time, to adjudicate international crimes, international tribunals were established by the UN Security Council (hereinafter referred to as UN SC) resolutions, which was not without significance for the strength of their mandate.[14]

Regardless of the fact that both the tribunals established after World War II, and the *ad hoc* tribunals established by the UN SC in the 1990s played a huge role in the development of international criminal law[15], it is impossible not to notice that they were affected by a certain "original sin". All of them were created *ex post*, i.e. in response to events, which were then subjected to juridical evaluation.[16] This, of course, weakened their legitimacy and provoked negative assessments when confronted with the elementary principles of criminal law, with the prohibition of retroactivity at the forefront. Resistance was caused, especially by the fact that retroactivity concerned not only systemic and procedural solutions, but also substantive legal assessments. The substantive legal basis for the prosecution of international crimes was still in its development phase.[17]

Avoiding this "sin" in the further development of the ICL was possible only on the assumption that an international court would be created, which firstly, would be permanent, and secondly, would only allow events committed after its creation and the final formation of the elements of the crime to fall within the scope of its jurisdiction. However, this step was only possible if there was an appropriate climate in international relations, which took place after the end of the Cold War in the 1990s.

Earlier attempts to start work on the establishment of the Court failed due to a lack of agreement on the definition of aggression.[18] However, in 1989, at the initiative of Trinidad and Tobago, the UN GA undertook a decision authorising the International Law Commission (hereinafter referred to as ILC) to consider the creation of an

11 On the importance of Tokyo Tribunal see: Dittrich et al., 2020; UNGA Res. 95(I), 1946; GA Resolution 95 (I) of 11th December 1946, Affirmation of the Principles of International Criminal Law Recognized by the Nuremberg Tribunal.

12 Bassiouni, 1992–1994, pp. 1–60.

13 Van den Herik, 2005, pp. 11 et seq.

14 UNSC Res. 808, 1993; UNSC Res. 955, 1994.

15 Sterio and Scharf, 2019; Pocar et al., 1996, pp. 67–124; Ambos, 2016, pp. 24–43.

16 The violation of the prohibition on retroactivity of criminal law in the context of the mandates of the Nuremberg and Tokyo tribunals has been the reason for many years of criticism of the adopted solutions. It was not only about the creation of courts that were to hear crimes committed at a time when these courts did not yet exist. The key was the violation of the principle of *nullum crimen sine lege certa* in the situation of conviction for conduct that was not typified either in the German law of the time or in the legal systems of other countries where the crimes were committed. Also see: Schmitt, 1945, in Werle and Jessberger, 2020, pp. 587–588.

17 Bassiouni in Sadat, 2002, p. 30; Ambos, 2016, pp. 19–24.

18 Werle and Jessberger, 2020, pp. 18–19; cf. Politi and Nesi, 2004.

international criminal court,[19] although an agreement on the definition of the crime of aggression was still far from being reached.

A draft of the Statute for an International Criminal Court was presented by the ILC in 1994 to UN GA,[20] and an *ad hoc* Committee set up to evaluate this draft[21]. The Committee presented its Report in 1995.[22] It resulted in the establishment of the Preparatory Committee, which was entrusted with the preparation of drafts for the Intergovernmental Conference. This Committee presented its report to the UN GA in 1996,[23] and the road to intergovernmental negotiations was opened.

The international treaty on the establishment of the ICC was adopted and opened for signature in Rome on 17th July 1998.[24] As defined in Article 126 (1) of the Rome Statute (hereinafter referred to as RS) the treaty had reached the required number of ratifications (60) in 2002 and therefore on 1st July 2002 the RS entered into force. The International Criminal Court was able to start its operations.

The establishment of the ICC as a result of the entry into force of the RS was certainly a milestone, both from the perspectives of the history of public international, and criminal law. The international community has decided that a permanent criminal court is needed to try the most serious international crimes: genocide, crimes against humanity, war crimes and crimes of aggression. There has been a further empowerment of the individual in public international law, and thus a certain taboo has been broken. From a criminal law perspective, it was also a revolution. Since then, the substantive legal basis for criminal liability has also become a treaty norm, and the administration of criminal justice has ceased to be a purely internal matter. Therefore the concept of national sovereignty, of which jurisdiction in criminal matters is an immanent part, was re-evaluated and it has been understood that sovereignty also means a joint responsibility for the prosecution of international crimes.

This landmark decision stemmed from the realisation that, despite the intensification of the international community, atrocities are still being committed in various regions of the world, and that it makes little sense to set up *ad hoc* tribunals in response to each new conflict. A Court has been created that operates to the highest standards[25] and is respected by most countries in the world,[26] including some of those that have not ratified the Rome Statute.

However, not everything has worked out. Despite intensive efforts, it was still not possible to reach an agreement on the definition of a crime of aggression. It took an additional 12 years to meet at the Review Conference in Kampala and decide on the

19 UNGA Res. 44/39, 1989.
20 International Law Commission, 1994, p. 18.
21 UNGA Res. 49/53, 1994.
22 UNGA Res. 50/22, 1995.
23 UNGA Res. 51/207, 1996.
24 UN Doc. A/CONF.183/9.
25 Pursuant to art. 21:3 of the RS, its provisions are to be interpreted considering generally accepted standards of protection of individual rights.
26 As of June 2025, after Ukraine's accession from January 2025, 125 countries of the world are parties to the Rome Statute.

elements of this controversial crime.[27] In addition, States decided to establishing a special mechanism activating and triggering jurisdiction, which is different from the case of other crimes provided for in the RS.[28]

By creating the ICC, the legal basis for its functioning also came into existence. The Rome Statute, in only 128 articles, defines the elements of crimes under the jurisdiction of the ICC, the principles of criminal responsibility, the provisions defining the organisation of the ICC, the procedural regulations and the principles of cooperation between States and the ICC. It was formulated with admirable restraint. This applies in particular to the procedural part, which contains only the most general regulations, leaving the details to the Rules of Procedure and Evidence (hereinafter referred to as Rules)[29] and the Regulations of the Court (hereinafter referred to as Regulations),[30] as well as to practice, which was expected to develop a model of proceedings that is the combination of elements rooted in different legal cultures, common law and civil law. Also, the substantive provisions of the RS were specified in the so-called Elements of the Crime.[31]

The Elements of Crimes and the Rules were adopted by the Assembly of States Parties to the RS (hereinafter referred to as ASP) (Articles 9:1 and 51:1 of the RS respectively), with the possibility for ICC judges acting by an absolute majority to initiate amendments to these legal acts through appropriate requests to the ASP (Articles. 9:2 (b) and 51:2 (b) of the RS accordingly). Requests for amendment may also be submitted by the Prosecutor and by any of the States Parties (Articles 9:2 (a) (c) and 51:2 (a) (c) of the RS respectively). Judges are also empowered to enact provisional rules in urgent cases where the Rules do not provide for a specific situation before the Court (Article 51:3 of the RS). The adoption of the Regulations was left to the judges themselves, who also retained the power to modify them, adapting them to the challenges of practice (Article 52 of the RS).[32]

Notwithstanding the above, the system of sources of law is complemented by the so-called Chambers Practice Manual.[33] It is a constantly updated by the judges' non-binding set of directives and guidelines, agreed to further enhance consistency and efficiency of proceedings.

The above system of sources of law has been supplemented by the provision, which defines their hierarchy and the rules for applying.[34] According to Article 21:1 of the RS the Court shall apply in the first place, the Statute, Elements of Crimes and Rules of Procedure and Evidence. However, considering the generality of the above-mentioned

27 On this point, see below para. 7.
28 On this point, see below para. 6.
29 ICC ASP, 2002, Part II.A.
30 ICC, 2016.
31 ICC ASP, 2002, Part II.B; cf. Dörmann, 2003.
32 For details see: Kreß, 2007, pp. 537 et seq.
33 ICC Chambers Practice Manual, 2024.
34 The hierarchy of applicable provisions provided for in article 21 of the RS differs somewhat from that which follows from article 38 of the ICJ Statute; Rome Statute, art. 21; cf. ICJ Statute, art. 38.

sources, the authors of the Statute provided for the application of supplementary applicable treaties and principles and rules of international law, including the established principles of the international law of armed conflicts. If judges are not able to work out the desired solution on this path either, they are allowed to reach for general principles derived from national laws of legal systems of the world, including, when appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and with international law and international recognised norms and standards (Article 21:1 (c) of the RS).

As far as the directives of the Court's application of the law are concerned, it is necessary to point to Article 21:3 of the RS, which requires that generally accepted standards of human rights protection must be taken into account in the process of interpretation, and prohibits making any distinctions founded on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social wealth, birth or other status. Guided by these directives, the Court very often refers in its jurisprudence to the achievements of international human rights courts, in particular the European and Inter-American ones.

Article 21 of the RS allows judges a high degree of flexibility in shaping their practice, which is widely used by judges.[35] Over the period of more than 20 years of its operation, the ICC has thus managed to build a specific model of proceedings that is *a sui generis* hybrid combining elements of the world's largest legal cultures. Contrary to expectations, it has been functioning well, because in searching for a compromise, judges try to choose the most functional solutions, always ensuring that they do not contradict the principles of the Rome Statute and the generally accepted standards of human rights protection. Of course the legal background of judges is not without significance for the positions presented and often leads to sharp disputes. The most important thing however, is that they are always resolved in a constructive way.

An interesting issue here is the way in which judges treat their own previous case-law. Article 21:2 RS is not firm on this point, suggesting that the Court may apply principles and rules of laws as interpreted in its previous decisions. They are therefore not binding. However, judges generally follow their previous jurisprudence, and a change in the line of jurisprudence generally requires a written justification for it.[36]

3. Jurisdiction of the ICC

The creation of the ICC itself was an extremely momentous event. The expected success of the new institution was linked to the scope of the jurisdiction entrusted to

35 The level of flexibility in the application of the law by judges was the subject of controversy at the Rome Intergovernmental Conference, and Article 21 is an expression of the compromise reached there. See: de Guzman in Ambos, 2022, pp. 1130–1133.
36 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, AC, 2015, para. 14.

it and the mechanism that triggers this jurisdiction. The settlement of both issues was possible thanks to a delicate compromise based on the principle of non-interference worked out in Rome.[37]

There are four different dimensions of jurisdiction:

1. Jurisdiction materiae
2. Jurisdiction loci
3. Jurisdiction personae
4. Jurisdiction temporis

The first dimension of jurisdiction is simply related to the types of crimes in cases for which the ICC has jurisdiction. This issue will be discussed in point 7. The other 3 points will be discussed below. It is worth noting that the criteria for all 4 "types" of jurisdiction do not have to be met cumulatively. Territorial and personal jurisdiction are required alternatively.[38]

Territorial jurisdiction. In accordance with art. 12:2 (a) of the RS the Court has jurisdiction if the conduct in question occurred on the territory of the State Party to the RS or if the crime was committed on board of a vessel or aircraft registered in the State Parties. This simple rule is based on the assumption, also known to most national legal systems, that the deck of a ship or aircraft is an extension of the territory of the state (the flag principle).[39]

The interpretation of the issue of territorial jurisdiction has raised several problems in the Court's practice, particularly in connection with doubts as to whether the State in which the alleged crime was to be committed is a State within the meaning of international law.[40] It should be noted that the Rome Statute can only be signed or ratified by States and not by other organisations, even if they are quasi-state in nature (Article 125:1-2 of the Rome Statute). In my view therefore, the opening of the field of jurisdiction is determined by whether the instruments of ratification have been adopted by the depositary, the Secretary-General of the United Nations, in accordance with Article 123:3 of the Rome Statute. Despite this, the jurisdiction of the Court in relation to the alleged crimes committed on the territory of Palestine was in practice questioned.[41]

Another problem may be the way in which the term "territory" is interpreted within the meaning of Article 12:2 of the RS. In particular, the status of occupied territories raises doubts, both in a situation where a State Party occupies the territory (or part thereof) of a Non-States Party, and in a situation where the territory of a State Party is occupied by a State that is not a party to the Rome Statute.[42]

37 Ambos, 2016, pp. 206–209.
38 ICC, Bemba Gombo, PTC III, 2008, para. 12.
39 PCIJ, *Lotus* (France v. Turkey), 1927, paras. 24 et seq.
40 Montevideo Convention, 1933, p. 19.
41 McBrian, 2023; cf. Dugard, 2013, pp. 563 et seq.
42 Vagias, 2011, p. 178; Tsilonis, 2024, pp. 45 et seq.

When interpreting the term "place where the crime was committed", the Court consistently takes the view that the place is not only where the alleged perpetrator acted, but also where the effect of their action occurred or was to take place (cross boundary conduct). This position was decisive in recognising the Court's jurisdiction with respect to the situation of Myanmar and Bangladesh. The criminal activity took place in a country that is not a party to the Statute (Myanmar). This action was continued in the territory of the State Party (Bangladesh), which determined that the jurisdiction could be exercised.[43] The latest Lithuanian referral on alleged crimes committed in Belarus (a non-State Party) is based on the same logic, i.e. the claim that crimes started in Belarus were continued in Lithuania.[44]

The extension of jurisdiction to the deck of a seagoing vessel was the reason for the recognition of jurisdiction in the Comoros situation, where the alleged crimes were committed on board a ship flying the flag of the Comoros, although it was outside the territory of any State Party.[45]

In addition, it should be added that the jurisdiction of the Court also extends to alleged crimes committed in the territory of a State which, despite not ratifying the Rome Statute, has nevertheless made declarations of recognition of the jurisdiction of the Court according to Article 12 (3) of the Rome Statute. This legal construction allowed the ICC Prosecutor to initiate an investigation in the situation of Ukraine, which exercised the possibility provided for in this provision.[46] The declaration provided for in Article 12:3 of the RS may not be used opportunistically, e.g. to limit jurisdiction to only certain parties to a conflict.[47]

Personal jurisdiction. Article 12:2 (b) of the Rome Statute provides that the Court shall have jurisdiction over alleged crimes committed by nationals of a State Party to the Statute. This provision opens the field of jurisdiction in a situation where the alleged crime is committed outside the territory of the State Party. Thus, for example, the investigation of the situation of Palestine covers not only alleged crimes committed on the territory of Palestine, which has ratified the Statute, but also crimes committed on the territory of the State of Israel, which is not a party to the Statute, if suspicion falls on citizens of Palestine or another State Party to the Rome Statute.[48]

Territorial and personal jurisdictions open the way for the prosecution of international crimes independently of each other. The jurisdiction of the Court thus extends to crimes committed in a specific territory, regardless of who may be the perpetrator.

43 ICC, Bangladesh/Myanmar, PTC III, 2019, paras. 42–62.
44 ICC, Prosecutor's Statement, 2024.
45 ICC, Comoros, AC, 2019.
46 ICC, Uganda, 2002. The declaration provided for in art. 12:3 of the RS may also be used by the State-Party to extend the temporal scope of jurisdiction, as was the case in the situation of Uganda, in respect of which RS entered into force on 1 September 2002, but the jurisdiction of the ICC was recognised in respect of events occurring from 1 July 2002.
47 ICC, Gbagbo, PTC I, 2012, para. 59.
48 ICC, Palestine, PTC I, 2021, para. 85; The issue was also considered in connection of committing crimes under the jurisdiction of the ICC committed by British citizens in Iraq (Non-State Party). See: Schabas and Pecorella, 2022, pp. 824–825.

The nationality of the perpetrator is completely irrelevant here. On the other hand, alleged crimes committed by nationals of States Parties shall undergo the jurisdiction of the Court, regardless of whether they occurred within the area covered by territorial jurisdiction. Therefore, arguments are sometimes raised that negate the admissibility of prosecuting crimes committed by citizens of a State which is not a Party, although they may have taken place on the territory of a State Party, which are absurd.[49]

When discussing the issue of personal jurisdiction, it is impossible not to mention the solution adopted in Article 26 of the RS, according to which the Court shall have no jurisdiction over any person who was under the age 18 at the time of the alleged commission of a crime.[50]

Temporal jurisdiction. The issue of temporal jurisdiction is addressed primarily in Article 11 of the Rome Statute. This provision determines that crimes committed after the entry into force of the Statute (1), i.e. after 30th June 2002, fall within the scope of jurisdiction. Of course, if the State has ratified the Rome Statute with effect at a later date, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State (2). Nevertheless, there is nothing to prevent the State, by ratifying the Statute, from declaring an extension of jurisdiction, backdated to an earlier period, in accordance with Article 12:3 of the RS.

An interesting question of interpretation may be the very concept of "time of committing the crime". It is generally accepted that in the case of crimes stretched over time, the entire relevant period is subject to criminal law assessment. However, the case is complicated by the specific construction of an international crime, which is most often composed of a number of causative (underlying) acts, the number of which determines the exhaustion of the (contextual) elements of a crime. This is due to the use of such elements as "widespread" or "systematic" in the crime description (Article 7:1 of the RS). The question then arises as to whether underlying acts that took place before the date of commencement of the jurisdiction can be considered in the overall assessment of the perpetrator's conduct, for example in the assessment of the contextual elements of the crime. This issue has not yet been developed in the Court's jurisprudence.

The jurisdiction of the Court is not limited in time "on the other hand". This is due to the lack of a statute of limitations for international crimes. This rule, already established in international law,[51] was finally confirmed in Article 29 of the RS with respect to all crimes under the jurisdiction of the Court.

The last issue that needs to be discussed in the context of temporal jurisdiction is related to the consequences of a State Party's withdrawal from the Rome Statute. Is it permissible to continue the proceedings in such a situation? This issue has arisen in ICC case law in the context of the situations in Philippines and Burundi. Both of

49 See: i.e. Scheffer, 2003; cf. ICC, Afghanistan, AC, 2020, paras. 55 et seq.
50 Triffterer and Clark, 2022, pp. 1247 et seq.
51 UNGA Res. 2391 (XXIII), 1968.

these States withdrew from the Rome Statute system in response to the actions taken by the Prosecutor. According to Article 127 (1) of the RS, withdrawal takes effect one year after the UN Secretary General has accepted the notification of withdrawal. However, the interpretation of Article 127(2) of the RS concerning the possibility of continuing proceedings after withdrawal raises difficulties. Namely the case law is unclear, since it can be argued that the ICC may continue the proceedings if the formal investigation has been formally initiated[52] or at least the preliminary examination had commenced before the expiry of the one-year grace period.[53]

4. The Principle of Complementarity

The fact that the ICC has jurisdiction over a particular situation does not mean that it can be effectively exercised. This is related to the issue of the admissibility of proceedings (admissibility of the exercise of jurisdiction), the most important aspect of this admissibility being the issue of complementarity.[54] Unlike the ICTY and ICTR, the ICC does not have the primacy of jurisdiction over national courts. This principle is a novelty in international criminal law. In the Agreement on the Prosecution and Punishment of the Principal War Criminals of the European Axis, signed in London on 8th August 1945.[55] The question is left virtually open, limited to the provision that nothing in this Agreement shall prejudice the jurisdiction or authority of any court of national or occupation which already exists or may be established in any Allied territory or in Germany for the purpose of trying war criminals (Article VI).[56] Explicit and essentially analogous provisions on this issue can be found in Article 9(2) of the Statute of ICTY and Article 8(2) of the ICTR Statute. They adopt the principle that the International Court is superior to national courts. At any stage of the proceedings, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal, in accordance with this Statute and the Rules of Procedure and Evidence of the International Tribunal.[57]

In the Rome Statute, the exact opposite principle has been adopted. It is enshrined in Article 1 of the RS, according to which the Court is complementary to national criminal justice systems. We also read this in the Preamula, and in the provisions of the Statute regarding the admissibility of the case.[58]

52 ICC, Burundi, PTC II, 2017, para. 26.
53 ICC, Situation in Ukraine, PTC II, 2021, para. 111.
54 Another important aspect of the admissibility of proceedings is the issue of gravity of crimes. According to the assumption, the incriminated events must reach a certain minimum level of gravity in order for the proceedings to be considered acceptable. See in this regard Lattanzi in Bellelli, 2010, pp. 196–197.
55 Journal of Laws, 1947, No. 63, item 367.
56 IMT Charter, 1945.
57 Cassese, 2008, pp. 339–342.
58 Seils, 2016, p. 29; Triffterer and Bohlander, 2022, pp. 22–23; cf. Stahn and El Zeidy, 2011.

A correct reading of the Preamble makes it possible to reconstruct without difficulty the purpose of the States that agreed in Rome to open the Statute of the ICC for signature. It was assumed that the primary issue is the obligation of the States Parties to the Statute to exercise their national jurisdiction (as the Preamble reminds), and the Court is to act as a safety valve in a situation where the States are unable or unwilling to exercise their jurisdiction. This relationship means that the ICC is often referred to as the "Court of the last resort" and that the entire system of the Rome Statute aims to close the impunity gap.

This issue is clearly drawn in the context of Article 17:1 of the Statute, according to which the Court shall declare a case inadmissible if:

> '(a) the case is the subject of criminal proceedings in the State under whose jurisdiction the case belongs, unless the State is unwilling or unable to actually conduct criminal proceedings;
> (b) the case was being investigated in a State under its jurisdiction and that State decided not to prosecute the suspect, unless such a decision was caused by the unwillingness or inability of that State to prosecute.'[59]

The capacity to conduct proceedings is broadly interpreted in the case law. The reasons for the state's passivity, which can be both factual and legal, are irrelevant. Sometimes the decisive factor is the condition of the national justice system, leading to the inability to collect evidence or apprehend a perpetrator, or sometimes a lack of appropriate legal regulations, which makes it impossible to prosecute at national level.[60] Article 17:2 of the RS specifies situations in which it should be considered that the state does not show the will to prosecute. Of course, the most classic situation is when the state with jurisdiction does not show any activity,[61] but it is also possible that the proceedings are delayed without a justified reason (Article 17:2 (b) of the SR), or that the proceedings are conducted unfairly, in a manner that is incompatible with generally accepted standards (Article 17:2 (c) of the RS). An important factor allowing for the assumption that the state remains passive is the desire to provide protection to the prosecuted person by protecting him or her from liability for crimes codified in the Statute (Article 17:2 (a) of the RS). For example, in the case of *Prosecutor v. Saif Al-Islam Gaddafi*, a Libyan court sentenced a person wanted by the ICC for crimes covered by The Hague arrest warrant to death (in the *in absentia* process), after which the Libyan authorities pardoned the convict person, freeing him from punishment.

59 This solution is complemented by a clearly formulated prohibition on the ICC from conducting proceedings in a situation where a person has already been detained on the basis of the act subject to the indictment; Rome Statute, art. 17:1 (c).
60 See: Rome Statute, art. 17:3. Regarding the implementation of the provisions of the Statute into national legal systems, see below.
61 Lack of activity is a criterion used most often in the case law when assessing the admissibility of proceedings in the context of Article 17:1 (a) of the RS; Schabas and El Zeidy in Ambos, 2022, pp. 961–965.

The Court held that this circumstance did not preclude the continuation of the proceedings, since the conviction and pardon had taken place solely to avoid proceedings before the ICC.[62]

The most controversial is the use of *the idem* test in this context. The Court's intervention is excluded when national proceedings concern the same case. It is controversial whether "the same case" is the same event in the ontological sense, or whether it is also an event subject to a specific legal assessment. This issue appears complicated if we take into account the nature of international crimes within the ICC's jurisdiction. These crimes are of a legally complex nature and consist of a number of individual perpetrator acts, each of which may constitute a crime under national law, but only when linked in a chain by means of contextual elements do these acts become an international crime. For example, we can talk about acts (even numerous) that meet the characteristics of murder in national law, which are not yet or necessarily crimes against humanity. They become so only when they are committed through the implementation of a specific strategy of the state or some organisation and are part of a widespread or systematic attack against the civilian population (Article 7:1 (a) in conjunction with Article 7:2 (a) of the RS). Similarly, causing serious bodily injury or disorder of health is usually a crime under national law, but if it concerns members of one group and is committed *en masse* with the aim of destroying all or part of that group, it may qualify as genocide (Article 6 (b) of the RS). Therefore, the question arises as to whether in a situation where the state conducts proceedings in cases concerning such (even numerous) individual acts of perpetrators, but in terms of the classification of murder or bodily harm, the road to proceedings before the Tribunal for crimes against humanity or genocide is closed?[63] This question should be answered in the negative. Rather, the Court consistently requires the prosecution of international crimes as such, which means that it does not limit itself to purely ontological criteria in determining the identity of the "case".[64]

Even more complicated is the issue of examining the identity of the "case" in the context of the structure of international crime. At first glance, it seems that the test of "the same act of the same person" makes sense only if the parameters of the act in question are established and its perpetrator is identified. In practice however, it does not work like this. Firstly in the case of international crimes which are complex in their very structure, there is not always an ontological identification of all the causative acts that make up the crime. Sometimes a crime is described with only examples of individual causative acts, and sometimes it is not possible to determine them at all

62 ICC, *Gaddafi*, AC, 2019, paras. 47 et seq.
63 This issue, but in terms of the scope of application of the *ne bis in idem* principle I have analysed together with Zabłocki, 2022, pp. 205–227.
64 ICC, Philippines, AC, 2023, paras. 211 et seq.

(e.g. in the case of discovering mass graves with bodies in a state of decomposition, making any identification impossible).[65]

It should also be noted that the provisions of the Statute open the way to questioning the admissibility of a case at a relatively early stage of the proceedings. In light of Article 18 of the RS, a preliminary ruling on the admissibility of the case may be issued at a very early stage. This is the case when the Prosecutor of the ICC considers that there is a basis for initiating an investigation or that the investigation is initiated, and the State with the "original" jurisdiction demands that proceedings be waived. However, the Prosecutor, instead of complying with the request, may ask the Pre-Trial Chamber of the ICC to authorise him or her to conduct the proceedings despite the state's objections. Of course, when considering the issue of admissibility of a case, judges refer to the criteria of admissibility of a case, as set out in Article 17 of the SR, as mentioned above. The examination of the "identity" of the case in the context of the admissibility of the proceedings takes place immediately after the initiation of the proceedings by the Prosecutor of the ICC, or even before their formal initiation, i.e. in the phase in which the potential perpetrators have not been identified at all, nor any individual acts of perpetrators on which the prosecution will be based in the future. Examination of the "identity of the case", even if the State in its request indicates specific pending proceedings before national authorities, becomes practically impossible in the absence of a relevant level of comparison.[66]

All these difficulties have led to the development of a practice whereby the Court leaves a case to the national judicial authorities only when there is no doubt that the prosecution by the ICC Prosecutor, or even merely the intention to prosecute, covers the same causative acts of the same person and that they qualify as international crimes and not as classic crimes under national law. In all other cases, the proceedings before the Court (the Prosecutor of the ICC) are continued, which does not preclude an objection to the admissibility of the case at a later stage, when the parameters of the competing proceedings have been clarified (Article 18 of the RS).

It is clear from the foregoing that in order to avoid the intervention of the Court, the States Parties should transform the crimes of the Rome Statute into their national legal orders. From a formal point of view, such a transformation is not a prerequisite for ratification of the Statute, nor does its ratification create an international legal obligation for implementation. However it is clear that if not properly implemented, the principle of complementarity in the context of crimes under national jurisdiction will simply not work. Implementation does not have to mean a literal repetition of the provisions of Articles 6-8 *bis* of the RS in national codes. However, it must be faithful to the spirit of the Statute and create a guarantee that the prosecution of the crime by national authorities will lead to the full representation of the criminal lawlessness

65 An extremely rigorous position on this issue was taken by the ICC, Bemba, AC, 2018, paras. 104, 110–111; cf. ICC, Bemba, AC, dissenting opinion of Judges Monageng and Hofmański, 2018, paras. 19–44; ICC, Ongwen, AC, 2022, paras. 281–311.
66 ICC, Venezuela, AC, 2024, paras. 93 et seq., 218 et seq., esp. paras. 243 et seq.

of the incriminated events. Of course, the extent of the necessary implementation depends on whether a given country has adopted a monistic or dualistic concept. In the first case, there is no absolute need for transformation, although in many monistic countries the transformation has been carried out.[67] It is almost certain that the lack of implementation, or incorrect implementation, may lead to the conclusion that the national authorities, for legal reasons, are not capable of actually conducting criminal proceedings within the meaning of Article 17(1)(a) of the RS.

Despite what has been stated above, there is absolutely no tendency for the Court to cover the proceedings as far as possible and exclude national jurisdiction. On the contrary, the Court has very limited possibilities to act in the face of the scale of atrocities committed every day around the world. To close the gap of impunity, as promised by the Preamble to the Statute, the Court's organs:

1. Take active steps to persuade the States Parties to implement the substantive provisions of the Statute into their national legal systems as faithfully as possible,
2. Exert pressure on States Parties to conduct proceedings before national authorities to the fullest extent possible, if they have national jurisdiction,
3. Initiate proceedings before the Court when there is no prospect of the perpetrators of international crimes being tried by national courts.

This *modus operandi* of the ICC runs in full harmony with the essence of the principle of complementarity. It is worth making the naysayers, who try to measure the effectiveness of the Tribunal by the number of pending court proceedings aware that the activation of the complementarity mechanism consumes most of the activity of the Tribunal, in particular its President and Prosecutor, who having the opportunity to meet at the highest level with the authorities of the States Parties to the Statute, spare no effort in bringing about the closure of the areas of impunity as much as possible. In this way, the so-called positive complementarity is implemented, which not only requires the exertion of pressure on national authorities, but even allows for the negotiation of the issue of covering certain areas of criminal activity by national law enforcement and judicial authorities in order to avoid the Court's intervention.[68]

67 In fact, there is a strong tendency in monistic states to verbatim repeat the relevant substantive provisions in national legislation in order to be sure that an obligation under international law has been fulfilled; Fostering European approach to accountability for genocide, crimes against humanity, war crimes and torture; Redress, 2007, pp. 7–8.

68 Stahn and El Zeidy, 2011; Akhavan, 2016, pp. 1043 et seq. The most spectacular example of positive complementarity is the negotiations with the Colombian authorities, which led to the fact that the ICC's intervention turned out to be unnecessary.

5. Universal Jurisdiction

Considerations on the principle of complementarity would be incomplete if we did not answer the question of how the impunity gap is filled. We already know that the Court intervenes when the State which has "original" jurisdiction does not exercise it. However, the question arises as to whether the ICC's jurisdiction is also excluded when proceedings are conducted in a state based on universal jurisdiction, which is an emanation of the principle of universal repression.

Universal jurisdiction applies only to international crimes. Whether it is in accordance with international law as such has always been a source of controversy.[69] I agree with the thesis that at present universal jurisdiction can find its source not only in the provisions of treaties,[70] but has become a customary norm of international law (*jus cogens*).[71] The fact is however, that in more than half of the countries of the world universal jurisdiction is envisaged, referring to international crimes provided for in the Rome Statute.

In the above context, two issues arise directly relating to the functioning of the complementarity mechanism provided for in the Rome Statute. Indeed, the frontal question arises as to whether the universal jurisdiction exercised by the State precedes that of the Court. This issue has never been considered in the case law so far, but in view of the increasing use of universal jurisdiction by states (especially in the context of the situation in Ukraine[72]), it may soon become very topical. I am inclined to answer this question in the affirmative. There are at least two arguments to back this up.

Firstly, the wording of Article 17:1 (a) of the SR does not preclude such an interpretation. Proceedings before the Court are inadmissible when the case is the subject of proceedings in the State to which it belongs, and it is not specified here that it is territorial, personal or any other jurisdiction. So why not a universal one?

Secondly, the philosophy of the Rome Statute assumes that the Court is to act as the Court of the last resort, closing the gap of impunity. Everything possible must

69 Fletcher, 2003, pp. 580–584; Eser, 2004, pp. 955–978.
70 See, for example, in the Geneva Conventions for the Protection of War Victims of 1949, which used the formula *aut dedere aut judicare*; Hague Convention on Unlawful Seizure of Aircraft, 1970, art. 4:1–2; Hostage-Taking Convention, 1979, art. 8; Convention against Torture, 1984, art. 5. Sometimes, to exercise universal jurisdiction, it is necessary to demonstrate some connection between the state and the case (e.g. the alleged perpetrator is present in the state), in other cases such a condition is not formulated.
71 Jeżewski, 2003, pp. 164–165.
72 To the author's knowledge, investigations are currently underway in cases of alleged crimes committed in Ukraine, among others, before the authorities of Poland, Sweden, Lithuania, Germany, Slovakia, Canada.

therefore be done to ensure that justice is served, and the Court should intervene only when all other paths fail.[73]

Finally, there is the question of the possibility of exercising universal jurisdiction by the Court itself. Here everything seems to be clear. The issue of endowing the Court with universal jurisdiction was discussed during the Intergovernmental Conference in Rome and this concept was ultimately rejected.[74] As always, politics and the interests of states were decisive. It was considered that endowing the ICC with universal jurisdiction would constitute an excessively far-reaching interference in the sphere of state sovereignty. To avoid this, a compromise was agreed, consisting in granting the UN Security Council the right to present the case to the Court in a situation where it also concerns crimes allegedly committed on the territory of a State that is not a party to the Statute. It is also an interference with sovereignty, but with the consent of the great ones who use the right of *veto* in the Security Council. The necessary political will was not found in 1998, and there is little indication that it is possible now. However, this does not mean that such a reform of the system cannot be postulated.

There are significant reasons behind such a postulate. If the international community is serious about closing the gap of impunity, it should at all costs erase the blank spots on the map of the world – areas where atrocities are likely to occur on a daily basis and where the exercise of any criminal jurisdiction is out of the question. The Security Council is paralysed by particular interests in conflict-ridden areas. Thus, the great powers are unable to communicate, and the societies of North Korea, Yemen and Syria suffer because there is no one to take responsibility for the crimes committed there. It is also impossible not to notice that even if it has become common practice to activate the universal jurisdiction provided for in many national legislations, it would not be entirely possible to close the gap of impunity, because it is impossible to bring heads of state, chiefs of governments and foreign ministers of states to criminal liability before the national courts of other states due to the functional immunity of international law[75] in protecting them. However, while such immunity is granted in the context of proceedings before courts of foreign states, it does not apply in the context of proceedings before an international tribunal.[76]

Of course, we must be aware that endowing the ICC with universal jurisdiction would entail abandoning the limitations that are currently defined by the framework

73 Nothing seems to prevent the priority of jurisdiction to a regional (international or internationalized) criminal court over the jurisdiction of the ICC. This understanding of the complementarity mechanism was probably behind the closure of the investigation in the situation of the Central African Republic, after the establishment of the Special Criminal Court (with an international element) there. Interestingly, the statute of the Special Criminal Court provides for the ICC to take precedence over its own, but this lack of compatibility is not a practical problem when the ICC is not further active in this region of the world.

74 Bekou and Cryer, 2007, pp. 49–68; Wilmshurst, 1999, p. 127.

75 Triffterer and Bohlander, 2022, pp. 1257–1279; Kreß, 2022, pp. 2585–2671.

76 This has been recognised as a *jus cogens* norm in the ICC jurisprudence. See: ICC, Jordan Referral (Al-Bashir), AC, 2019.

of territorial and personal jurisdiction. Consequently, the ratification of the Statute by the State would cease to be a condition for the exercise of jurisdiction by the Court in respect of alleged crimes committed on its territory and by its nationals.

6. Triggering Mechanism

The mechanism for triggering ICC jurisdiction is the result of the Rome compromise. The most controversial issue in this area was related to the scope of decision-making power that should be vested in the ICC Prosecutor. The most misguided solution is certainly to grant the UN Security Council the competence to activate the jurisdiction of the ICC by means of a special resolution.[77]

Before moving on to discuss the modes of activation of ICC jurisdiction, an answer should be attempted for the questions about the sources of information on the basis of which decisions provided for in the RS are made. The sources of information can vary greatly, from official information from countries, through to the reports of international organisations, to information provided by private individuals. All information provided is analysed in terms of its usefulness. The basis for the Prosecutor's decision to formally initiate the investigation is given by his or her conviction that the information collected provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (Article 53:1 (a) of the RS).

There are three ways to initiate the investigation.

a) A State Party or a State recognising ICC jurisdiction under Article 12:3 RS refers a suspected crime,
b) the UN Security Council presents a situation indicating that a crime has been committed,
c) the ICC Prosecutor him or herself, acting *ex officio,* initiates an investigation (the so-called *proprio motu* procedure).

State referral. Any State Party may refer a situation to the Prosecutor in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with commission of such crimes (Article 14:1 of the RS). As far as possible, the referral should specify the relevant circumstances and be supported by documents that are available to the referring State (Article 14:2 of the RS).

Referrals of states constitute a kind of "self-denunciation" – states themselves "reported" as a place of crime, indicating potential perpetrators. However, each time there have been specific political reasons behind this decision. Such a referral

77 See: Lee, 1999, pp. 143 et seq.; Akande, 2012, pp. 299 et seq.

is *de facto* a cede of State's jurisdiction to the ICC, despite the applicable principle of complementarity and the obligation of the State to prosecute international crimes.[78]

It should be noted that the referral made by the State Party does not have to relate to events that took place on its territory. The Statute does not provide for such limitations, so it is also possible to refer a situation concerning alleged crimes committed on the Territory of another State-Party (or its citizens).

The first investigations after the ICC began the operation were initiated by the Prosecutor following referrals from the authorities of Uganda (January 2004), the Democratic Republic of the Congo (April 2004) and the Central African Republic (December 2004). In the following years, referrals were submitted by the authorities of Mali (July 2012), again of the Central African Republic – CAR II (May 2014). Subsequently, referrals were made by the authorities in Argentina, Columbia, Chile, Paraguay and Peru in relation to alleged crimes committed in Venezuela after 12th July 2014, which resulted in the opening of an investigation on 3rd November 2021 (Venezuela I), as well as by a group of 43 countries in relation to crimes committed in Ukraine after 21st November 2013, which resulted in the initiation of an investigation by the Prosecutor on 2nd March 2022.

Further notifications came from the authorities of Venezuela – Venezuela II (13th February 2020), the Democratic Republic of Congo – DRC II (23.5.2023) and Lithuania (30th September 2024). In these cases, the Prosecutor has not yet decided whether the investigation will be initiated.

The mere fact of reporting the suspicion of a committed crime does not automatically trigger the initiation of an investigation. However, the ICC Prosecutor is obliged to carry out the preliminary examination in order to determine whether there would be a reasonable basis to commence an investigation (Article 18 (1) of the RS).[79]

UNSC referral. The Security Council may refer a situation to the ICC in which one or more crimes occurred within the jurisdiction of the Court whenever the situation poses a threat to peace and security. This action is based on the content of Article 39 of the UN Charter, which states that in a situation where 'the Security Council determines the existence of a threat or violation of peace, or an act of aggression, makes recommendations or decides what measures should be taken (...) to maintain or restore international peace and security'.

The mere reporting of a suspicion of committing a crime to the Tribunal is not tantamount to initiating the investigation. According to the interpretation adopted

78 Chaitidou, 2022, pp. 868–869; See: ICC, Lubanga, PTC I, 2006.
79 It is not known why the term used in art. 18:1 (a) of the RS ('a reasonable basis to commence an investigation') is different from that used in art. 53:1 (a) of the RS ('a reasonable basis to believe that crime within the jurisdiction of the Court has been or is being committed'). After all, both provisions are about initiating an investigation. See a different position in ICC jurisprudence: for example Pre-Trial II's Decision Pursuant Article 15 of the Rome Statute on the Authorisation of Investigation into the Situation in ICC, Kenya, PTC II, 2010, para. 27. Of course, a different standard is required in the case of a decision to issue an arrest warrant or summon to appear: 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'; Rome Statute, art. 58:1 (a) and :7.

by the Court, it is the Prosecutor who decides whether to initiate the investigation.[80] He or she must assess whether the conditions under Article 53 of the RS are met, deciding whether there is a reasonable basis for conducting an investigation, i.e. whether the available information provides sufficient grounds to believe that crimes falling within the jurisdiction of the ICC have been committed or are being committed. In addition, the Prosecutor must assess whether the resulting case or cases would be admissible and moreover, whether the conduct of the proceedings is "in the interests of justice", which is assessed considering the gravity of the offences and the "interests of the victims".

Generally, whenever the UNSC or a State (-s) has referred a situation to the Court, the Prosecutor decided to initiate an investigation. This is what happened in both the Libya and Sudan situations. However, the Prosecutor refused to initiate an investigation in the situation of the *Comorian ships, Greece and Cambodia,* due to the inadmissibility of the potential case(s) in the context of the gravity of the crimes committed.[81] Also, Gabon's referral submitted in 2016 did not lead to the initiation of an investigation due to the finding that the offences referred to did not fall under the jurisdiction of the Court.[82]

It is important to distinguish between two concepts: "situation" and "case". The States and the UN Security Council refer the "situation". The Statute does not define the term "situation". It is understood in general geographical, temporal boundaries: there is a suspicion that crimes of international law have been committed in a given territory at a given time. There is no need to point to specific perpetrators or groups of perpetrators, as well as to specific crimes. However, sometimes potential perpetrators are also indicated in the referral.[83] On the basis of the referral, the ICC Prosecutor should determine individual "cases" in the course of further proceedings. Thus, while the "situation" referred to in Article 13 of the SR, justifying the initiation of proceedings before the Court, covers a whole range of conduct, limited to time, place and possible perpetrators, the "case" refers to a specific event constituting one of the crimes within the jurisdiction of the Court (or several crimes related to each other). Thus, even if it is the States or the UNSC that entrust the Prosecutor with investigating a specific conflict situation, the Prosecutor has the competence to select certain suspects and investigate in relation to specific parts of that situation.

80 Although art. 18 of the RS (1), which requires the Prosecutor to verify whether there is a reasonable basis to commence an investigation, refers directly only to the situations specified in art. 13 (a) and (c) of the RS, and thus does not cover the UNSC referral, the Prosecutor is not obliged to initiate an investigation in cases initiated by the UNSC if he or she considers that there is no reasonable basis to proceed; Nsereko and Ventura, 2022, p. 106. Admissibility test referral of the UNSC (see: Pre-Trial Chamber I's Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to Article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council; ICC, Libya (Al-Senussi), PTC I, 2013, para. 20.

81 Chaitidou, 2022, pp. 863–865; Journal of Laws, 1947, No. 63, item 367.

82 ICC, Gabon, PTC I, 2019.

83 Froville in Fernandez, Pacreau, Ubéda-Saillard, 2019, pp. 808 et seq.

Within one reported situation, the Prosecutor may distinguish many proceedings (cases). On the other hand, any limitation indicated in the referral, e.g. with respect to certain persons or specific types of crimes, is not binding on the Prosecutor.[84]

Proprio motu procedure. The ICC Prosecutor may initiate proceedings *ex officio* on the basis of any information available to him or her about crimes falling within the jurisdiction of the Court. Information about crimes of international law can come from any source or person. It is the Prosecutor him or herself who decides whether a given source of information is reliable and what he or she will do with the information. Therefore, the Prosecutor has a lot of freedom to decide who will stand before the Court and for committing what crime. However, his or her decision to initiate proceedings must always be approved by the Pre-Trial Chamber (Article 15:3 of the RS).

Granting the Prosecutor such broad powers was opposed by many countries.[85] It should be remembered that he or she can take up a case concerning the territory *of de facto* most countries and any crime that he or she deems to be within the jurisdiction of the ICC. In particular, the United States opposed the granting of this competence to the ICC Prosecutor, arguing that the freedom to initiate proceedings would prevent him or her from conducting his or her case impartially, engaging his or her attention on political issues and making difficult political decisions – they feared "frivolous" and even "malicious" charges brought publicly in the international arena against states and governments by the "erratic" ICC Prosecutor. The adoption of this solution undoubtedly contributed to the refusal of the United States to ratify the Statute. Both supporters and opponents of this competence agreed on one thing: it was to be of fundamental importance to the competence of the Court itself. It was supposed to be a test of its independence.[86]

Although the ICC has almost unlimited jurisdiction, it also has limited resources to exercise it. The number of perpetrators of crimes under international law is often impossible to estimate precisely. Certainly, the ICC's resources (since there are only 18 judges) do not allow for the prosecution of all of them. Therefore, it is impossible to avoid the process of selecting situations, cases and defendants.

Different concepts of case selection can be adopted:

– prosecuting only the leaders and top officials responsible for committing crimes,
– "prosecution for example" – selecting "sample cases" from a given field of crime or from a given region where crimes are committed; persons whose conviction could lead to the identification of the guilty, the condemnation of certain actions or actions of a specific party to the conflict, and the assurance of a sense of justice among the victims, would be prosecuted.
– selecting perpetrators, if it turns out to be necessary in order to achieve a specific goal,

84 Chaitidou, 2022, p. 874.
85 See: Preparatory Committee, 1988.
86 See: Bergsmo and Zhu in Ambos, 2022, pp. 882–886.

– taking into account "the degree of agitation of the international community",
– considering threats to security and peace in a given country.

The bigger the freedom to choose suspects, the bigger the need for transparent and consistent rules for this selection. The Rome Statute does not offer the Prosecutor sufficiently clear guidance regarding which cases to deal with. Often, the Prosecutor is criticised for using an inconsistent selection policy. Therefore in order to eliminate accusations of the arbitrary selection of defendants, the Prosecutor's Office publishes "Strategic Plans, [87] and "Policies"[88] in which it presents its policy of selecting cases.

The judges of the Court have so far authorised investigations in relation to seven situations: Kenya,[89] Côte d'Ivoire,[90] Georgia,[91] Burundi,[92] Afghanistan,[93] Bangladesh/ Myanmar[94] and The Philippines.[95]

Special mechanism in respect of the crime of aggression. At the Review Conference in Kampala in 2010, not only was the definition of the crime of aggression agreed, but also a special (triggering) mechanism was established to trigger the prosecution of this crime. The resistance of states against the excessively far-reaching freedom to make accusations of crimes of aggression has led to a compromise that has proven to be absolutely non-functional in practice.[96] Although being in effect since July 17th 2018, the ASP decided to activate the Court's jurisdiction over crimes of aggression (after obtaining the amendments from Kampala 30 ratification- Article 15 *bis* :2 of the RS),[97] however to date, no case in this regard has appeared on the Court's agenda, and the Prosecutor has not initiated any investigation.[98]

Unlike cases of the other three crimes under the jurisdiction of the Court, with respect to crime of aggression, States that are not parties to the Rome Statute are excluded from the ICC's jurisdiction over the crime of aggression, either from the side of the attacked or the aggressors (Article 15 *bis* (5) of the RS), however in the case of a UNSC referral, this rule does not apply (Article 15 *ter* of the RS).

87 ICC Prosecutor, Strategic Plan, 2023–2025.
88 ICC Prosecutor, Policy on Gender Persecution, 2022; ICC Prosecutor, Policy on Gender-Based Crimes, 2023; ICC Prosecutor, Policy on Children, 2023.
89 ICC, Kenya, PTC II, 2010. The investigation was closed on 27th November 2023.
90 ICC, Côte d'Ivoire, PTC III, 2011.
91 ICC, Georgia, PTC I, 2016.
92 ICC, Burundi, PTC II, 2017.
93 ICC, Afghanistan, AC, 2020; With this ruling, the appeal judges reversed the earlier decision of PTC II of 12th April 2019, ICC-02/17-33, which denied authorisation for an investigation.
94 ICC, Bangladesh/Myanmar, PTC I, 2019.
95 ICC, Situation in Ukraine, PTC II, 2021.
96 See: Ambos, 2010, pp. 463 et seq.; Kreß and von Holtzendorff, 2010, passim. It should be noted that the provisions of the Kampala amendments were ratified by just over 40 states, i.e. 1/3 of the States Parties to the RS.
97 ICC ASP Res. 16/5, 2017.
98 It is therefore not surprising that attempts are currently being made to reform the Kampala mechanism, which would be similar to the one in force in relation to the other three crimes under the jurisdiction of the Court. See: Kreß, Hobe and Nussberger, 2022.

As far as a State Party referral or a *proprio motu* investigation (Article 15 *bis* of the RS) is concerned, the ICC will only be able to proceed with the investigation if the Kampala Amendments have entered into effect for the aggressor, but also for a state being a victim of an act of aggression (Article 15 *bis* :4 and :5 of the RS). Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall inform the UN Secretary-General of the situation.[99] Additionally, the UN Security Council has the authority to determine whether an act of aggression has been committed by the respecting State Party.[100] The deadline to make such a determination is six months. If the UN Security Council fails to determine the committing of an act of aggression, the Prosecutor may still proceed with an investigation with the authorisation of the Pre-Trial Chamber.

From a legal point of view, this is a strange construction, especially in view of the fact that one of the key elements of a crime subject to the jurisdiction of the Court is to be decided not by judges, but by a strictly political body. Of course, a decision of the UNSC stating that a given act was an act of aggression is not binding on judges, because they can still decide that aggression did not take place after all (Articles 15 *bis* :9 and 15 *ter* :4 of the RS). However, the UNSC's decision stating that the act of aggression did not take place is already binding and closes the way to the prosecution of the alleged perpetrators of crime of aggression.

The procedure in the case of a UN Security Council referral (Article 15 *ter*) is different from the procedure of the other two triggering mechanisms. If the UN Security Council refers a situation to the ICC, the Prosecutor will have the authority to investigate the crime of aggression committed in any State territory and by any State's national. In other words, at a UN Security Council referral, it is irrelevant whether the victim or the aggressor is a non-State Party, whether aggression has taken place on the territory of a non-State Party, or whether aggression has been committed by a national of a non-State Party.[101]

As mentioned, the mechanism that triggers jurisdiction in cases of aggression is non-functional. Its potential change faces many difficulties. The problem with all its sharpness emerged after the full-scale aggression of the Russian Federation against Ukraine. Although Ukraine has recognised the jurisdiction of the ICC by way of a prior declarations under Article 12 (3) of the Statute,[102] the jurisdiction of the Court with respect to the crime of aggression may not be exercised. Hence the discussion on the need to establish a special tribunal to investigate the crime of aggression against

99 It is assumed that the UN Secretary General will forward the information received to the UNSC, which has the power to take the decision referred to in art. 15 bis :6 of the RS.

100 There is a clear distinction between the concepts of "act of aggression", which is attributed to the state, and "crime of aggression", which can only be attributed to a natural person, according to art. 8 bis of the RS.

101 Zimmermann and Freiburg–Braun, 2022, pp. 929–932.

102 In the first declaration Ukraine has accepted ICC jurisdiction over alleged crimes committed on Ukrainian territory between November 21st 2013, and February 22nd 2014; in the second alleged crimes committed on Ukrainian territory from February 20th 2014, onwards.

Ukraine.[103] The initiative of the Council of Europe countries seems to be the most realistic in recent times.[104] Politically however, this step seems to be very problematic. The same countries that agreed to the compromise in Kampala are trying to circumvent it when there is aggression on a large scale, which hits their political interests.

The issue of the planned revision of the Rome Statute in the part concerning the mechanism activating jurisdictions in the field of the crime of aggression is different.[105] It is not known yet[106] how the planned change will turn out and whether there will be the political will to accept it. The direction of change is undoubtedly the right one, because there are no serious arguments against equalising the regimes of activating jurisdiction in cases of aggression and in cases of other international crimes. However, there is no doubt that the potential change will not have a retroactive effect, so the problem of aggression against Ukraine cannot be solved in this way.

7. Core Crimes Under the Rome Statute

The most serious violations of international criminal law are currently divided into four basic categories of crimes under international law:

1. Genocide
2. Crimes against humanity,
3. War crimes
4. The crime of aggression.

All these crimes are characterised by “systemic criminality”, i.e. “collective evil”. Collective evil means that such crimes are committed on an exceptional, mass scale, most often as part of the implementation of a systematic plan of acts of violence. They are also most often committed by a group of people organised to carry out a specific policy. It is the scale of crimes against international law committed and the implementation of this policy that makes them separate and different from common crimes and constitute crimes of international law.

Despite the efforts made by some countries, other treaty crimes, such as international terrorism or international drug trafficking, have not been included in the ICC’s jurisdiction.[107]

Genocide. The origins of the concept of “genocide” should be sought in the writings of Rafał (Raphael) Lemkin,[108] who defined the elements of this crime for the first time and, through his personal efforts, led to the adoption of the first convention

103 Kreß, Hobe and Nussberger, 2022.
104 Council of Europe, 2024.
105 ICC ASP, Special Session, 2025.
106 The special session of the Assembly of State Parties to the Rome Statute is planned for July 2025.
107 See: UN Diplomatic Conference on the Establishment of the ICC, 1998.
108 Lemkin, 1945, pp. 39 et seq.

introducing an obligation to criminalise this crime as a crime of international law (at first it was referred to as “acts of barbarism”). By “genocide” Lemkin meant the destruction of a nation or ethnic group. This new word, invented by the author, was made up of the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing). According to Lemkin, genocide does not necessarily mean the immediate destruction of a nation. Rather, it means a coordinated plan to destroy the foundations of national groups, in order to annihilate the groups themselves. The aim of such a plan would be the disintegration of political and social institutions, culture, language, national feelings, religion and economic existence of national groups, and the destruction of personal security, freedom, health, dignity and even the lives of people belonging to such groups.

Genocide was not included in the Nuremberg judgment as such, because the focus was then on the act of Nazi aggression and violations of the laws and customs of war.[109]

The UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9th December 1948 in Paris.[110] It entered into force on 12th January 1951 and at present there are 153 States Parties to the Convention.[111] Under the Convention, the parties to the Convention have reaffirmed that genocide, committed both in peace and in war, constitutes a crime under international law, and that they undertake to prevent and punish this crime.

Ad hoc tribunals had jurisdiction to prosecute this crime (Article 4 of the ICTY Statute and Article 2 of the ICTR Statute). Their jurisprudence undoubtedly influenced the final definition of the crime of genocide adopted in the Rome Statute.

Article 6 of the Rome Stature repeats verbatim the wording of Article II of the Genocide Convention of 1948. According to this Article, the crime of genocide means any of the following crimes committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as:

1. murder of group members
2. causing serious bodily injury or mental health disorder to the members of the group,
3. the deliberate creation of conditions of life for a group calculated to cause its total or partial physical degradation,
4. the use of measures that are aimed at preventing birth within the group,
5. forcibly transferring the children of group members to another group.

In addition, Article 25 (3) (e) of the RS states that a crime is committed by anyone who ‘directly and publicly incites the commission of genocide’.[112] Only incitement to

109 Werle and Jessberger, 2020, pp. 335–336.
110 UNGA Res. 260 A (III), 1948.
111 As of June 30, 2024.
112 This provision is a reflection of Article II of the Genocide Convention. See: Council of Europe, 2024.

commit genocide is subject to penalisation – but not to other crimes within the scope of the Court's jurisdiction.

The content of Article 6 of the RS is explained in the Elements of Crimes, which contains a detailed description of the way in which the elements adopted in Article 6 of the Statute are understood, both concerning the subjective side (the relationship of the perpetrator to the act) and the objective side (the act). The most important contextual elements of the crime of genocide are limited to the context of the attack, its purpose and the intention of the perpetrator.[113] The perpetrator's behaviour must take place as part of the implementation of a plan – a visible pattern of similar behaviour directed against a given group.[114]

This context must be covered by intention (*mens rea* – the subjective side must refer to both constitutive elements). Genocide is a material crime, i.e. one that can only be committed when there is not only the result of death or destruction of given people, but also when a further effect in the form of a threat to a given protected group.

The purpose of the perpetrator's behaviour is to destroy 'in whole or in part a national, ethnic, racial or religious group'.[115] However, it is not sufficient for the perpetrator to aim at the annihilation of only a small part of a particular group.[116]

It is assumed that the concept of a group should be interpreted broadly, in accordance with the teleological interpretation. In the report of the UN Commission investigating the crimes committed in Darfur, it was assumed that the term "national group" should be given such a meaning that it is a group that has a different national identity or national origin. The term "racial group", on the other hand, should be understood as a group of individuals sharing hereditary physical characteristics or distinctive features. An "ethnic group" is a group of individuals who share a common language, tradition, or culture.[117]

Genocide can only be committed with a direct, special intention, because the perpetrator must include the goal specified in the Statute with his or her intention. This means that the crime must be committed with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group as such.[118]

Only one of the cases before the ICC concerns the crime of genocide: it is the proceedings against the Sudanese President, Omar Al-Bashir.[119] Since 2010, it has been

113 In ICTY case law, it was accepted that proving a plan or policy is not a necessary element of the crime of genocide, ICTY, Jelišić, TC, 1999, para. 100.

114 Whether a contextual element is included in the definition of genocide was the subject of dispute. See: ICC, Al-Bashir, PTC I, 2009, para. 119; cf. ICC, Al-Bashir, Separate and Partly Dissenting Opinion of Judge Ušacka, 2009, para. 19; Werle and Jessberger, 2020, pp. 356–357; Kreß, 2009, p. 297.

115 The perpetrator does not have to aim at the destruction of the group as a whole. It is sufficient if his intention includes the destruction of even a small part of the group; ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007.

116 ICTY, Krstić, TC, 2001, para. 12.

117 See: Schabas, 2022, pp. 125–126.

118 ICTY, Sikirica et al., TC, 2001, paras. 58 et seq.; ICTR, Ntakirutimana, AC, 2004, para. 364.

119 ICC, Al-Bashir, PTC I, 2009; ICC, Al-Bashir, PTC I, 2010.

at the pre-trial stage – the ICC does not conduct court proceedings in the absence of the defendant, so without ensuring his presence in the courtroom, it is not possible to hold him or her liable.

Crimes against humanity. In the so-called Moscow Declaration adopted on 1st November 1943[120] it was announced that the perpetrators of the atrocities committed against the civilian population of the territories occupied by the Axis governments would be tried. The United Nations War Crimes Commission,[121] an international body composed of representatives of 17 countries, was entrusted with building the legal foundations for punishing these acts. This commission – for the first time in the history of international criminal law – constructed the concept of crimes against humanity, which was then used by the International Military Tribunal in Nuremberg.

Based on the International Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis and Character of the Military International Tribunal signed in London on 8th August 1945,[122] the Statute of the International Military Tribunal at Nuremberg was created, which defined crimes against humanity in Article VI(c) and stipulated that they were subject to its jurisdiction. Crimes against humanity include murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds in the commission of any crime falling within or in connection with the Court's competence, whether or not it was in conflict with the law of the country in which the crime was committed. Leaders, organisers, instigators, and accomplices who participated in the formation or execution of a common plan or conspiracy to commit one of the above-mentioned crimes were to be held responsible for committing such crimes.[123]

The definition adopted in the Statute of the International Military Tribunal defined crimes against humanity in an exemplary manner. Article 3 of the Statute of the ICTR and Article 5 of the ICTY stipulate that a crime against humanity is one of the following acts committed as part of a widespread or systematic attack against civilians: murder, extermination, slavery, deportation, imprisonment, torture, rape, persecution for political, racial or religious reasons, other inhumane acts.[124]

The definition of crimes against humanity can be found in Article 7 of the RS. According to this provision, it is any of the following acts, committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack:

120 Declaration was signed in Moscow by Franklin D. Roosevelt, US President, Winston Churchill, British Prime Minister, and Joseph Stalin, Soviet leader.

121 The United Nations War Crimes Commission, initially the United Nations Commission for the Investigation of War Crimes, was a United Nations body that aided the prosecution of war crimes committed by Nazi Germany and other Axis powers during World War II.

122 UNTS, Vol. 82, p. 280.

123 Crimes against humanity were also incoded in Article 5 9c) of the Tokyo Charter but no one was convicted of these crimes in Tokyo; Werle and Jessberger, 2020, p. 375.

124 Mattraux, 2005, pp. 148 et seq.

1. murder,
2. extermination,
3. enslavement,
4. deportation or forcible transfer of a population,
5. imprisonment or other severe deprivation of physical liberty of fundamental rules of international law,
6. torture,
7. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity,
8. persecution against any identifiable group or collectively on political, racial, national, ethic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court
9. the enforced disappearance of persons,
10. the crime of apartheid,
11. other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

It is important that the list contained in Article 7 of the RS is not exhaustive, since any other inhuman act may also become a crime against humanity if it is committed in a given context. It is also worth noting that the RS excludes the need for a connection between the armed conflict and the crimes committed against humanity.

One of the elements of a crime against humanity is that the perpetrator commits it 'as part of a widespread or systematic attack against the civilian population'. An attack means a mode of action consisting in the repeated commission of acts listed in Article 7 of the RS, undertaken in accordance with or in support of the State or organisational policy to commit such an attack (Article 7 (2) (a) of the RS).[125] An attack does not have to be an armed attack or a violent attack. It can cover any case of ill-treatment of civilians.

The attack must be "widespread or systematic". These conditions do not have to be met simultaneously – it is enough to meet fulfil of them.[126] Specific premises are then analysed: the number of victims, the means and methods of attack, the status of the victims, the nature of the crimes committed during the attack, the type and degree of resistance put up by the victims, and the degree of compliance with the laws and customs of war by the attacking entities. Its consequences, the involvement

125 It is not certain whether the requirement of "policy" constitutes an independent material element of the crime or rather a typical manifestation of crimes against humanity. Although, unlike in the ICTY and ICTR statutes, the requirement to demonstrate 'a State or organizational policy to commit such attack' is expressly included in the RS, such wording may simply be understood as excluding spontaneous or isolated acts of violence; ICC, Katanga, TC II, 2014, para. 1123; ICC, Bemba, TC III, 2016, para. 149.
126 Von Hebel and Robinson, 1999, pp. 79 et seq.

of State authorities, the existence of a pattern in the crimes committed and the state or organisational policy in this area, the establishment of institutions responsible for the implementation of such an attack, and the continuity of the violence used should also be considered.

An attack is systematic (qualitative criterion[127]) when violent acts are carried out as planned and have been organised in such a way that their accidental nature must be excluded. They must be carried out within a specific pattern and include repetitive behaviours in a non-random way. An attack is widespread (quantitative criterion[128]) when acts of violence committed on a large scale, are of great importance, and have the potential to affect numerous victims across a vast territory. Both a systematic and a widespread attack must be carried out by an organisation – whether public or private (i.e. not just the State government) – that has the ability to implement a specific policy against the civilian population according to an adopted plan.

The attack must be conscious. This follows directly from Article 7:1 of the RS, although it is only a *superfluum* in the context of the general requirement under Article 30:1 of the RS, which states that all material elements of the crime must be committed with intent and knowledge.[129] The perpetrator must be aware of fulfilling all the above contextual elements with his or her behaviour and acting within a specific pattern, knowing that his or her behaviour fits into this plan. The perpetrator's intention and awareness must include: the intention to commit a specific causative act listed in this provision, the specific context of the action making him or her commit a crime against humanity, i.e. the fact that such an attack is ongoing and has certain characteristics (it is systematic or extensive and committed against civilians) and the fact that his or her act is part of such an attack. However, it does not have to include an awareness of the entire criminal plan, as it was organised, for example by the ruling regime – after all, a single perpetrator may not have knowledge about it because certain people keep the whole plan secret. He or she may have only a superficial knowledge of the entire scheme – provided that he is she is aware of taking part in an attack of a certain scale.

War crimes. The concept of war crimes was already used since the Middle Ages. At first, the law of international armed conflict developed as customary law, and only with the passage of time did it take the form of written law. It was not until the 20th century that this concept was defined, and acts of international law were adopted, which oblige states to criminalise these crimes. Unlike crimes against humanity and genocide, which were defined in a specific historical context, the definition of war crimes is the result of a long and complex evolution. War crimes involve violations of the laws and customs of war, so the scope of responsibility for war crimes is linked to the development of the way warfare is conducted.

127 Werle and Jessberger, 2020, p. 386.
128 Delmas-Marty, 2009, pp. 5 et seq.
129 Robinson, 1999, pp. 51 et seq.; Ambos, 2013, p. 280.

The basis for the development of international criminal law was undoubtedly international humanitarian law and the law of armed conflict. The following were of key importance for the contemporary scope of the criminalisation of war crimes:

1. The Geneva Convention of 22nd August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field,[130] where for the first time an absolute ban on attacks on certain categories of persons was introduced.
2. The Hague Conventions of 1899[131] and 1907[132] extended the scope of applicable standards to other types of persons and objects. What is more, they enumerated the means by which it could be determined which persons' use in armed conflicts was to be prohibited. The regulations annexed to the Hague Convention of 1907 concerning the Laws and Customs of War on Land provided for a set of norms of international law relating to the ways of harming the enemy, the methods of besieging and bombing.
3. The Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous other Gases, and of Bacteriological Methods of Warfare of 17th June 1925[133] required national legislators to adopt adequate national law which would penalise conduct enumerated in the Convention as prohibited by international law in wartime, if national legal systems did not provide for punishment for similar acts.
4. The Briand-Kellog Pact (General Treaty for Renunciation of War as an Instrument of National Policy) of 27th August 1928[134] rejected war as a tool of national policy and an instrument for resolving international disputes.
   Unfortunately, all these efforts of the international community had limited results, and during World War II war crimes could be witnessed being committed on an unprecedented scale. The response to the horrors of war was, on the one hand, the four Geneva Conventions of 1949, which aimed to strengthen the protection of victims of armed conflict and to oblige the signatory states to

130 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864.

131 Convention (I) for the Pacific Settlement of International Disputes (Hague I), 1899.

132 Hague Convention (XII) relative to the Creation of an International Prize Court, 1907, arts. 1–57.

133 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

134 General Treaty for the Renunciation of War as an Instrument of National Policy, 1928.

> criminalise serious violations of their provisions.[135] These conventions were subsequently supplemented by Additional Protocols.[136]

On the other hand, it was necessary to build the foundations of international criminal justice in order to think about taking up the fight for the implementation of the laws of war. Through the Nuremberg and Tokyo tribunals, and then *the ad hoc* tribunals, such a foundation was created, and its crowning achievement is Article 8 of the RS. This provision, like the ICTY (Article 2) and ICTR (Article 4) regulations that preceded it, refers to the *acquis* of international law, making "grave violations of the Geneva Conventions" war crimes.

The Rome Statute refers to the best practices and case law of *ad hoc* tribunals. Article 8 of the SR contains a catalogue of war crimes, dividing them into two basic categories: those committed in international conflicts, and those committed in internal (non-international) conflicts (civil wars). In Article 8 of the RS, the term "grave breaches of the Geneva Conventions" is used only in relation to conflicts of an international nature. Regarding non-international conflicts, Article 8:2 (c) of the RS uses the phrase 'serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949' and "other violations".

The catalogue of war crimes is extremely extensive; Article 8 is the longest article in the entire Statute. It covers nearly a hundred specific prohibited acts, with some of them partially overlapping.

Violations of the laws of war are within the jurisdiction of the ICC only if a condition of sufficient gravity is met – Article 8:1 The RS also notes that this jurisdiction refers "in particular" to crimes 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'. However, the very existence of a plan is not

135 These are: the First Geneva Convention, concerning the improvement of the fate of the wounded and sick in armies active on land (Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern, pp. 205–224), the Second Geneva Convention, concerning the improvement of the fate of the wounded, sick and shipwrecked armed forces at sea (Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern, pp. 225–242), the Third Geneva Convention, concerning the treatment of prisoners of war (Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern, pp. 243–296), the Fourth Geneva Convention, concerning the protection of civilians in time of war (The Geneva Conventions of 12th August 1949, International Committee of the Red Cross, Geneva, pp. 153–221).

136 Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8th June 1977 (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978), Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8th June 1977 (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978), Protocol additional to the Geneva Conventions of 12th August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8th December 2005 (Notification of the Federal Department of Foreign Affairs of Switzerland, Bern, 4th January 2006).

a condition for exercising jurisdiction, but only an indication of how to assess the seriousness (gravity) of the acts committed.[137]

Every prohibited act must be related to an armed conflict. However, this “relationship” is interpreted very broadly – it is enough that the acts were committed on the territory of the belligerents. There are both international conflicts (Article 8:2 (b) of the RS) and non-international ones (Article 8:2 (c) of the RS). It is also possible to assume that the subject of the judgment is a mixed conflict.[138]

Each perpetrator must be aware of the existence of the conflict and the fulfilment of the basic elements of the crime. He or she does not need to have precise knowledge of the exact nature of the conflict: whether international or internal. He or she is only supposed to be aware of the existence of the actual circumstances determining the occurrence and accompanying a given conflict situation. For example, whether the perpetrator was aware that he or she was using a type of weapon prohibited during armed conflicts and that such an armed conflict was ongoing[139] can be investigated.

Crime of aggression. The crime of aggression is the “youngest” among the crimes of international law. For many years, the right of each state to wage an aggressive war (the so-called *jus ad bellum*) was recognised. Even after the conviction emerged that attacking another state is a crime of international law, states did not agree to criminalise aggression as a crime in written law.

Pre-war attempts to define the crime of aggression did not bring any results, although the Kellogg-Briand Pact of 27th August 1928[140] formulated the concept of crimes against peace, which became the legal basis for punishing Nazi and Japanese criminals in the Nuremberg and Tokyo Trials.[141]

The key provision was Article 2:4 of the UN Charter adopted in 1945 according to which ‘[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or independence of any State’. This provision allows us to conclude that war is not a legal means of resolving international disputes,[142] but this does not mean that a consensus has been reached on the criminalisation of the crime of aggression.[143]

The question of defining this crime was an extremely difficult challenge for the international community. It was not defined for the purposes of the ICTY and the ICTR, as the jurisdiction of these Tribunals was limited to crimes committed in the context of internal conflicts. Nor was an agreement reached in Rome during the Intergovernmental Conference of 1998, at which the Rome Statute was adopted.

137 Cottier and Kolb, 2022, pp. 360–361.
138 Werle and Jessberger, 2020, pp. 462 et seq.; ICC, Lubanga, TC I, 2010, para. 540; ICC, Katanga, TC II, 2014, para. 1174.
139 Ambos, 2013, pp. 284 et seq.; Dörmann, 2000, p. 780; Werle and Jessberger, 2020, pp. 476 et seq.
140 See: Robinson, 1999, pp. 51 et seq.; Ambos, 2013, p. 280.
141 In the Nuremberg Judgment 12 from of 24 defendants charged with the crime against peace were convicted. In the Tokyo Judgment it concerned 25 defendants from of 28 charged.
142 See: ICJ, Corfu Channel (*United Kingdom v. Albania*), 1949.
143 UNGA Res. 3314 (XXIX), 1974.

However, it was assumed that this crime would become part of the ICC's jurisdiction once an agreement could be reached on its definition and legal elements (Article 5:2 of the RS).

This was only achieved during the Kampala Review Conference in 2010 when a new provision of Article 8 *bis to RS* was introduced.[144] According to this provision "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[145]

Determining whether an "act of aggression" constitutes a manifest violation of the UN Charter requires an analysis of three elements: nature, gravity and scale. All these features of an act of aggression must be serious enough to show that the violation of the Charter was "obvious". Fulfilling only one of these elements is not enough. Therefore, cases of aggression "of lesser gravity" (e.g. minor border skirmishes) are to be excluded from the jurisdiction of the Court. According to the principles of the imputable nature of a prohibited act, in order to be able to attribute the commission of this crime to the perpetrator, the perpetrator should be aware of the factual circumstances determining that a specific use of force against another state constituted an act of aggression and moreover, by its nature, gravity or scale, manifestly violated the UN Charter.[146]

In defining in RS the acts considered acts of aggression, States referred to UN Definition on Aggression and recognised that such an act is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other way inconsistent with the UN Charter. An act of aggression is considered to be:

a) The invasion or attack by the armed forces of a State on the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
c) The blockade of the ports or coasts of a State by the armed forces of another State;
d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the

144 By 15th November 2024 The Kampala Amendment on the crime of aggression ratified 46 States.
145 Hajdin, 2021, pp. 43 et seq.
146 Werle and Jessberger, 2020, pp. 599 et seq.

conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

8. Future Prospects

From a broader perspective, it must be said that the ICC is still at the beginning of the road, hopefully a long one. A little over 20 years of its operation have passed in just the blink of an eye. The international community has decided on an important, but also very ambitious project. Unfortunately, tense international relations pose a great threat to its implementation. It turns out that the international criminal justice system has a chance to be implemented only when there is an atmosphere of mutual trust and cooperation. This is currently lacking. It is not only about the fact that several countries, including significant players in the international arena, have boycotted the Court. This is also the result of the lack of political determination of the State-Parties to ensure an appropriate level of cooperation.[147]

It is impossible not to see that the cooperation of the Court with States Parties, as well as with States that have not ratified the Statute, will be of key importance for the success of the ICC. As we know, the Rome Statute system is devoid of an enforcement mechanism, which has been replaced by the obligation to cooperate fully with the Court (Part 9 and 10 of the RS). It concerns all its forms, but above all about the execution of arrest warrants issued by judges.[148] Currently only one case is pending before the Court at trial stage.[149] The next two could start before the end of 2026.[150]But, there is nothing more in the pipeline and in the near future we may see empty courtrooms. It does not matter that the Prosecutor's Office is very active and that it is proceeding with several investigations on four continents. Even if judges issue arrest warrants for suspects, these orders are not executed. As a result, the ICC may soon transform into in an "investigative institution", and the expectations of the international

147 The last, very negative example of demonstrative non-cooperation was the refusal to arrest a person wanted by the ICC during his official visit to Mongolia; ICC, Mongolia non-cooperation, PTC II, 2024.

148 Bellelli, 1996, pp. 211–240.

149 This is the case ICC, Said Abdel Kani (CAR II).

150 There are cases ICC Rodrigo Roa Duerte (Philippines) and ICC El Hishri (Libya).

community and, above all, the victims of atrocities for justice will only bring bigger disappointments.

It was the States that established the Court. It is now up to them to decide whether they still want to have a real independent judicial institution, or whether they prefer to drown the Court in mutual disputes by pursuing their own particular and individual political interests.

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