

Ambos

# Rome Statute of the International Criminal Court

Article-by-Article Commentary

Fourth Edition



# Rome Statute of the International Criminal Court

Article-by-Article Commentary

edited by

Kai Ambos

Fourth Edition

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## Editor's Preface

This fourth edition of this Commentary – founded by the late Otto Triffterer – has been thoroughly revised, updated, extended and complemented with further resources, especially a Table of Cases. The Commentary continues to offer a detailed article-by-article analysis of the Statute of the International Criminal Court (ICC). It aims at explaining the content of the various articles in a broader sense, including their drafting history, their interpretation through emerging ICC case law, their impact on International Criminal Law ('ICL'), and their relation with other sources of the ICC such as the Rules of Procedure and Evidence ('RPE'), the Regulations of the Court ('RegC') and the Prosecution ('RegOTP'), etc.

The main objective of this new edition was threefold: First, to update the case law, especially of the ICC; second, to take into account most important academic contributions and legislative developments; third, to provide clarity and structure of presentation as well as greater consistency. This alone has been a mammoth task as highlighted by Judge Schmitt in his foreword. We invited a number of new authors with diverse backgrounds in both academia and practice, as can be seen from our Authors' list. Several entries have been substantively expanded and deepened and some authors even deviated from the previous edition(s) due to jurisprudential or other intervening developments. As to the listing of previous (no longer active) authors we have followed the general rule of the publisher that their names are removed if they have not been contributing for two editions, i.e., were no longer involved in the third and this fourth edition.

Of course, this Commentary is not meant to be the mouthpiece of the ICC but critically engages, in a constructive spirit, with its case law and its performance in general. The ICC, like every judicial institution, needs not only good faith criticism to constantly improve its performance but also, perhaps more importantly, the continued support from the academic community at large, especially in times where it is attacked by powerful political forces (see for the general context and challenges Mr. O-Gon Kwon's foreword). Wherever critical views do come from, they should be taken into consideration and be discussed openly, rather than being suppressed.

I am very grateful to all authors, both former and current ones. Without the former authors, this Commentary would not be what it is today. The current authors tremendously invested into this edition – some (especially new authors) had to update and completely revise their entries in the midst of various other important commitments within extremely short time frames. I am especially indebted to Piotr Hofmański, President of the ICC and Full Professor at the University of Krakow (Poland), Bertram Schmitt, Judge at the ICC and Honorary Professor at the University of Würzburg (Germany), Karim Khan, new Prosecutor of the ICC, Peter Haynes, QC and President of the ICC's Bar Association, and His Excellency O-Gon Kwon, President of the ICC's Assembly of States Parties, for writing forewords for this edition. These contributions confirm our ongoing and constructive engagement with ICL practice to a great extent represented by the ICC's case law. It goes without saying that all authors write in their personal/academic capacity and their views do not in any way represent their institutions.

Last but not least, I would like to thank my editorial team at my chair at the Georg-August-Universität Göttingen (coordinated by Luca Petersen and Tjorven Vogt and

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mainly composed of Jacopo Governa, Carolin Jaquemoth, Maximilian Menges, Jonathan Stelter and Julian Vornkahl and further supported by Dr. Matthias Lippold). I also thank the publisher C.H. Beck, especially Thomas Klich, Dr. Wilhelm Warth and Aleksandra Hadžić, for accommodating the editor's requests to a large extent and of course for publishing and, together with Hart and Nomos, disseminating the Commentary.

It is hoped that the Commentary will continue to provide a useful guide for both practitioners and academics in various capacities. At any rate, as said in the preface to the third edition, this Commentary is (still) a work in progress and, thus, critical comments are always welcome; they may be sent to ICC-Commentary@jura.uni-goettingen.de.

Kai Ambos, Göttingen/The Hague, August 2021

## INTRODUCTIONS TO THE FOURTH EDITION

### **Piotr Hofmański, President of the International Criminal Court**

I was greatly honored by the invitation to write the opening words for the next edition of the Commentary on the Rome Statute of the International Criminal Court, the first editions of which were edited by the late Professor Otto Triffterer and which is now in the capable hands of Professor Kai Ambos.

This book needs no introduction to anyone who has even briefly worked in the field of international criminal law. Although the Rome Statute, which entered into force less than 20 years ago, is still very young, the discipline is very dynamic. This is evidenced by the fact that the fourth edition of the leading Commentary on this treaty – the book you are holding in your hands – is already being published. In fact, this new edition of the Commentary is very much needed. Five years after the release of the previous edition, we are now in a whole new era in the development of international criminal law. A lot has happened in the meantime. The jurisdiction of the ICC in cases of aggression has been activated and, although no case has yet been brought to trial, the issue is of very strong interest. New war crimes have been added to Article 8 of the Statute. The Assembly of States Parties amended the Rules and Procedure and Evidence, and the Judges of the Court have repeatedly amended and improved the Regulations of the Court and identified best practice reflected in a non-binding but highly useful Chambers Practice Manual. There have been a number of judgments and decisions of the Court, including some that were highly controversial and were probably just the opening of a debate on the directions of interpretation of many provisions of the core legal instruments of the Court.

The coming years will be challenging for the Court. The relatively large number of situations under scrutiny by the Office of the Prosecutor and the investigations already initiated will likely lead to new trials. These proceedings will undoubtedly require the Court to consider and interpret provisions of the Statute that are not yet illuminated by jurisprudence, and to revisit issues touched upon in existing jurisprudence. The Commentary will certainly be a very helpful tool in this work. But, as it is said in the academic world, commentaries generally end exactly where real problems begin. So, let the editors and authors of this Commentary already begin to reflect on new directions of interpretation, which in the near term will result in its fifth edition.

Today, however, let us enjoy the fourth edition of the Commentary, written by academics and practitioners of international criminal law of unquestionable authority. It will be one of the books that, despite its large size, will not need a place on my bookshelf because it will always be on my desk.

The Hague, June 2021

## Introductions

### O-Gon Kwon, President of the Assembly of States Parties, ICC

It is an honour to offer some words of introduction for this Commentary, which is one of the leading academic texts on the Rome Statute and the International Criminal Court.

Just over twenty-three years ago, in a dramatic vote in the early hours of the morning at the Rome Conference, States adopted the Rome Statute of the International Criminal Court. This vote proved to be an historic breakthrough, reflecting a collective determination to put an end to impunity for the most serious crimes of concern to the international community as a whole.

The International Criminal Court has since become, with the crucial support of States Parties and civil society, a fully-fledged and leading international institution in the fight against impunity. The Court is now an integral part of the international system, and its work contributes to the development of the rule of law, the promotion of human rights, and to a more peaceful and secure world. The Court stands as a permanent symbol of hope for the victims of horrific crimes.

We are at a crucial moment in the Court's development. At its eighteenth session in December 2019, the Assembly of States Parties decided via resolution ICC-ASP/18/Res.7 to establish a "transparent, inclusive State-Party driven process for identifying and implementing measures to strengthen the Court and improve its performance". As part of that process the Assembly also decided to commission an Independent Expert Review, with a view to making concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole.

The Group of Independent Experts appointed by the Assembly submitted its final report, containing a comprehensive set of recommendations, in September 2020. At the resumed nineteenth session of the Assembly in December 2020, States Parties welcomed the report and the recommendations, and decided to establish a mechanism dedicated to planning, coordinating, keeping track and regularly reporting to the Assembly Presidency and the Bureau on the assessment of the recommendations and further action, as appropriate. The nineteenth session of the Assembly also saw important elections, with the election of new judges and a new prosecutor. The new leadership and potential structural changes represent the beginning of a serious conversation, introspection, and positive momentum that will strengthen the Court and enable it to face new challenges and live up to its full potential.

While the Court represents an important stepping stone in the road towards international accountability, it is also facing serious and unprecedented challenges. Today more than ever we must stand firm together in our relentless commitment to uphold, defend and promote the values and principles enshrined in the Rome Statute, and to preserve the integrity of the Court.

Against this background, I commend the authors and contributors for their efforts to enhance our collective understanding of the Rome Statute and the International Criminal Court. I am confident that their contributions will continue to support the work of the Court as we go forward.

July 2021

## Introductions

### Bertram Schmitt, Judge International Criminal Court

It is my great pleasure and honour to write this introduction to the 4<sup>th</sup> edition of the Ambos Commentary. Not merely because this is the leading commentary on the Rome Statute and the ICC's legal framework, but above all because this edition deftly takes up and processes a wealth of new developments at the ICC. In that regard, one cannot underestimate the importance of this Commentary as a source of information and reference for anyone dealing with the ICC and international criminal law. It is worth taking a brief look at these recent developments to see the immense achievement of this edition.

I mention first some quite substantial innovations in the legislation of the Court. Most importantly, the Court's jurisdiction over the crime of aggression was activated on 17 July 2018, while in 2017 and 2019 four new war crimes were added to Article 8 of the Rome Statute regarding: employing microbial, biological or toxin weapons, employing weapons that injure by fragments undetectable by X-rays, employing laser weapons and the starvation of civilians. In addition, significant amendments were made to the Rules of Procedure and Evidence, such as Rules 134 *bis* to 134 *quater*, regarding the presence of the accused at trial through video technology and his or her excusal from presence at trial under exceptional circumstances.

In this context, it is also important to note that the Chambers Practice Manual has been significantly amended by the judges for all three stages of the proceedings. Although it is not binding on judges, the Manual consists of guidelines that the judges have recognised as best practices and that can therefore be considered as basic instructions for judicial work. In that regard, I make special mention of the introduction of timeframes for rendering key decisions. These timeframes are meant to streamline and significantly expedite the process of decision-making and the overall proceedings. For example, the Manual states that the Pre-Trial Chamber's written decision under Article 15, paragraph 4, shall be delivered within 120 days from the date the Prosecutor submits a request for authorisation of an investigation. In the same spirit, the Trial Chamber's written decision under Article 74 of the Statute shall be delivered within 10 months from the date the closing statements end. Against the background of my judicial experience, I point out that this Trial deadline is significantly shorter than the deadline required for written judgments of a comparable scope in Germany. Similarly, the Appeals Chamber shall deliver the written judgment in respect of appeals against conviction, acquittal or reparations orders within 10 months of the date of the filing of the response to the appeal brief or respectively, within 10 months of the closing of the oral hearing, if one is to occur.

As important as these innovations are, they are still overshadowed by the jurisprudential developments since the Third Edition of the then Triffterer/Ambos Commentary. The remark of Judge Silvia Fernandez de Gurmendi, at that time President of the ICC, that with "the increase in the ICC's case load, we can expect the Court's body of jurisprudence to develop rapidly", can only be seen as prophetic. In the following, I mention only a few of the important steps in criminal proceedings since 2015 which all contributed to this body of jurisprudence and are addressed within this edition of the Commentary:

Mr Bemba was convicted by Trial Chamber III and subsequently acquitted upon appeal. Mr Bemba, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido were convicted



## Introductions

by Trial Chamber VII for offences against the administration of justice (Article 70 of the Statute); their convictions were upheld upon appeal. Mr Al Mahdi was convicted by Trial Chamber VIII for the war crime of destruction of protected property after he made an admission of guilt (Article 65 of the Statute). Mr Ntaganda was convicted by Trial Chamber; Mr Gbagbo and Mr Blé Goudé were acquitted by Trial Chamber I. The Appeals Chamber has confirmed these decisions. Moreover, Mr. Ongwen was convicted by trial Chamber IX, appellate proceedings are pending. It is worth noting that the aforementioned proceedings produced a lot of procedural decisions, such as on the admission of guilt by the accused, the submission/admission of evidence, witness preparation and the introduction of Rule 68 statements. Apart from the above, reparation proceedings are underway in four cases (Lubanga, Katanga, Al Mahdi and Ntaganda) and in preparation in one case (Ongwen).

Moreover, with regard to the pre-trial stage, charges against three suspects were confirmed and their cases sent to trial (Mr Al Hassan, Mr Yekatom and Mr Ngaïssona). One suspect in the Darfur situation was surrendered to the Court after the first warrant of arrest was issued 13 years ago in 2007 and preparations for the confirmation hearing are ongoing (Al Kushayb). Three new investigations were authorised (Burundi, Afghanistan and Myanmar/Bangladesh, the latter with an important interpretation regarding the Court's territorial jurisdiction). The case law taken into account in the Commentary further includes two important decisions: the admissibility challenge of a person alleging that he has already been tried (*ne bis in idem*), which led the Court to also make first pronouncements on the applicability of amnesties and pardons in the context of international crimes (Saif Al Islam Gaddafi), and the question of whether immunities of heads of States can be invoked by States Parties when asked to execute warrants of arrest (Al Bashir).

Lastly, the Prosecutor declined to open two investigations referred by States Parties (Gabon and Union of the Comoros). One of those States Parties challenged the Prosecutor's decision not to open the investigation (Article 53 of the Statute) which led to lengthy litigation (Union of the Comoros).

The above selection of significant judicial developments makes it more than clear that the Court is fully operational. The Court remains steadfastly true to its mandate against all resistance and pressure it faces. It also deserves mention that in general the proceedings at the Court have been accelerated considerably and their duration is comparable to that of large-scale cases in other international and national jurisdictions. The wealth of case law means that this edition of the Ambos Commentary had a lot of new judicial material to process. In this respect, the Commentary is a reliable source of information, allowing a quick reference to the most important developments at the ICC. The authorship, composed of practitioners and academics, organises the case law and distils trends in the Court's voluminous jurisprudence that are otherwise difficult for external observers to discern. This makes the Commentary an indispensable tool for practitioners, not only at the ICC, but also – importantly – the many practitioners at the domestic level who increasingly investigate and prosecute international crimes, “in complementarity” to the ICC. Thus, the Commentary helps disseminate the Court's jurisprudence and contributes to the emergence of a homogenous interpretation of key notions on a global scale.

The authors of this work deserve great praise. Their comments are scientifically sound and faithfully reflect the jurisprudence of the Court. Likewise, Professor Ambos, who has taken on the mammoth task of editing this work, deserves the highest recognition. Anyone who has ever edited a legal work can appreciate what it means to publish a commentary of this size with such a large number of authors, while

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maintaining the highest scientific standard throughout and, if need be, kindly asking the authors to meet the deadlines. This Commentary has always been a book of great authority. Yet, it is now more important than ever. As the jurisprudence of the Court increases so will the relevance of a commentary such as this. In sum, I am confident that the 4<sup>th</sup> edition of the Ambos Commentary will consolidate its status as the leading commentary on the Rome Statute and international criminal law.

The Hague, June 2021

Reading sample

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### Karim A. A. Khan QC, Prosecutor of the International Criminal Court

I think it was a sunny day in mid-1998 that I met Professor Otto Triffterer for the first time. Professor Morten Bergsmo, then a colleague of mine at the ICTY and also a contributor to this work, kindly introduced me to the late Professor who then graciously invited me to participate in his nascent project, which I was honoured to accept. “Triffterer’s Commentary” quickly became the standard commentary of the Rome Statute. I feel genuinely humbled – almost 23 years later – to have been invited by his successor as Editor-in-chief, Professor Kai Ambos, to write this Preface. I am delighted to welcome this 4<sup>th</sup> edition of what is now rightly known as the “Ambos Commentary” on the Rome Statute. It is, in my opinion, the leading Commentary on the Rome Statute and has the advantage of being distilled in one volume and written by recognised experts in the field of international criminal law.

Since the first edition of this Commentary was published more than twenty years ago, it has become an indispensable companion for any practitioner appearing before the International Criminal Court. I know that for many colleagues it has become the first point of reference when considering any novel issue in the interpretation of the Statute or in the practice of the Court. With the arrival of this 4<sup>th</sup> edition, I am confident that the Ambos Commentary will continue to be essential reading for practitioners, judges, and researchers alike.

The jurisprudence of the International Criminal Court has moved on in significant respects in the years that have passed since the 3<sup>rd</sup> edition was published. Examples of these developments are many and varied and include the jurisprudence on jurisdiction in the situation in Bangladesh/Myanmar, the conviction and sentencing of Ahmad al-Faqi al-Mahdi for intentionally directing attacks against religious and historic buildings, the appeal decision in the *Gbagbo* and in *Ntaganda* cases and the contempt proceedings in *Bemba et al.* The authors of the 4<sup>th</sup> edition have risen to the challenge of comprehensively updating the text to reflect the many developments in the Court’s jurisprudence.

Professor Ambos deserves our thanks for his herculean efforts in editing this Commentary. He is an eminent jurist and this work is just one example of his many contributions to the field of international criminal law. For this edition in particular, as well as providing a comprehensive update on the law, Professor Ambos set out to improve the consistency and structure of the presentation of the Commentary. This may not appear to be the most glamorous of tasks, but it is certainly an essential one to ensure that the standards of the 4<sup>th</sup> edition remain the highest – and I am certain that readers will be grateful for it.

As I step into my new role as Prosecutor of the International Criminal Court, I am acutely aware of the myriad challenges facing the Court and the Office of the Prosecutor. I am equally aware of the myriad opportunities for the Court to grow as an institution, to have a positive impact in fortifying the rules-based system and in doing so to deepen its recognition internationally.

For the Court to be further strengthened as an institution, it is essential that we increase understanding of the methods and value of its work amongst all those who are affected by – or involved in – its proceedings. As I noted upon my swearing-in as Prosecutor, we have the honour to work within a body of law that is owned by

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humanity, that belongs to each and every one of us. The Statute is not the property of any legal tradition or geographic region but represents a collective promise that we will stand united in seeking justice for those impacted by the worst of crimes. If we are to engender the sense of common cause needed to realize this promise, we must seek wherever possible to increase transparency and understanding of our work. In those endeavours, I welcome the role played by commentaries such as this 4<sup>th</sup> edition in explaining the Statute and jurisprudence of the Court.

The Ambos Commentary has become the standard work in the area and I am sure this Fourth Edition will be welcomed by all.

Baghdad/The Hague, June 2021

Reading sample

## Introductions

### Peter Haynes, QC, President of the International Criminal Court Bar Association (ICCBA)

At the risk of being accused of hyperbole, I regard the invitation from Professor Ambos to write a few words of introduction to the fourth edition of the Commentary on the Rome Statute as one of the greatest honours of my professional career. “Triffterer” has for more than 20 years been the “Bible” on the law, practice and procedure at the International Criminal Court and it has received far more worthy *imprimatur* than mine. Soon to become known as “Ambos”, no doubt, in eponymous recognition of its stellar editor in chief, it will continue to be the touchstone for anybody aspiring to practice at the court.

I have had the pleasure to know and work with Professor Kai Ambos. His contribution to the topic of International Criminal Law is remarkable and there can be few, if any, with a greater understanding of the constitution and jurisprudence of the ICC. He has, moreover, here assembled a collection of contributors of impeccable pedigree and arranged the fourth edition of the work in a concise and logical way. Structurally and substantively, it is a fine piece of work and an improvement on its predecessor.

It arrives at an important time for the ICC. By the time of going to press, a new prosecutor will have been sworn in. The court and the Assembly of States Parties, moreover, will have to commence prioritizing and implementing the three hundred or so recommendations of the Independent Expert Review into governance and operations at the court. A new era is approaching.

Furthermore, jurisprudentially, much has happened in the years since the publication of the Commentary’s 3<sup>rd</sup> edition: new offences have been added to the statute, previously untested modes of liability tried and analysed on appeal, innovative procedures have been created and refined (for example, the NCTA process, trailed in *Ruto* and *Gbagbo*), the extent of the court’s geographical jurisdiction has been expanded in the Myanmar/Bangladesh and Palestine situations and the *locus standi* of victims’ legal representatives at earlier phases of the process reappraised.

One other significant development in the last five years has been the creation of the International Criminal Court Bar Association (ICCBA) of which I have the privilege to be the fourth president. The myriad benefits of a bar both to its members and the court need no amplification, save to say that the ICC now has an effective interface with those independent practitioners who represent accused, victims, governments, *amici* and other interested parties and those practitioners have a core and a voice.

One of the ICCBA’s central objectives is to ensure that its members, comprising both counsel and junior staff, are up to the mark as practitioners before the court. Training on specific areas is, of course, regularly delivered, however, for a compendious understanding of the court’s operational matrix and case law, an authoritative reference work is indispensable. In that regard, Ambos’ Commentary on the Rome Statute has no peer. It is not just essential reading for independent practitioners, it’s the tome they must have in their armoury, the book that the prosecutor will cite in his filings, and to which the judges and their ALO’s will resort in their decisions.

I happily commend this single volume to all of those who practice independently at the court – it is the paddle that may keep you afloat in turbulent waters!

The Hague, June 2021

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**Kai Ambos**, Dr. iur., is Professor and Chair of Criminal Law, International Criminal Law and Public International Law at the Georg August University of Göttingen (GAU). He is also a judge at the Kosovo Specialist Chambers (KSC), The Hague, *amicus curiae* (advisor) of the Colombian Jurisdiction for Peace and Director of the Centro de Estudios de Derecho Penal y Procesal Penal Latinoamericano (CEDPAL) at the GAU. [Preamble; Articles 7(1), 7(2)(a), 23, 25, 31, 76]

**Robert Arnold**, Dr. iur., is a former public prosecutor of Canton Ticino (Switzerland) and Military Investigating Magistrate of the Swiss Military Justice. She currently works for the Federal Department of Justice and Police, lectures at the University of Zurich and is affiliated with Franklin University Switzerland. Her previous positions include: legal officer – Federal Attorney General's Office, Centre of Competence for International Criminal Law and Counter-Terrorism Division; legal adviser on IHL and political adviser on small arms and light weapons – Swiss Federal Department of Defence; editor-in-chief of The Military Law and the Law of War Review. [Articles 8(2)(b)(xxi), 8(2)(b)(xxiii)–(xxiv), 28]

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**Morten Bergsino** is the Director of the Centre for International Law Research and Policy (CILRAP). [Preamble, Articles 15, 16, 42, 53, 54]

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Specialist Chambers since 2017. He is the general editor of the *International Criminal Law Review* (Martinus Nijhoff) and of *Studies in International and Comparative Criminal Law* (Hart/Bloomsbury). [Articles 1, 36]

**Rafael Braga da Silva** is a criminal and human rights attorney and litigator with prosecution experience at domestic and international courts. He holds a cum laude LL.M. Adv. Studies in Public International Law in the Grotius Centre for International Legal Studies, Leiden University and an LL.M. University for Peace and United Nations Interregional Criminal and Justice Research Institute (UNICRI). [Article 7(1)(i)–(j) and 7(2)(h)–(i)]

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## Article 7 Crimes against humanity\*

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

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

(2) For the purpose of paragraph 1:

- (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

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\* The (new) authors of the commentary to Article 7 would like to thank Christopher K. Hall for his important contribution to the first and second editions. His original contribution has been substantially amended and extended already in the third edition and even more now in this edition. – The views expressed herein are those of the authors in their personal capacities and do not necessarily represent those of any organizations with which they are or were affiliated.

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- (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

(3) For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Directly relevant Elements of Crimes: Article 7: Crimes against humanity.

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(Sijthoff & Noordhoff 2<sup>nd</sup> edition 1979); Whitaker, B., Report on Slavery, UN. Doc. E/CN.4/Sub.2/1982/20/Rev.I, UN Sales No. E.84.XIV.1.

**Note by the editor:** the former items 6–9 (Decisions of the ICTY and ICTR, Decisions of national courts, national legislation) have not been continued and can be consulted in the previous edition at pp. 149–151.

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### A. Introduction/General remarks\*

- 1 The definition of Crimes against Humanity ('CaH') has evolved and become further clarified since this concept first received explicit international legal recognition in the *St.*

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\* Kai Ambos acknowledges the important research assistance of Jacopo Governa.



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*Petersburg Declaration of 1868* limiting the use of explosive or incendiary projectiles as ‘contrary to the laws of humanity’.<sup>1</sup> The concept received further recognition when the First Hague Peace Conference in 1899 unanimously adopted the Martens Clause as part of the Preamble to the *Hague Convention respecting the Laws and Customs of War on Land*.<sup>2</sup> The Martens Clause has been incorporated virtually unchanged in most subsequent humanitarian law treaties.<sup>3</sup> The first formal reference to some of the crimes which would be included in the concept of CaH was given in the *Declaration of France, Great Britain and Russia* on 24 May 1915 denouncing the massacres by the Ottoman Empire of Armenians in Turkey as ‘crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres’.<sup>4</sup> The novelty was, of course, that the crimes were committed by citizens of a State against their own fellow citizens, not against those of

<sup>1</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 11 Dec. 1868. (The parties agreed to draw up additional instruments ‘in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity’). There were earlier uses of the phrase, but often the link with the twentieth century concept of CaH is either tenuous or non-existent. For example, in 1794, Maximilien de Robespierre called Louis XVI a ‘criminal toward humanity’, but most of ‘crimes’ of the ‘tyrant’ – primarily his conspiracy in league with foreign countries against the government that deposed him, were not specifically identified in his speech and are far removed from the current understanding of what constitutes CaH. Robespierre, in: Bryan, *Orations* (1906) 380. – More likely, the concept owes more to natural law thinking in some of the early writings on international law, such as Grotius’s views on the natural law limits on the use of armed force in *De Jure Belli Ac Pacis* (On the Law of War and Peace) and Emmerich de Vattel’s concept of ‘offices of humanity’, binding men and nations alike, which were founded on the laws of nature, *The Law of Nations or the Principles of Natural Law* (1758) Book II, Ch. 1, para. 2. In the early 19<sup>th</sup> century, a U.S. Attorney General, citing Grotius, declared that acts of ‘extreme atrocity’ involved ‘crimes against mankind’. 1 Opinion. Attorney General (1821) 509, 513. The Reverend T. Parker in 1854 called the US Fugitive Slave Bill a new CaH (Parker, *The New CaH* (1854)). In 1874, the American editor and leading proponent of public reform, G.W. Curtis, also called slavery a ‘CaH’, in: Norton, *Orations* (1894) 208. In 1906, in an article that was not published until 1921, R. Lansing, later U.S. Secretary of State and participant in the Versailles Peace Conference (see below fn. 6), stated that the slave trade, along with piracy, was an example of a ‘CaH’ over which any State could exercise universal jurisdiction (Lansing (1921) 15 *AJIL* 13, 25).

<sup>2</sup> Hague Convention respecting the Laws and Customs of War on Land of 1899, Preamble (‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience’). The Martens Clause is named after the Russian diplomat who drafted it, see Bassiouni, *CaH* (2011) 88, fn. 7; Lippman (1997) 17 *BCTHirdWorldLJ* 171, 173; Meron, *Humanisation IL* (2006) 16 ff.; Hankel, in: Hankel, *Macht* (2008) 414, 428–9; Salter and Eastwood (2011) 2 *JHumLStud* 216, 251 ff.; *id.*, in: Behrens and Henham, *Genocide* (2013) 20; Stahn, *Introduction ICL* (2019) 52 ff.

<sup>3</sup> See, e.g., Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, Preamble, para. 8; Article 63 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First GC), 12 Aug. 1949, 6 UST 3114, 75 UNTS 31; Article 62 Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second GC), 12 Aug. 1949, 6 UST 3217, 75 UNTS 85; Article 142 Convention Relative to the Protection of Prisoners of War (Third GC), 12 Aug. 1949, 6 UST 3316, 75 UNTS 135; Article 158 Convention Relative to the Protection of Civilian Persons in Time of War (Fourth GC), 6 UST 3516, 75 UNTS 287; Article 1(2) Add. Prot. I; Preamble Add. Prot. II.

<sup>4</sup> Declaration of France, Great Britain and Russia, 24 May 1915, quoted in Schwelb (1946) 23 *BYbIL* 178, 181. The date of 28 May 1915 in this article is a misprint. Dadrian (1989) 14 *YaleJIL* 221, 262, fn. 129. The history of the drafting of the Declaration remains to be fully explored, but the concept appears to reflect in part the similar justifications advanced by Western countries for earlier diplomatic protests and military humanitarian interventions to protect minorities in Lebanon, Romania and Turkey. See *U.S. v. Altstötter (Justice Trial)*, Judgment, U.S. Military Tribunal, Nuremberg, Germany, 4 Dec. 1947, 4 LRTWC 1 (HMSO 1947). See also UNWCC, *History* (1948) 35; Cerone (2008) 14 *NewEngJl&CompL* 191, 191–2.

Convention on CaH.<sup>11</sup> Definitions in the different instruments are, however, vague and, in many respects, inconsistent with regard to, for instance, the different approaches as to whether the CaH are linked to an armed conflict,<sup>12</sup> or are to be considered as mere peace crimes.<sup>13</sup> The scope of these definitions and their interpretation by international and national tribunals and courts will be discussed below.

## B. Analysis and interpretation of elements

### I. Paragraph 1: List of crimes

#### 1. Chapeau

Article 7 represents both a ‘codification’ and a ‘progressive development’ of international law within the meaning of Article 13 UN Charter.<sup>14</sup> It unites the distinct legal features which may be thought of as the ‘common law’ of CaH.<sup>15</sup> The *chapeau* of para. (1) of Article 7 establishes the jurisdictional threshold of the Court over CaH under the Statute, while subpara. (2)(a) defines this threshold in greater detail (see below mn. 200 ff.).<sup>16</sup> It captures the essence of such crimes, namely that they are acts which occur during a widespread or systematic attack on any civilian population in either times of war or peace. The drafting history of this provision reveals that little consensus existed in respect of most of these elements before the Diplomatic Conference in Rome.

Thus, a more in-depth scrutiny going beyond the mere analysis of the positive law is required in order to understand the **rationale** of CaH. Historical facts suggest conceptualizing them as State crimes in a broad sense.<sup>17</sup> This definition is problematic, however, for two reasons. First, it is limited to the classical relation between a State and its citizens residing in its own territory, leaving out other extraterritorial State-citizen relations and relations between a State and foreign citizens;<sup>18</sup> second, it does not account for non-State actors, at least not explicitly. Replacing ‘State’ by ‘non-State actor’ to accommodate the concept to the now recognised standing of the latter as a potential perpetrator of CaH seems inadequate, however, since there is clearly a difference

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have been considered in the category of other inhumane acts under the Nuremberg IMT Charter or were identified as such, in the Peace Conference Commission Report 1919.

<sup>11</sup> See for the work in progress Murphy (2018) 16 *JICJ* 679, 680–1; Sadat (2018) 16 *JICJ* 683, 689 ff.; Kreß and Garibian (2018) 16 *JICJ* 909, 909 ff. (‘solid groundwork has been laid’). The (first) Draft was adopted at the 69<sup>th</sup> session of the ILC (ILC, Report sixty-ninth session, 1 May– 2 Jun. and 3 Jul.–4 Aug. 2017, A/72/10, Aug. 2017, 9) and the UN GA noted the completion of the first reading of the draft articles on 7 Dec. (A/RES/72/116).

<sup>12</sup> See Article 5 ICTY Statute and Article 6(c) IMT Charter.

<sup>13</sup> See Article 3 ICTR Statute.

<sup>14</sup> See also Clark, in: Clark *et al.*, *Russia* (2001) 139, 139–156.

<sup>15</sup> Luban (2004) 29 *YaleJIL* 85, 93 ff., summarizing these legal features as follows (at 108): ‘CaH are international crimes committed by politically organised groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics’.

<sup>16</sup> The ILC Draft Statute 1994 did not include any definition for CaH, which had been proposed as a crime within the Court’s jurisdiction in Article 20.

<sup>17</sup> Cf. Richard Vernon’s classical definition in Vernon (2002) 10 *JPolPhilosophy* 231, 233, 242, 245: ‘a moral inversion, or travesty, of the State’, ‘an abuse of State power involving a systematic inversion of the jurisdictional resources of the State’, ‘a systematic inversion: powers that justify the State are, perversely, instrumentalised by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless’.

<sup>18</sup> See the convincing criticism of Luban (2004) 29 *YaleJIL* 85, 94, fn. 28.



between a State's obligation under international law to guarantee the rule of law and protect its citizens and a similar (emerging) duty of a non-State actor over the territory under its control. Therefore, a concept of CaH which does not deny their eminent political connotation, but yet downplays the focus on the entity behind these crimes is more convincing.<sup>19</sup> 'CaH', understood in this way, intend to provide penal protection against the transgression of the most basic laws protecting our individuality as political beings and our social entity as members of political communities. They protect both, being international crimes, the collective legal interests of international peace and security,<sup>20</sup> but also more concrete individual legal interests such as life, bodily integrity, liberty, and personal autonomy and thus ultimately human dignity.<sup>21</sup>

That also answers another unresolved question since the inception of the concept of CaH, namely whether they were crimes that were particularly inhumane or crimes against a collective body of individuals. Probably the best answer is that they are both,<sup>22</sup> a double assault on individuality (the individual and political 'quality of being human', 'humanness') and groups ('the set of individuals', 'sociability', 'humankind').<sup>23</sup> There was no fundamental disagreement over the prerequisite that the acts must be committed as part of an attack on any civilian population.<sup>24</sup> However, it was unresolved whether these acts needed to take place during armed conflict, and if they had to occur on discriminatory grounds.<sup>25</sup> It is evident from the *chapeau* of Article 7 that the State delegates finally decided not to include either of these requirements.<sup>26</sup>

- 4 Another point of divergence arose over whether the attack had to be both **widespread and systematic**, or only one or the other.<sup>27</sup> It seems to clearly follow from the *chapeau* that the matter was resolved in favour of the alternative formulation. Indeed, this was also the approach taken by the UNWCC speaking of crimes 'which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of

<sup>19</sup> Ambos, *Treatise ICL II* (2014) 47, fn. 14 and main text.

<sup>20</sup> See the Preamble of the ICC Statute, para. 3.

<sup>21</sup> Further on the protected legal interests, see Ambos, *Treatise ICL II* (2014) 48–9, with further references; Werle and Jessberger, *Principles ICL* (2020) 379; Satzger, *ICL* (2018) § 14, mn. 32; *id.*, *Internationales Strafrecht* (2018) § 16, mn. 32.

<sup>22</sup> The following two examples suffice to illustrate the divide. On the one hand J.G. Barsegov, a member of the International Law, noted during the 1989 session that '[i]n Russian as in English and French, the term 'humanity' could mean both 'mankind' and the moral concept whose antonym was 'inhumanity'. That terminological ambiguity clearly showed that there was a conceptual problem. In order to remove the ambiguity, it was necessary to go back to the sources.' See in the 24 May 1915 Declaration by France, Great Britain and Russia (above fn. 4) the crimes in question had been characterised as 'CaH' in the sense of 'crimes against mankind' 1 *YbILC* 10 (1989) (overlooking the use of the term 'laws of humanity' in the St. Petersburg Declaration 1868 and the Martens Clause of 1899 which can be seen as emphasizing the concept of *humaneness* rather than the idea of an attack against 'mankind'. On the other hand, Cassese emphasizes the former concept in: Cassese *et al.*, *Rome Statute I* (2002) 353, 360 ('They are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings').

<sup>23</sup> See Luban (2004) 29 *YaleJIL* 85, 86 ff.; Vernon (2002) 10 *JPol'lPhilosophy* 231, 237 ff., while critical of the element of humanness (see 237), shares the idea of an attack on humankind in the sense of entity and diversity; on humanity as the basis of CaH see Nollez-Goldbach, in: Kastner, *ICL* (2018) 94 ff.; for good overview of the theoretical justifications Stahn, *Introduction ICL* (2019) 53 ff.; see also Ambos, *Treatise ICL II* (2014) 48, fn. 18–20.

<sup>24</sup> *Ad Hoc* Committee Report, paras. 77–80; PrepCom I 1996, paras. 82–90; PrepCom Decisions Feb. 1997, 4–6; PrepCom Draft 1998, 30–3.

<sup>25</sup> *Ibid.*

<sup>26</sup> Article 3 of the ILC Draft of 2017, follows this approach adopting the ICC definition. Note however that the crime of persecution requires that the acts be committed on certain discriminatory grounds (Article 7(1)(h) ICC Statute).

<sup>27</sup> See below mn. 19 ff.

## Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

- (a) Grave breaches of the Geneva Conventions of 12 Aug. 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  - (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  - (vii) Unlawful deportation or transfer or unlawful confinement;
  - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
  - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
  - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
  - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

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### A. Introduction/General remarks\*

**Literature:** Abi-Saab, G., 'The Concept of "War Crimes"', in: S. Yee and W. Tieya (eds.), *International Law In The Post-Cold War World – Essays in Memory of Li Haopei* (Routledge 2001) 99; *id.* and Abi-Saab, R., 'Les crimes de guerre', in: Ascensio et al., *DIP* (2012) 142; Abi-Saab, R., *Droit humanitaire et conflits internes: origines et évolution de la réglementation internationale* (Pedone 1986); Ahlbrecht, H., *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (Nomos 1999); Akande, D., 'Sources of International Criminal Law', in: Cassese *Companion* (2009) 41; Akande, D., 'Classification of Armed Conflicts: Relevant Legal Concepts', in: E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012) 32; Ambos, K., 'Die Verfolgungsermächtigung i.R.v. § 129b StGB', (2015) 8 ZIS 505; Bartels, R., 'From Jus In Bello to Jus Post Bellum. When do Non-International Armed Conflicts End?', in: C. Stahn, J. S. Easterday and J. Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 297; *id.*, 'Legitimacy and ICC Jurisdiction Following Security Council Referrals: Conduct on the Territory of Non-party States and the Legality Principle', in: N. Hayashi and C. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 141; *id.*, 'The Relationship between International Humanitarian Law and the Notion of State Sovereignty' (2018) 23 JCSL 461; *id.*, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals', (2020) 20

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Scope of Application of the Conventions', in Clapham et al., *GC Commentary* (2015) 51; Vit , S., 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', (2009) 91 *IRevRC* 69; Wilmschurst, E., 'Conclusions', in: E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012) 478; van Schaack, B., 'Mapping War Crimes in Syria', (2016) 92 *ILS* 281; Witt, F., *Lincoln's Code: The Laws of War in American History* (Free Press 2012); Zimmermann, A., 'The Creation of a Permanent International Criminal Court', (1998) 2 *MPYbUNL* 169.

### I. Elements of war crimes

- 1 Under international law, war crimes are violations of IHL that are criminalized under international law.<sup>1</sup> Therefore, a conduct can amount to a war crime if it:
  - constitutes a violation of IHL and
  - has been criminalized under treaty or CIL.<sup>2</sup>
- 2 IHL is the law applicable in situations of armed conflict.<sup>3</sup> In contrast to what has occasionally been argued,<sup>4</sup> not all violations of that law necessarily constitute war

<sup>1</sup> Historically, the term 'war crime' can be found in its German version 'Kriegsverbrechen' in Bluntschli, *V lkerrecht* (1872) 358 mn. 643a; according to Witt, *Lincoln's Code* (2012) 343, Bluntschli borrowed this term from Francis Lieber. Lassa Oppenheim used the term in a way which encompassed not only violations of recognised rules of warfare but also all hostilities committed by individuals who were not members of armed forces, espionage and war treason as well as marauding acts, Oppenheim, *International Law II* (1905) 264 mn. 252. – To be sure, under a particular national legal system, the term 'war crimes' may be given a specific national meaning, the consequences of which, however, remain internal to the respective State. Some national military codes, manuals, regulations or other national criminal law instruments use the term 'war crimes' in a broader sense (or more rarely in a more narrow sense) than the term would carry under international law. For instance, national law may subsume offences violating the national military code or discipline such as military disobedience or offences like 'high treason' under the nationally coined notion of 'war crimes'. – In a non-technical sense, the term 'war crimes' is often used, not least by the media, in a broader and more colloquial sense as a convenient short form to connote particular egregious and internationally repudiated crimes connected to a 'war'. At times, the term and the related notions 'war criminal' and 'war crimes tribunal' are also used to refer to all so-called core crimes under international law, that is, war crimes (in the above-described technical sense under international law), crimes against humanity and genocide, and, the crime of aggression. The term 'war crimes' for a crime against humanity or an act of genocide however is misleading since both offences do not require a link to an armed conflict (colloquially a 'war'). – Besides, the term 'war crimes' has sometimes been used to designate all IHL violations which is incorrect. For the more comprehensive and modern term 'crimes of armed conflict' Ambos, *Treatise ICL II* (2014) 117.

<sup>2</sup> Abi-Saab, in Yee and Tieya, *International Law in the Post-Cold War World. Essays in memory of Li Haopei* (2001) 112; O'Keefe, *ICL* (2015) 123–4; Werle and Jessberger, *Principles ICL* (2020) 441–2 mn. 1145; Gaeta, in Clapham et al., *Oxf HB Armed Conflict* (2014) 744; Schwarz, in MPEPIL (last updated 2014) mn. 1; Eudes, in Fernandez et al., *Commentaire I* (2019) 632; Kolb, in Kolb and Scalia, *DIP* (2012) 140; Cottier (2005) 1 *Jurnal Hukum Humaniter* 21, 22; cf. also Henckaerts and Doswald-Beck, *Customary IHL I* (2005) 568 and 570; Rule 156 states that '(s)erious violations of international humanitarian law constitute war crimes', and the commentary speaks of 'violations entailing individual criminal responsibility under international law'; on the doctrinal debate of the concept of war crimes see Cryer, *Prosecuting* (2005) 262–3; for a recent critique of the criminalization element see Hathaway et al. (2019) 44 *YaleJIL* 53, 82 ff. (in favour of replacing the criminalization requirement with the criterion of seriousness); Heller (2017) 58 *HarvILJ* 353 ff., and 370 (arguing that the criminalization does not follow from international law but from an international obligation to domestically criminalize particular acts).

<sup>3</sup> Certain IHL provisions entail obligations which States have to comply with outside of an armed conflict, see for instance Article 49 GC I, Article 50 GC II, Article 129 GC III and Article 146 GC IV on the obligation to criminalize the commission of grave breaches of the Geneva Conventions or Article 4(3) (c) of Add. Prot. II on the prohibition to recruit children who have not attained the age of 15.

<sup>4</sup> US Department of the Army, *Field Manual: The Law of Land Warfare* FM 27–10 (1956) 178 para. 499; cf. now US Department of Defence, *Law of War Manual June 2015 (Updated December 2016)* 1093–4; Paust, in Yee and Tieya, *International Law in the Post-Cold War World. Essays in memory of Li Haopei* (2001) 293.

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crimes.<sup>5</sup> Only those violations of IHL that have been specifically ‘criminalized’, that is, for the perpetration of which customary or treaty international law establishes individual criminal responsibility, may qualify as war crimes. Generally, it is only the more serious violations of IHL that have been criminalized under international law.<sup>6</sup>

Hence, for a specific conduct to amount to a war crime, the following elements are required:

- existence of an armed conflict?
- nexus of the conduct to this armed conflict?
- violation of a specific rule of IHL?
- is this violation of IHL criminalized under international law, and if so, does the conduct fulfil all requisite material and mental elements of the offence?

All of these elements are necessary with respect to each of the offences listed under Article 8(2)(a), (b), (c) and (e). Therefore, we shall examine the first two general elements (types of armed conflict and nexus to such conflict) in their own right. Furthermore, we will provide an overview of the numerous offences under Article 8 and address the question of how the definitions under Article 8 need to be interpreted. First, however, we shall give a short introductory overview of the essence and objectives as well as the evolution of the law of war crimes and the drafting history of Article 8.

## II. International humanitarian law<sup>7</sup>

Given the above, correctly interpreting definitions of war crimes requires an understanding of IHL.<sup>8</sup> IHL is also called the law of armed conflict or *ius in bello*, more archaically also the laws and customs of war or simply law(s) of war.

IHL sets forth rules governing any situation of armed conflict, be it of an international or non-international character. Some acts are prohibited in IACs alone, some in NIACs alone, and some in all conflicts.<sup>9</sup>

Essentially, IHL seeks to moderate negative effects of armed conflicts. In the fog of war, persons in the power of an adversary party to the conflict or in the middle of armed hostilities require special protection. This is why IHL typically protects persons and objects belonging to one of the parties to the conflict from certain abusive or overly destructive conduct by an adversary party to the conflict. Since IHL’s rules have been

<sup>5</sup> Lauterpacht (1944) 21 *BYbil* 58, 77–9; Abi-Saab and Abi-Saab, in Ascensio et al., *DIP* (2012) 152; Dinstein, *Hostilities* (2016) 298; Bothe, in Cassese et al., *Rome Statute I* (2002) 387; Robinson, in Cryer et al., *ICL* (2019) 263.

<sup>6</sup> Cf. Meron (1998) 9 *EJIL* 18, 24 (referring as relevant considerations to the gravity of the act and the interests of the international community); cf. Rowe, in McGoldrick et al., *ICC* (2004) 205: ‘It is not, therefore, surprising to see that all judicial bodies, whether acting as an international or a national tribunal, have concentrated on what they perceive to be the most serious crimes under this umbrella.’

<sup>7</sup> On IHL, see generally Henckaerts and Doswald-Beck, *Customary IHL I/II* (2005); David, *Principes* (2019); Kalshoven and Zegveld, *Constraints* (2011); D. Fleck (ed.), *Handbook IHL* (2013); Clapham et al., *GC Commentary* (2015); Rogers, *Battlefield* (2012); Detter, *War* (2000); McCoubrey, *IHL* (1998); Gasser, *Introduction* (1993); Sassòli, Bouvier and Quintin, *How Does Law Protect in War?* (2011); Sassòli, *IHL* (2019); Kolb, *IHL* (2014); ICRC, *Commentary GC I* (1952); *GC Commentary* (2016); *GC Commentary II* (2017); *GC Commentary III* (2019); *GC Commentary IV* (1958).

<sup>8</sup> Gaeta, in Clapham et al., *GC Commentary* (2015) 738–9; Werle and Jessberger, *Principles ICL* (2020) 454 mn. 1180; on the influence of ICL on IHL see Sassòli, in Cassese, *Companion* (2009) 111 ff.; Cryer, in Harvey, Summers and White, *Essays Rowe* (2014) 117 ff.

<sup>9</sup> As stated by Crawford (2007) 20 *LeidenJIL* 441, 456–7, ‘[...] of the 161 customary rules of humanitarian law as determined by the ICRC study, 17 are solely applicable in international armed conflicts, and only six are solely applicable in non-international armed conflicts [...] 138 rules – or 85 per cent – are uniformly applicable in all armed conflicts.’

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elaborated and adopted to strike a balance between considerations of military necessity and humanitarian considerations, arguments of 'military necessity' cannot (unless a rule provides so specifically) justify the violation of IHL.<sup>10</sup> Recently, the question has arisen *whether IHL is a prohibitive regime or whether it can authorize conduct otherwise prohibited*.<sup>11</sup> With the growing acceptance of the applicability of IHRL also in times of armed conflicts and extraterritorially, IHL no longer is the only branch of international law applicable in conflict situations.<sup>12</sup> The generally more stringent constraints under IHRL led certain States to advocate what others consider to be an expansive application of IHL and to argue that IHL prevails over IHRL as *lex specialis*. Furthermore, it was argued that IHL could be relied on as legal basis for coercive measures, for instance for detention in extraterritorial NIACs, where States act outside of their own territory and cannot rely on their own domestic law.<sup>13</sup> Against this background, the same humanitarian considerations that once motivated actors to advocate a broad application of IHL<sup>14</sup> now give reason to caution against an 'overapplication' of IHL at the expense of more protective standards under IHRL.<sup>15</sup> This debate informs contemporary discussions for instance of the distinction between IACs and NIACs<sup>16</sup> and the scope of application of IHL.<sup>17</sup> At the same time, it should not be overlooked that IHL and its rules tailored to conflict situations aim at the effective protection of civilians in the difficult circumstances

<sup>10</sup> Dinstein, *Hostilities* (2016) 10–1; Kolb, *IHL* (2014) 85–6; O'Connell, in Fleck, *Handbook IHL* (2013) 37; Schmitt (2010) 50 *VirgJIL* 795, 798; see below mn. 119, mn. 193, mn. 215.

<sup>11</sup> Cf. Kolb, *IHL* (2014) 17 (arguing that States' power to act flow from States' respective sovereignty and that 'the general approach of IHL is indisputably negative or prohibitive'); see also Jinks, in Clapham *et al.*, *Oxf HB Armed Conflict* (2014) 658–9, 666–7; Sassòli, *IHL* (2019) 486–95; Quintin, *The Nature of International Humanitarian Law* (2020) 94 ff. (arguing that IHL's general function is a restrictive one but that IHL can also contain permissions).

<sup>12</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Rep. 2004, 136, 178 para. 106: 'As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.'; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Rep. 1996, 226, 240 para. 25; see also HRC, *General comment No. 36 (2018) on Article 6 ICCPR, CCPR/C/GC/36*, 30 Oct. 2018, para. 64 (applicability in armed conflict and extraterritorially); on extraterritorial application see also ECtHR, *Al-Skeini et al. v. UK*, Grand Chamber, Judgment, 55721/07, 7 Jul. 2011, paras. 130–42; *Georgia v. Russia (II)*, Grand Chamber, Judgment, 38263/08, 21 Jan. 2021, paras. 125–44 (holding that events during the active phase of hostilities in an IAC did not fall within the jurisdiction of Russia for the purposes of Article 1 ECHR).

<sup>13</sup> On this development see Rona (2015) 91 *ILS* 32, 40–2; Milanović, in Clapham *et al.*, *GC Commentary* (2015) 48–9; Clapham, in Newton, *War Manual* (2019) 283–92. After the UK Government had unsuccessfully argued that it could rely on a power to detain in the NIAC in Afghanistan before the High Court of Justice and the Court of Appeal, the UK Supreme Court did not decide on this point as a power to detain could be based on an applicable resolution of the Security Council, see UK Supreme Court, *Abd Ali Hameed Al-Waheed and Serdar Mohammed v. Ministry of Defence*, Judgment, [2017] UKSC 2, 17 Jan. 2017, para. 14; see also ICRC, *Commentary GC I* (2016) 249 mn. 728: The ICRC shares the view that 'both customary and international humanitarian treaty law contain an inherent power to detain in [NIAC]. However, additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality.'

<sup>14</sup> Cf. Pictet, *Commentary I* (1952) 50, arguing that common Article 3 'should be applied as widely as possible'.

<sup>15</sup> Kretzmer (2009) 42 *IsLRev* 8, 39; Sassòli, in Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (2011) 52; for a thorough treatment of the question of whether a whole branch of law could prevail over a different branch of law on the basis of a *lex specialis* argument see Milanović, in J.D. Ohlin, *Theoretical Boundaries of Armed Conflict and Human Rights* (2016) 78 ff.

<sup>16</sup> For an emphasis of this distinction see Clapham, in Clapham *et al.*, *GC Commentary* (2015) 11 and 25; Mégret (2014) 96 *IrevRC* 44, 47–8.

<sup>17</sup> Lubell and Derejko (2013) 11 *JICJ* 65, 71–2.

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of armed conflicts. Furthermore, ICL and the prospect of prosecution of violations of IHL can provide an incentive to comply with these rules.<sup>18</sup> Rather than emphasizing one branch of international law at the expense of the other, one should interpret the relevant rules and principles as part of one system in good faith under consideration of their object and purpose (see Articles 31–33 VCLT), be aware of their interrelations and strive for interpretations which reconcile *prima facie* conflicting rules with each other.<sup>19</sup>

IHL first **protects persons not (e.g. civilians) or no longer (e.g. prisoners of war) actively participating in the hostilities** who find themselves in the hands of an adversary. Persons protected under this so-called ‘Geneva law’ branch of IHL include most particularly the wounded, sick, shipwrecked, prisoners of war and any other person detained, interned or otherwise deprived of liberty in connection with an armed conflict, and civilians, particularly the population in an occupied territory. Such persons in the hands of an adversary must be treated humanely. Prohibited are, for instance, torture, rape, scientific experiments, or other violations of a person’s dignity or physical or mental integrity. In general, protected persons that are deprived of liberty are entitled to a judicial examination of their status and, insofar they are prosecuted, to fair trial guarantees. The main sources of this IHL branch are *the four GCs of 1949 as well as the two Add. Prot. of 1977 and CIL*, which is of particular relevance with regard to the law applicable in NIACs and to States which did not ratify the aforementioned treaties.<sup>20</sup> *Whereas IHL first and foremost regulates the relationship between two opposing parties and towards civilians,*<sup>21</sup> *there are also rules addressing the relationship between a party and this party’s own armed forces.*<sup>22</sup> The ICRC has taken the position that ‘insofar as a specific situation has a nexus to a non-international armed conflict, as in the examples given above [when members of the armed forces were ‘tried for alleged crimes [...] by their own Party [...] or sexually or otherwise abused by their own Party’], all Parties to the conflict should, as a minimum, grant humane treatment to their own armed forces based on common Article 3’.<sup>23</sup>

<sup>18</sup> From this perspective, the distinction between IACs and NIACs can be evaluated differently than from the just described IHL perspective, in particular when it comes to war crimes, in relation to which Article 8 makes a distinction between both types of conflicts.

<sup>19</sup> In this sense, the ECtHR held that the grounds for detention under Article 5 ECHR ‘should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under [GC III-IV]’; at the same time, the European Court held that States need to comply with human rights as well and that there must be procedural safeguards which protect the individual against arbitrariness, *Hassan v. UK*, Judgment, 29750/09, 16 Sep. 2014, paras. 104, 106.

<sup>20</sup> Kolb, *IHL* (2014) 65–70; CIL was the applicable law in the Eritrea-Ethiopia Claims Commission, *Ethiopia’s Claim 4, Partial Award: Prisoners of War*, 1 Jul. 2003, XXVI RIAA 73, 87–7 paras 30–2 and *Eritrea’s Claim 17, Partial Award: Prisoners of War*, 1 Jul 2003, XXVI RIAA 23, 39–40 paras. 39–40 (holding that the Geneva Conventions ‘have largely become expressions of customary international law’).

<sup>21</sup> Cf. Clapham, in: Lafontaine, Larocque and Arbour, *Essays Arbour* (2019) 16 (‘International humanitarian law does not traditionally cover how an armed group treats its own forces’); see also below mn. 786.

<sup>22</sup> In relation to IACs several conventions imposed obligations on ‘wounded or sick combatants, to whatever nations they belong’, see Article 6 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Aug. 1864, Article 1 of the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 Jul. 1906, see <ihl-databases.icrc.org> accessed 1 May 2020; Article 1 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 Jul. 1929, 118 LNTS 303; Article 12 GC I; Article 13 GC I; Article 10 Add. Prot. I; see on intra-party protection Sivakumaran, *The Law of Non-International Armed Conflict* (2012) 249: ‘Accordingly, it is submitted that certain provisions regulate the intra-party relationship.’; David, *Principes* (2019) 298–9 mn. 1.229; on the ICC case-law see below mn. 39.

<sup>23</sup> ICRC, *Commentary GC I* (2016) 191–2 mn. 549 and 547 (bracketed addition); critical Newton (2017) 45 *GeorgiaJICL* 513 ff.



## Article 17

### Issues of admissibility\*

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court;

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice;

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

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\* The views expressed in this chapter are those of the authors and, in the case of the second author, does not necessarily reflect those of the ICC.

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### A. Introduction/General remarks

The concept of admissibility in international criminal procedure concerns the forum 1 allocation of cases between national and international criminal jurisdictions. In the domain of international criminal law, when two judicial systems coexist (whether at the horizontal or vertical level), each empowered to exercise competence over the same case(s), it becomes quite common to establish mechanisms to regulate which jurisdiction proceeds and under what conditions.<sup>1</sup> Admissibility in international criminal procedure or international criminal law seeks to solve the potential conflict of jurisdiction that might arise between the two tier legal fora, the national and the international.

This is actually the *status quo* if one follows the development of international criminal law over the last seventy years and in particular, the last two decades. Starting with the attempts undertaken by official, unofficial and semi-official bodies during the Second World War (1941–1943), these bodies proposed the establishment of an international judicial forum or an inter-Allied court, which was meant to function alongside domestic courts, to prosecute the Nazis for their crimes committed in the course of the war.<sup>2</sup> There was a growing tendency to organize the relationship between the proposed court and domestic jurisdictions by creating a procedure which allowed

<sup>1</sup> In the same vein, Schabas, *Introduction ICC* (2017) 169. For instance, at the horizontal level, there is a growing tendency to solve possible conflicts of jurisdiction in the context of crimes under international law through the principle of 'subsidiarity'. According to this principle, the territorial State or the State of nationality enjoys 'jurisdictional priority' as far as it proves ability and willingness to prosecute. In other words, any other State which demands to prosecute international crimes, say on the basis of universal jurisdiction, can do so only as far as the State directly affected fails to do so. Thus, there is a sort of an admissibility test, which assists in resolving issues of competing jurisdictional claims. See Ryngaert, *Jurisdiction* (2008) 211–18. See more recently, *Report of the SG: The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc. A/68/113, 26 Jun. 2013, para. 25; also *Report on the Scope and Principle of Universal Jurisdiction: Information provided by the Kingdom of Spain*, No. 094 FP, 29 Apr. 2013, in particular para. 16; *Report of the SG Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc. A/65/181, 29 Jul. 2010, 26 (observations by Chile and Cuba).

<sup>2</sup> See for example the work done by the London International Assembly, the International Commission for Penal Reconstruction and Development and the UNWCC. The London International Assembly was established in 1941 under the auspices of the League of Nations Union, although it was not an official body. Its mandate was mainly to make recommendations in relation to the question of war crimes committed during the course of WW II and to find solutions to ensure effective punishment for those who bear responsibility for these crimes. See on the London International Assembly, *Historical Survey of the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/7/Rev.1, 1949, at 18; *International Commission for Penal Reconstruction and Development: Proceedings of the Conference held in Cambridge*



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the international machinery to exercise its competence only under exceptional circumstances. The underlying idea was to give preference to the role of domestic courts and solve any possible conflict of jurisdiction at both levels through a sort of admissibility procedure, which aimed at filtering the cases to be dealt with before the international forum.<sup>3</sup> In essence, this is similar to the existing mechanism under the Rome Statute, as designed by its drafters.

- 2 The experience of the Nuremberg IMT, which finally overruled these initiatives, was notably different. The three main Allied powers (UK, USA and the Soviet Union) made a statement in the Moscow Declaration of 30 Oct. 1943,<sup>4</sup> later referred to in the London Agreement of 8 Aug. 1945 establishing the IMT,<sup>5</sup> that German war criminals should be judged and punished in the countries in which their crimes were committed. However, this declaration was limited to the case of relatively minor offenders. ‘German criminals whose offenses [had] no particular geographical localization [and who were labelled as major war criminals] [would] be punished by joint decision of the government of the Allies’.<sup>6</sup> The joint decision resulted in the creation of the IMT, which was called upon to try only the ‘major war criminals’, while the remaining offenders referred to in both the Moscow Declaration and the London Agreement were to be dealt with before national criminal jurisdictions under the confines of CC Law No. 10.<sup>7</sup>

Therefore, this allocation of cases between the IMT and domestic courts, including military tribunals, did not give rise to the need to further establish conditions or criteria to regulate which forum was to proceed with the case under consideration. The Allies’ decision to divide the responsibilities between the two-tier jurisdictions in this categorical manner, on the basis of the accused’s level of responsibility, resolved from the outset any possible conflict of jurisdiction that could have arisen and thus actually served as an admissibility procedure. This filtering process was carried out in accordance with Article 14 of the IMT Charter.<sup>8</sup> The situation in the Far East was quite similar. The IMTFE was created ‘for the just and prompt trial and punishment of the major war criminals in the Far East’. The remaining Japanese war criminals lacking a ‘leadership background’ were dealt with in their respective ‘occupied or colonized territories’.<sup>9</sup>

- 3 When the *ad hoc* tribunals were established in the early 1990s the idea that these tribunals would exercise exclusive jurisdiction over the core crimes referred to in their statutes was rejected (retaining instead also the competence of national courts). This led to the inevitable conclusion to set up a system by which to resolve the positive conflict of jurisdiction between the two level fora. The Statutes of the ICTY and ICTR as well as their respective RPE<sup>10</sup> embody identical provisions which serve this purpose. The SCSL

on the 14<sup>th</sup> November, 1941, Between Representatives of Nine Allied Countries and of the Department of Criminal Science in the University of Cambridge, at 11; UNWCC Progress Report, Doc C.48, 12 Sep. 1944.

<sup>3</sup> *Ibid.*

<sup>4</sup> The Tripartite Conference at Moscow, October 19–30, 1943, reprinted in: *International Conciliation*, No. 395, at 599–605 (1943) [hereinafter Moscow Declaration].

<sup>5</sup> London Agreement of August 8, 1945, reprinted in: (1947) 1 *TWCC Before the IMT* 8 [hereinafter London Agreement] 8.

<sup>6</sup> *Ibid.*

<sup>7</sup> Allied CCL No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, 20 Dec. 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 Jan. 1946; also, Cassese, in Cassese *et al.*, *Rome Statute I* (2002) 7.

<sup>8</sup> IMT Charter, 8 Aug. 1945, Article 14(b) <<http://avalon.law.yale.edu/imt/imtconst.asp>> last accessed 23 Apr. 2020.

<sup>9</sup> El Zeidy, in Stahn and El Zeidy, *Complementarity* (2011) 71, 124–125.

<sup>10</sup> See Rule 9 ICTY RPE; Rule 9 ICTR RPE.

## Article 21 Applicable law

1. The Court shall apply
  - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

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(2005) 16 *CLF* 1; Triffterer, O., ‘Acts of Violence and International Criminal Law – A New Position of Power to Fight Abuse of Power?’, (1997) 4 *Croatian AnnCL&Prac* 811; Young, Rebecca, ‘Internationally Recognized Human Rights Before the ICC’, (2011) 60 *I&CompLQ* 189.

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### A. Introduction/General remarks

- Article 21 establishes a hierarchy of applicable law for the judges of the ICC to apply in adjudicating cases. The sources of law elaborated in Article 21 derive generally from those contained in Article 38 of the ICJ statute, which represents the most authoritative statement of the sources of general international law.<sup>1</sup> Article 38 lists as sources: treaties, custom, general principles recognized by ‘civilized’ nations, and, as a subsidiary means for determining the law, judicial decisions and scholarly publications. Article 21 is modelled on this list, with modifications to account for the particularities of criminal law, especially the need for clarity and specificity. For instance, Article 21 departs from Article 38 in establishing a hierarchy among sources of law.
- Article 21 also reflects compromises reached in the negotiations. The principal issue at stake in drafting Article 21 was how much discretion should be granted to the ICC’s judges in light of the conflicting demands of the principle of legality on the one hand, and, on the other, the inevitability of lacunae in a nascent legal system. Two principal schools of thought emerged at the PrepCom meetings regarding the appropriate degree of judicial discretion in discerning applicable law. A minority of States took the position that the principle of legality requires that judicial discretion be limited strictly in the

<sup>1</sup> While Article 38 is binding only with respect to cases before the ICJ, it is considered evidence of customary law. See Jennings and Watts, *Oppenheim* (1992) 24.

### *Applicable law*

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criminal law context.<sup>2</sup> Any doubt as to the relevant legal provision should be resolved, according to this view, by direct application of the appropriate national law. The majority position, on the other hand, sought to accommodate the unique nature of the international legal order by allowing the judges to discern and apply general principles of international criminal law. Article 21 represents a compromise between these two approaches: when all other sources fail, the Court must apply general principles derived from national laws, including, as the Court deems appropriate, those of the States that would normally exercise jurisdiction over the crime.

The negotiating history of Article 21 shows an evolution in the discussions that led to the adoption of this compromise. The ILC's final Draft Statute for an ICC listed three sources of law, without specifying a hierarchy of application. The Court was to apply (a) the statute; (b) treaties and principles and rules of general international law; and (c) applicable rules of national law.<sup>3</sup> No guidance was provided as to which national laws should be considered applicable. The 1996 PrepCom Report noted the extensive discussion of 'whether the Court should be empowered to elaborate/legislate further the general principles of criminal law that are not written in the Statute'.<sup>4</sup> Among the proposals favouring wide judicial latitude was one that would have empowered the judges to elaborate elements of crimes and principles of liability and defences not included in the Statute.<sup>5</sup> These elements and principles would then be submitted to the States Parties for approval.<sup>6</sup> However, some delegations rejected the notion that the judges should be empowered to 'legislate' general principles of criminal law.<sup>7</sup> One delegation proposed that where the Statute itself did not contain the relevant law, the Court should apply directly the national law of the territorial State, the State of nationality of the accused, or the custodial State – in that order.<sup>8</sup>

At the Rome Conference, as in the earlier negotiations, contentious debate surrounded paragraph 1(c) – the final source of law, which was divided into two vastly different options in the final draft of the Statute.<sup>9</sup> Option 1, which had broad support, stated that the Court would apply general principles of law derived from national laws of the legal systems of the world; and option 2, endorsed by a substantial minority, provided that the Court would apply national laws directly, in the hierarchical order described above<sup>10</sup>.

On 8 Jul., the Working Group on Applicable Law issued a Working Paper stating: 'Most delegations favoured option 1, but some still favour option 2. A view was expressed that the laws indicated in option 2 could be given as examples of the national laws referred to in option 1, so that the two options be combined'<sup>11</sup>. On 11 Jul., the WG transmitted to the Committee of the Whole the text of what was to become Article 21, with the exception of paragraph 3, which was still under discussion<sup>12</sup>. The final text of paragraph 1(c) reflects the compromise proposed in the Working Paper – options 1 and

<sup>2</sup> See PrepCom II 1996, p. 105 ('It was stated by some delegations ... that the Court should not be empowered to legislate principles of criminal law').

<sup>3</sup> See ILC Draft Statute 1994, Article 33, p. 103.

<sup>4</sup> PrepCom II 1996, p. 104.

<sup>5</sup> See *ibid.*, pp. 104–05.

<sup>6</sup> See *ibid.*

<sup>7</sup> See *ibid.*, p. 105.

<sup>8</sup> See *ibid.*

<sup>9</sup> In contrast, the first two sources in paragraphs 1(a) and (b) were generally uncontroversial and paragraphs 2 and 3 were completely without brackets in the final draft. See PrepCom Draft 1998, Article 20, pp. 47–48. Note that Article 20 became Article 21 in the Rome Statute.

<sup>10</sup> See *ibid.*, p. 46.

<sup>11</sup> Working Paper on Article 20, UN Doc. A/CONF.183/C.1/WGAL/L.1 (8 Jul. 1998), p. 2, mn. 3.

<sup>12</sup> Report of the WG on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2 (11 Jul. 1998).

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2 were combined, except that the reference to particular national laws was now optional, and no hierarchy was specified.

- 6 The Report of the WG shows that neither side of the debate felt completely vindicated by this solution. The Report notes that '[s]ome delegations were of the view that the phrase 'including, as appropriate' should be replaced by the word 'especially'<sup>13</sup>. On the other hand, '[s]ome delegations express the view that, as a matter of principle, no reference to any national laws of States should be made. The Court ought to derive its principles from a general survey of legal systems and their respective national laws'<sup>14</sup>. Despite these lingering objections, the Committee of the Whole endorsed the WG's compromise, adopting paragraph 1(c) without modification<sup>15</sup>.
- 7 The sources of general public international law have become well established since the adoption of the ICJ statute<sup>16</sup>. However, until the ICC was created, international criminal law lacked a permanent international forum. Moreover, the statutes of the ICC's predecessor international criminal tribunals contain no provisions specifying the applicable law. Article 21 thus constitutes the first codification of the sources of international criminal law.
- 8 In practice, the *ad hoc* international criminal tribunals generally apply first their statutes and rules of procedure and evidence, and, if those sources prove inconclusive, customary international law and general principles derived from the legal systems of the world<sup>17</sup>. Although the U.N. Secretary General decreed that the ICTY should apply only rules 'which are beyond any doubt part of customary law'<sup>18</sup>, the tribunals have unquestionably effectuated significant developments in international criminal law. These include, notably, the ICTY's holding that war crimes can be committed in non-international armed conflict<sup>19</sup>. Some commentators have been critical of the tribunals in this regard, arguing that they are insufficiently respectful of the principle of legality<sup>20</sup>. In fact, some participants in the Rome Conference apparently feared that the ICC would follow what they called the 'Cassese approach', referring to the judge responsible for many of the ICTY's legal innovations<sup>21</sup>.
- 9 Such fears stemmed not only from concerns about fairness to defendants, but also from the reluctance of some States to relinquish control over the law that could be applied to their nationals. Some delegations preferred to safeguard this aspect of their sovereignty by mandating that, when faced with lacunae in the applicable statutory and customary law, the Court would apply directly the national law of relevant States. Other delegations felt strongly, however, that it would be inappropriate for an international court to apply anything other than international law. They argued that direct application of national law would involve inconsistent justice and would hinder the development of a coherent body of international criminal law.

<sup>13</sup> *Ibid.*, p. 2, fn. 3.

<sup>14</sup> *Ibid.*, p. 2, fn. 4.

<sup>15</sup> Compare *ibid.*, with Rome Statute, Article 21.

<sup>16</sup> See ICJ Statute, Article 38; see also Preliminary Remarks, in Triffterer, *Commentary* (2008) 38–39, mn. 64 *et seq.*

<sup>17</sup> See, e.g., ICTY, *Prosecutor v. Erdemović*, AC, Joint Separate Opinion of Judge McDonald and Judge Vohrah, IT-96-22-A, 7 Oct. 1997, para. 40; Fan (2012) 10 *JICJ* 1063.

<sup>18</sup> See, e.g., ICCPR, entered into force 23 Mar. 1976, 999 UNTS 171, 6 *ILM* 368 (1967), Article 15 para. 1 ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed').

<sup>19</sup> ICTY, *Prosecutor v. Tadić*, AC, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 Oct. 1995, paras. 128–37.

<sup>20</sup> See, e.g., Fan (2012) 10 *JICJ* 1063, 1065 (citing Degan (2005) 4 *Chinese JIL* 45).

<sup>21</sup> *Ibid.*, 1068.



## Article 25

### Individual criminal responsibility\*

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- 3bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

**Literature:** Agbor, A.A., 'The Substantial Contribution Requirement: The Unfortunate Outcome of an Illogical Construction and Incorrect Understanding of Article 6(1) of the Statute of the ICTR', (2012) 12 *ICLRev* 155; *id.*, 'The Problematic Jurisprudence on Instigation under the Statute of the ICTR: The

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\* Kai Ambos acknowledges the important research assistance of Jerre Sander and Jacopo Governa.



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lichkeit im Völkerstrafrecht', (2004) 116 ZStW 999; *id.*, 'Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges', (2008) 6 JICJ 471; *id.*, 'Societas delinquere non potest?', (2008) 6 JICJ 927; *id.*, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', (2011) 9 JICJ 91; *id.*, 'Problems of Attribution in ICL: A German Perspective', (2014) 12 JICJ 253; *id.*, 'How to interpret complicity in the ICC Statute' 15 Dec. 2014, <<http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute/>> accessed 22 Sep. 2020; Weißer, B., *Täterschaft in Europa: Ein Diskussionsvorschlag für ein europäisches Tätermodell auf der Basis einer rechtsvergleichenden Untersuchung der Beteiligungssysteme Deutschlands, Englands, Frankreichs, Italiens und Österreichs* (Mohr Siebeck 2011); *id.*, *Organisationsherrschaft und organisationsbezogene Beihilfe*, (2019) 166 GA 244; Weltz, K., *Die Unterlassungshaftung im Völkerstrafrecht, eine rechtsvergleichende Untersuchung des französischen, US-amerikanischen und deutschen Rechts* (Edition Iuscrim 2004); Werle, G., 'Individual Criminal Responsibility in Article 25 ICC Statute', (2007) 5 JICJ 953; *id.*, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in: van Sliedregt, E. and Vasiliev, S. (eds.), *Pluralism in ICL* (OUP 2014), 301; *id.*, 'Täterschaft und Teilnahme im Statut des Internationalen Strafgerichtshofs', in: Heger, M., Kelker, B. and Schramm, E. (eds.), *FS für Kristian Kühl zum 70. Geburtstag* (C.H. Beck, 2014), 851; Werle, G. and Burghardt, B., 'Die mittelbare Mittäterschaft – Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?', in: Bloy, R. et al. (eds.), *FS für Manfred Maiwald zum 75. Geburtstag* (Duncker & Humblot 2011) 849; Williamson, J., 'Command Responsibility in the Case law of the ICTR', (2002) 13 CLF 365; Wirth, S., 'Co-Perpetration in the Lubanga TJ', (2012) 10 JICJ 971; Wise, E.M., 'Part 3: General Principles of Criminal Law', in: Sadat Wexler, *Draft Statute* (1998) 39; Yanev, L.D., 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of JCE', (2015) 26 CLF 419; *id.*, 'Co-Perpetration Responsibility in the KSC. Staying on the Beaten Path?', (2016) 14 JICJ 102; *id.*, 'On Common Plans and Excess Crimes: Fragmenting the Notion of Co-Perpetration in ICL', (2018) 31 *LeidenJIL* 693; *id.*, 'JCE', in: Hemptinne et al., *Modes* (CUP 2019) 121.

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### A. Introduction/General remarks

The provision, in particular paras. 1 and 2, confirms the universal acceptance of the principle of individual criminal responsibility as recognized by the IMT<sup>1</sup> and reaffirmed by the ICTY in the *Tadić* jurisdictional decision with regard to individual criminal responsibility for violations of common Article 3 GC.<sup>2</sup> The drafting history has been described elsewhere.<sup>3</sup>

Subparas. (a)–(c) of para. 3 establish the basic concepts of individual criminal attribution.<sup>4</sup> Subpara. (a) refers to three forms of perpetration: on one’s own, as a co-perpetrator or through another person (perpetration by means, *mittelbare Täterschaft*). Subpara. (b) contains different forms of participation: on the one hand, ordering an (attempted) crime, on the other soliciting or inducing its (attempted) commission. Subpara. (c) establishes criminal responsibility for ‘aiding and abetting’ as the subsidiary form of participation. Thus, in contrast to the ILC Draft Codes of Crimes against the Peace and Security of Mankind,<sup>5</sup> the Statutes of the *Ad Hoc* Tribunals and the so-called mixed tribunals (SCSL and the ECCC),<sup>6</sup> para. 3 distinguishes between perpetration (subpara. (a)) and other forms of participation (subparas. (b) and (c)), with the latter establishing different degrees of responsibility.<sup>7</sup> This approach confirms the general

<sup>1</sup> The IMT (H.M. Attorney General by HMSO, 1950, Part 22, 447) held that individual criminal responsibility has ‘long been recognized’ and further stated: ‘enough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced’.

<sup>2</sup> ICTY, *Prosecutor v. Tadić*, AC, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR-72, 2 Oct. 1995, paras. 128–37 (134): ‘All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife’. For an analysis on the case law since Nuremberg, see Ambos, *Völkerstrafrecht* (2002) 78 ff.; *id.*, in: McDonald and Swaak-Goldman, *ICL I* (2000) 1, 7 ff. See also Triffterer, in: Hankel and Stuby, *Strafgerichte* (1995) 169, 211–3; Bassiouni, *Introduction* (2013) 17, 49, 60–1, 66 ff.; Jain, *Perpetrators* (2014), 18 ff. For an analysis of the ICTR’s case law, see Boed (2002) 13 CLF 293, 296 ff.

<sup>3</sup> Cf. Ambos, *Internationales Strafrecht* (2018) § 6 mn. 22–3; Bassiouni, *Legislative History I* (2005) 3–40; Schabas (1998) 6 *EJCLCJ* 400. For a good critique of the misnomer ‘modes of liability’ Stewart (2012) 25 *LeidenJIL* 165, 166, fn. 2 (who, however, uses the expression then all over his paper).

<sup>4</sup> See also Ambos, *Internationales Strafrecht* (2018) § 7 mn. 3. For a comprehensive treatment of Article 25(3) see *id.*, *Treatise ICL I* (2021) 211 ff.

<sup>5</sup> Article 2(13) ILC Draft Code 1954; Article 3 ILC Draft Code 1991; Article 2 ILC Draft Code 1996.

<sup>6</sup> See Article 7(1) ICTY Statute and (the identical) Article 6(1) ICTR Statute: ‘A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ...’. See also Article 6(1) SCSL Statute, Article 29 ECCC Law, Article 16(1)(a) KSC Law.

<sup>7</sup> Conc. Eser, in: Cassese *et al.*, *Rome Statute I* (2002) 767, 788, fn. 86.

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tendency in comparative criminal law to reject a pure unitarian concept of perpetration (*Einheitstätermode*ll)<sup>8</sup> and to distinguish, at least on the sentencing level, between different forms of participation.<sup>9</sup> The approach is also followed, albeit less elaborate, by the internationalized panels for East Timor;<sup>10</sup> for example the act of providing the *means* for the commission of a crime is not made explicitly punishable.<sup>11</sup> In fact, Article 25 differentiates already at the level of allocation of responsibility, at least terminologically, between different forms of participation and thereby follows a unitarian concept of perpetration in a functional sense (*funktionelle Einheitstäterschaft*)<sup>12</sup> as known, for example, in Austrian and Swedish law.<sup>13</sup> This differentiation entails, at least with regard to the relationship between the forms of perpetration (direct, indirect and co-perpetration) and the forms of secondary participation (encouragement, assistance), a **hierarchy** in terms of the blameworthiness of the

<sup>8</sup> In favour of the unitarian model Stewart (2012) 25 *LeidenJIL* 165, 205 ff. who, however, argues on the basis of some incorrect and imprecise assumptions (most importantly the 'Hitler-as-accomplice' assumption, at 167, which runs through the whole paper), takes the Austrian system as his model of a unitarian system (at 205; apparently, despite fn. 194, not fully grasping its functional unitarian orientation similar to Article 25, see next fn.) and, most importantly, does neither provide an analysis of Article 25 (apparently assuming that it is based on the differentiated system) nor further elaborates on his (alternative) 'theory'; previously Kreß (1999) 9 *HuV-I* 4, 12 (interpreting Article 25 as a unitarian model).

<sup>9</sup> Cf. Triffterer, in: Hankel and Stuby, *Strafgerichte* (1995) 169, 226; Pradel, *DP Comparé* (2016) 139 ff.; Fletcher, *Concepts* (1998) 188 ff.; Du Bois-Pedain, in: Ambos *et al.*, *Core Concepts I* (2020) 94; Robinson, *Justice* (2020), 210–13. In a similar vein also Mantovani (2003) 1 *JICJ* 26, 34; Jain, *Perpetrators* (2014) 43–4; Conway (2018) 7 *CILJ* 51 (proposing a *sentencing hierarchy*, based on a hierarchy of the modes of liability, with a view to solving the problem of inconsistent sentencing practices in ICL); Jackson ((2016) 29 *LeidenJIL* 879, esp. 886–9), argues against Stewart's 2012 proposal for the abolition of accomplice liability in ICL (as expounded in: Stewart, 25 *LeidenJIL* 165), and stresses that it is necessary to retain the participatory system in ICL in order to be able to accurately allocate criminal liability to the various participants; there are also different views. See e.g. Rotsch, 'Einheitstäterschaft' (2009) who renounces any differentiation between forms of participation and instead advocates, contrary to a traditional unitarian system, a uniform system of imputation that only recognizes the distinction between immediate (direct) and mediate (indirect) violations of legally protected goods. For an even more radically different approach Jakobs, *Beteiligung* (2014) who argues that participation constitutes only a reason of imputation [*Zurechnungsgrund*] and the form of participation – perpetration or secondary participation – only a kind of competence in quantitative terms [*Zuständigkeitsquantitäten*]; competence in turns depends on or is linked to certain spheres of organisation [*Organisationskreise*] each person is competent for and must not extend to the detriment of others. This negative duty is complemented by a positive one according to which one has to establish or maintain certain institutions.

<sup>10</sup> Sec. 14 UNTAET Regulation 2000/15.

<sup>11</sup> Unlike Article 25 (3)(c) and (f) ICC Statute respectively.

<sup>12</sup> Advocating a four-layer-system of participation Werle (2007) 5 *JICJ* 953, 957; *id.* and Burghardt, in: Bloy *et al.*, *FS Maiwald* (2011) 849, 853; *id.*, in: van Sliedregt and Vasiliev, *Pluralism* (2014), 301, 315 ff.; *id.*, in: Heger *et al.*, *FS Kühl* (2014), 851; Werle and Jessberger, *Principles* (2020) mn. 611. Vest (2010) 8 *JICJ* 851, 856, fn. 19 addresses the peculiarity of Article 25(3) by defining it as 'a differentiating model with uniform (unified) range of punishment'; see also *id.*, *Völkerrechtsverbrecher* (2011) 179; *id.* (2014) 12 *JICJ* 295, 305 ff.; *conc.* Gil and Maculan (2015) 28 *LeidenJIL* 351, 362; in favour of a 'functional unitary theory' now Stewart in: Ackerman *et al.*, *Visions* (2016) 326, 350 (on the basis of a review of several, primarily European, legislations concluding that this is preferable to a 'pure' unitary system; deviating from his former view, above fn. 8). Descriptive on the whole discussion about the structure of Article 25 (3): Stahn (2014) 12 *JICJ* 809, 822 ff.; Gil and Maculan (2015) 28 *LeidenJIL* 364 ff. (rejecting 'hierarchy of blameworthiness' [at 365] and focusing on the 'accessory or autonomous nature of the contribution' [366] as the key distinguishing criterion [cf. also 363, 370]); Gal, in: Hemptinne *et al.*, *Modes* (2019) 18–19. Leaving the question of the model open: Mitgutsch, in: Geisler *et al.*, *FS Geppert* (2011) 357, 373–4 (concluding that Article 25 could be understood either as a unitarian or a differentiated model).

<sup>13</sup> For profound comparative studies see Hamdorf, *Beteiligungsmodelle* (2002) 43 ff., 75 ff., 104 ff.; Ambos, *Völkerstrafrecht* (2002) 543 ff.; Weißer, *Täterschaft in Europa* (2011); on the English and German law Jain, *Perpetrators* (2014) 103 ff. and 166 ff. (perpetrator), 155 ff. and 176 ff. (accessory); recently critically on the Austrian law Schünemann (2020) 167 *GA* 224 ff. ('identical legal consequences for perpetration and complicity').

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participation.<sup>14</sup> This higher blameworthiness of a form of perpetration within the meaning of subpara. 3(a) applies, *a fortiori*, with regard to the expansions of attribution provided for by subparas. (d), (e) and (f), *i.e.*, contributing to the commission or attempted commission of a crime by a group, incitement to genocide, attempt.

Thus, in sum, Article 25(3) contains, on the one hand, basic rules of individual criminal responsibility and, on the other, rules expanding attribution (which may or may not still be characterized as specific forms of participation). *Grosso modo*, an individual is criminally responsible if s/he perpetrates, takes part in or attempts to commit a crime within the jurisdiction of the Court (Arts. 5–8). It must not be overlooked, however, that criminal attribution in ICL has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person's individual act is punished, ICL creates liability for acts committed in a collective context and systematic manner; consequently the individual's own contribution to the harmful result is not always readily apparent.<sup>15</sup>

## B. Analysis and interpretation of elements

### I. Paragraph 1

As far as the jurisdiction over natural persons is concerned, para. 1 states the obvious. Already the IMT found that international crimes are 'committed by men not by abstract

<sup>14</sup> The *Lubanga* TC followed this approach: ICC, *Prosecutor v. Lubanga*, TC I, Judgment Pursuant to Article 74, ICC-01/04-01/06-2842, 14 Mar. 2012, paras. 996–9 (998: '...predominance of principal over secondary liability, which, in turn, supports a notion of principal liability that requires a greater contribution than accessory liability'). In the same vein, the *Lubanga* AC (*Prosecutor v. Lubanga*, AC, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red A5, 1 Dec. 2014, paras. 462 ff.) distinguishes (confusing terminologically, however, 'commit' and 'perpetrate') between perpetration and accessory responsibility, the former being more blameworthy than the latter (para. 462), which makes it necessary to determine the basis of this distinction (para. 463); adopting this view *Prosecutor v. Blé Goudé*, PTC I, Decision on the confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11-186, 11 Dec. 2014, para. 135 and especially *Bemba et al.*, AC, Judgment on the Sentence, ICC-01/05-01/13-2276-Red, 8 Mar. 2018, para. 60. In favour also Kiss, in: Hemptinne *et al.*, *Modes* (2019) 42 ff.; Cupido, in: *ibid.*, 321–22. However, the *Katanga* TC (*Prosecutor v. Katanga*, TC II, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, 7 Mar. 2014, paras. 1386–7, 1394 ff.) while recognizing the inherent distinction between perpetrators and accomplices in the Statute (paras. 1387, 1395) and the *control-over-the-act* approach (1394–5) rejects the normative hierarchy between them (1386–7); *contra* also *Lubanga*, ICC-01/04-01/06-2842, Sep.Op. of Judge Adrian Fulford, paras. 6–12, who rejects 'a hierarchy... between the modes of liability' (9), which 'were not intended to be mutually exclusive' (7); *Prosecutor v. Ngudjolo Chui*, TC II, Judgment pursuant to Article 74, TC, Conc.Op. Judge van den Wyngaert, ICC-01/04-02/12-4, 18 Dec. 2012, paras. 5–6, 17, 22 ff., 66, 70 (who, although recognising 'a conceptual difference between principal and accessory criminal responsibility', rejects their 'different legal treatment' (22)) and *Prosecutor v. Katanga*, TC II, Jugement rendu en application de l'article 74 du Statut, Min.Op. Judge van den Wyngaert, ICC-01/04-01/07-3436-AnxI, 7 Mar. 2014, paras. 279–81; in favour of against a hierarchy between the various modes of perpetration within the meaning of para. 3(a) *Prosecutor v. Al-Mahdi*, TC VIII, Judgment and Sentence, ICC-01/12-01/15-171, 27 Sep. 2016, para. 60. *Contra* also Ohlin *et al.* (2013) 26 *LeidenJIL* 725, 728 ff., 740 ff., 745–6; Sadat and Jolly (2014) 27 *LeidenJIL* 755, 758, 775, 782, albeit with a too formalistic, international law based reading of Article 25 without going into any substantive discussion of the respective forms of participation (785); Aksenova (2015) 15 *ICLR* 653–658; Kappos (2018) 16 *JICJ* 425, 432–3; Schabas, *Introduction* (2017) 213–4.

<sup>15</sup> See – for a first attempt to develop a theory of attribution in ICL – Marxen, in: Lüderssen, *Kriminalpolitik* (1998) 220, 226 ff.; see also Vogel (2002) 114 *ZStW* 403 ff.; similarly, Kreß in: Tiedemann *et al.*, *Verfassung* (2016) 259 ff.; on the peculiarities of attribution in ICL see also Ambos, *Völkerstrafrecht* (2002) 539 ff. and *passim*; *id.* (2006) 4 *JICJ* 660, 663; *id.*, *Internationales Strafrecht* (2018) § 7, mn. 11.

## Article 28

### Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take the necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

**Literature:** Abeyratne, R., 'Superior Responsibility and the Principle of Legality at the ECCC', (2012) 44 *GeoWashJILRev* 39; Ambos, K., 'Superior Responsibility', in: Cassese *et al.* *Rome Statute I* (2002) 823; *id.*, 'Joint Criminal Enterprise and Command Responsibility', (2007) 5 *JICJ* 159; *id.*, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LeidenJIL* 715; *id.*, 'International Economic Criminal Law', (2018) 29 *CLF* 499; *id.*, 'Omissions', in Ambos *et al.*, *Core Concepts I* (2020) 17; Ambos K. and Aboueldahab, S. 'Command Responsibility and the Colombian Peace Process', in: FS Kremnitzer 2020, (forthcoming); Arnold, R., 'Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Khiam Detention Centre', (2002) 7 *JCSL* 191; *id.*, 'Military Criminal Procedures and Judicial Guarantees: The Example of Switzerland', (2005) 3 *JICJ* 749; *id.*, 'Book Review of Nybondas, M. L., Command Responsibility and Its Applicability to Civilian Superiors', (2013) 11 *JICJ* 943; *id.*, Book Review 'E. Heffes *et al.* (eds.), International Humanitarian Law and Non-State Actors – a Contradiction of Terms?' 2020 53(3) *IsLRev* 13 409; *id.* and Wehrenberg, S., 'Die Strafbarkeit des Vorgesetzten nach Article 264 k StGB' ('The Criminal Responsibility of the Superior Under Article 264k of the Swiss Criminal Code'), (2013) (52) 2 *MLLWRev* 241; Bantekas, I., 'Contemporary Law of Superior Responsibility', (1999) 93 *AJIL* 577; Barco, J., 'La responsabilidad por el mando en el Acuerdo de Paz firmado por el Gobierno Colombiano y las FARC-EP: un análisis sobre la base del caso Bemba de la Corte Penal Internacional', (2019) 15 *Nuevo Foro Penal* 153; Berster, L., "'Duty to Act" and "Commission by Omission" in International Criminal Law' (2010) 10 *ICLRev* 619; Bonafe, B.I., 'Finding a Proper Role for Command responsibility', (2007) 5 *JICJ* 599; Bradley M. and de Beer A., "'All Necessary and



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### A. Introduction

#### I. General

- 1 In October 1945, at the residence of the United States' High Commissioner in Manila, a Military Commission established under the authority of General MacArthur, Commander of the U.S. Armed Forces in the Pacific Theatre, was convened to try General Tomoyuki Yamashita.<sup>1</sup> General Yamashita had commanded Japanese forces in the Philippines prior to his surrender in September 1945. The core of the charge against Yamashita lay in the claim that he failed to discharge his duty as commander to control the activities of members of his command, activities which included the commission of atrocities.<sup>2</sup> Yamashita was convicted by the Military Commission, denied his petition for *habeas corpus* and prohibition by the U.S. Supreme Court early the following year,<sup>3</sup> and executed in February 1946.<sup>4</sup>

<sup>1</sup> U.S. Military Commission, Manila, *Trial of General Tomoyuki Yamashita*, Case No. 21, 4 Feb. 1946, LRTWC, Volume IV (London: UN War Crimes Commission, 1948).

<sup>2</sup> *Ibid.*, 3–6.

<sup>3</sup> U.S. Supreme Court, *In re Yamashita*, 327 US 1 (1946).

<sup>4</sup> For an overview and evaluation, see Parks (1973) 62 *MillRev* 22–38.



This is the modern origin of the doctrine of command responsibility or, more aptly given its evolution, the doctrine of superior responsibility.<sup>5</sup> The previous edition of this commentary provides a rich overview of its historical development.<sup>6</sup> Often described as an original creation of international law,<sup>7</sup> superior responsibility establishes the criminal responsibility of superiors on the basis of their material ability to control their subordinates. National military law has long provided a system of responsibility of commanders, including the delineation of specific duties of control.<sup>8</sup> On the international plane, as early as the Geneva Convention of 1864, we see the articulation of a specific duty of implementation: 'The implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.'<sup>9</sup> As Triffterer explains, slow and uneven normative development followed, which eventually led to the articulation of a more comprehensive set of principles and duties in Articles 86 and 87 of Add. Prot. I.<sup>10</sup>

The overarching military notion of responsible command, pursuant to which commanders must discharge their command and control duties,<sup>11</sup> is key to understanding the genesis and application of the criminal law doctrine of command responsibility and, more specifically, Article 28.<sup>12</sup> The principle of 'responsible command' is incorporated in Article 1 Hague Reg.,<sup>13</sup> and in the provision in Article 43(1) Add. Prot. I that the 'armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates ...'<sup>14</sup> The principle of responsible command applies also in times of NIAC: Article 1(1) Add. Prot. II refers to armed forces, dissident forces or other organized groups under a 'responsible command'.<sup>15</sup> In *Hadžihasanović*, the ICTY AC explicitly drew the link between responsible command and command responsibility as a criminal law doctrine. First, in general terms, the Chamber referred to command responsibility as the *corollary* of responsible command – as the 'the most effective method by which international criminal law can enforce responsible command.'<sup>16</sup> Second, and more specifically, the Chamber found that the requirement of military organization applicable

<sup>5</sup> Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 851. For criticism in respect of its application to General Yamashita himself, see *U.S. Supreme Court*, *In re Yamashita*, 327 US 1 (1946) (DissOp of Justice Murphy). See further Parks (1973) 62 *MillRev* 35–38.

<sup>6</sup> Triffterer, in: Triffterer/Ambos, *Commentary* (2016) mn. 1–84.

<sup>7</sup> Werle and Jessberger, *Principles ICL* (2014) 221. See generally Karsten, *Verantwortlichkeit* (2010).

<sup>8</sup> Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 5. See relatedly ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, AC, Judgement, IT-96-21-A, 20 Feb. 2001, para. 226: 'It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.'

<sup>9</sup> Article 8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 Aug. 1864. See Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 10.

<sup>10</sup> Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 10–24.

<sup>11</sup> See Sivakumaran (2012) 10 *JICJ* 1130–1137 on the duty of commanders.

<sup>12</sup> On the historical development of the doctrine of superior responsibility, see Parks (1973) 62 *MillRev* 1; Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 1–84.

<sup>13</sup> Article 1 Regulations, Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 Oct. 1907.

<sup>14</sup> Article 43(1) Add. Prot. I.

<sup>15</sup> Article 1(1) Add. Prot. II.

<sup>16</sup> ICTY, *Prosecutor v. Hadžihasanović et al.*, AC, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 Jul. 2003, paras. 14, 16.

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too in NIAC implied responsible command and thus the applicability of the criminal law doctrine of command responsibility.<sup>17</sup>

- 4 Article 28, then, entails the detailed specification of superior responsibility in its *criminal* form on the international plane. On one hand, this detailed specification is helpful, marking a clearer delineation of the doctrine than in the Statutes of the ICTY and ICTR.<sup>18</sup> On the other hand, certain drafting choices add a new dimension to points of discussion in older case law, while also introducing new doctrinal questions. More widely, at first glance, the justification for the criminal law doctrine of superior responsibility in general, and for its inclusion in the Rome Statute in particular, is straightforward: it centres responsibility on those who have a particular capacity to ensure compliance with international law.<sup>19</sup> At the same time, in its creation of a form of *omissions* liability, as well as in respect of particular elements of the doctrine, superior responsibility has long encountered principled critique – in terms of the principles of legality and culpability, as well as wider considerations of fairness.<sup>20</sup> Central here is the contested issue of causation, as well as the fact that liability can arise in situations where the superior possessed neither intent nor knowledge.<sup>21</sup> In addition, the story of superior responsibility as a criminal law doctrine is, in part at least, a story of expansion,<sup>22</sup> bound up with growth in substantive international criminal law. We see in the Rome Statute the textual affirmation of this expansion: from application in international armed conflict to non-international armed conflict, from war crimes in a broad sense to other international crimes set out in the Statute, from military commanders to civilian relationships, even in times of peace.<sup>23</sup>
- 5 The elements of superior responsibility in customary international law have been developed and scrutinized in international case law and scholarship. Much of that material is relevant for the interpretation of Article 28, though account must be taken of certain textual choices in the Statute. In addition, Article 28(a) received detailed judicial attention at each stage of the proceedings in *Bemba*, where the charges related to crimes committed by forces found to be under the defendant's command on the territory of the CAR between late-October of 2002 and mid-March of 2003.<sup>24</sup> These proceedings encompass the PTC's confirmation of the charges in 2009,<sup>25</sup> conviction at trial in

<sup>17</sup> Hadžihasanović, IT-01-47-AR72, para. 17. See though Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP 2018) 85–89 on whether responsible command is a pre-requisite to party status under Common Article 3. In this respect, see *Prosecutor v. Mrkšić et al.*, TC II, Judgement, IT-95-13/1-T, 27 Sep. 2007, para. 407: 'While some degree of organisation by the parties will suffice to establish the existence of an armed conflict, this degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute.'

<sup>18</sup> See similarly Article 6(3) SCSL Statute and Article 29 ECCC Law.

<sup>19</sup> Ambos, *Treatise ICL I* (2021) 274.

<sup>20</sup> See e.g. Damaška (2001) 49 *AmJCompL* 455; Mettraux, *Responsibility* (2009) 8–11; Robinson (2012) 13 *MelbJIL* 1.

<sup>21</sup> Cf. Article 30 Rome Statute. On this issue, see Damaška (2001) 49 *AmJCompL* 455; Martinez (2007) 5 *JICJ* 638; Robinson (2017) 28 *CLF* 633.

<sup>22</sup> See though, as discussed in detail below, ICC, *Prosecutor v. Bemba*, AC, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC 01/05-01/08-3636-Red, 8 Jun. 2018.

<sup>23</sup> Cf. Mettraux, *Responsibility* (2009) 96–99 and Ronen (2012) 43 *VandJTransnatL* 313.

<sup>24</sup> See McDermott (2016) 110 *AJIL* 526; Powderly (2018) 57 *ILM* 1031.

<sup>25</sup> ICC, *Prosecutor v. Bemba*, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC 01/05-01/08-424, 15 Jun. 2009.

## Article 31

### Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
  - (i) Made by other persons; or
  - (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

**Literature:** Anguiling-Pangalangan, R.L., 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals' (2018) 33 *AmUJILRev* 605; Ambos, K., 'Other Grounds for Excluding Criminal Responsibility', in: Cassese *et al.*, *Rome Statute I* (2002) 1003; *id.*, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *CLF* 1; *id.*, 'Zur Rechtsgrundlage des Internationalen Strafgerichtshofs – Eine Analyse des Rom-Statuts' (1999) 111 *ZStW* 175; *id.*, 'May a State Torture Suspects to Save the Life of Innocents?' (2008) 6 *JICJ* 261; *id.*, 'Defences in International Criminal Law', in: Brown, *RH ICL* (2011) 299; *id.*, 'Defences in ICL: Exceptions in International Law?', in: Bartels and Paddeu (eds.), *Exceptions in International Law* (OUP 2020) 347; *id.* and Alkatout, J., 'Has 'Justice been done'? The Legality of Bin Laden's Killing under International Law' (2012) 45 *IsLRev* 341; Babucke, L., *Der Schulddefekt im Völkerstrafrecht. Rechtsvergleichende Analyse und Reformvorschlag für den internationalen Strafgerichts-*

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43; Xavier, I., 'The Incongruity of the Rome Statute Insanity Defence and International Crime' (2016) 14 *JICJ* 793; Yee, S., 'The *Tu Quoque* Argument as a Defence to International Crimes, Prosecution or Punishment' (2004) 3 *ChinJIL* 87; Zimmermann, A., 'Superior Orders', in: Cassese *et al.*, *Rome Statute I* (2002) 957.

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## A. General remarks – Genesis and scope of the provision

With regard to the genesis of Article 31, two lines of development are worth mentioning: a more substantive and a more formal one. The first is concerned with the question of whether the Statute should provide for exclusionary grounds at all given the especially serious nature of ICC crimes.<sup>1</sup> However, while defences should certainly not be applied lightly to abhorrent crimes, every (alleged) criminal has a right to be tried according to the rule of law, which includes his/her right to invoke possible defences. Insofar, the drafters' attempt to codify the main exclusionary grounds marks a progress and a welcome step towards a comprehensive codification of ICL.<sup>2</sup>

At any rate, the development in recognizing exclusionary grounds leads from almost zero to considerable heights, finally ending on a middle level.<sup>3</sup> If we take the 1994 ILC Draft Statute, neglecting earlier drafts,<sup>4</sup> as starting point we quickly realize that it does not mention exclusionary grounds at all; this may be explained by the fact that this ILC Draft only contains a general rule on 'applicable law' (Article 33), thereby allowing the recourse to 'general international law' or 'any (applicable) rule of national law' in order to identify exclusionary grounds. Given the considerable criticism of this approach, including alternative proposals,<sup>5</sup> all further UN or ILC drafts contained a number of defences. This new openness can be observed as early as 1995 with the *Ad Hoc* Committee Report, where in Annex II a long list of possible defences can be found.<sup>6</sup> Still more proposals arose from the work of the 1996 PrepCom.<sup>7</sup> However, in all further recommendations of the WG on General Principles of Criminal Law, solely mistake of fact or of law were explicitly recognized.<sup>8</sup> The eventually decisive step was then taken by the PrepCom at its December 1997 session, where it accepted the recommendations of the WG on General Principles, which formed the basis of the current Article 31.<sup>9</sup>

After these recommendations had basically been upheld by the Inter-Sessional Meeting of January 1998<sup>10</sup> and were finally included in the PrepCom Draft Statute of April

<sup>1</sup> See also Stahn, *Introduction ICL* (2019) 147 ('tension' with end of impunity, 'limited role').

<sup>2</sup> To the same end cf. van Sliedregt, *Responsibility IHL* (2003) 299; also Ambos, in: Bartels and Paddeu, *Exceptions* (2020) 347–48.

<sup>3</sup> See also Ambos, *Internationales Strafrecht* (2018) 212 ff.; *id.*, *Treatise ICL I* (2013) 301 ff.; Knoops, in: Doria *et al.*, *Legal Regime* (2009) 779, 793 ff.; Schabas, *ICC Commentary* (2016) 638 ff.; van Sliedregt, *Responsibility IHL* (2003) 239 ff. – Further cf. on the controversy about an exhaustive or enumerative list of defences, Scaliotti (2001) 1 *ICL Rev* 111, 119; van Sliedregt, *Responsibility* (2012) 221 ff.

<sup>4</sup> Such as the ILC Draft Code 1991, in which at least some rudimentary general principles and in rather general terms 'defences and extenuating circumstances' had been recognized: cf. Eser, in: Bassiouni, *Commentaries* (1993) 58 ff. – As to whether and to what kind and degree defences had already found consideration and recognition in the Nuremburg trials see Heller, *Nuremburg* (2011) 294 ff.

<sup>5</sup> In particular cf. the various (private) Siracusa/Freiburg/Chicago-Drafts which, as an alternative to the (official) ILC-Drafts, had been prepared by a WG of the AIDP/ISIS in Siracusa/Italy and the (former) MPI for Foreign and International Criminal Law (now renamed "MPI for the Study of Crime, Security and Law") in Freiburg/Germany (Article 33; published in: Nill-Theobald, *'Defences'* (1998) 454 ff.); as several of these rules had been phrased differently by Eser, Koenig, Lagodny and Triffterer with the assistance of Ambos and Vest (reprinted and compared with the version in the Updated Siracusa Draft in: Ambos, *Völkerstrafrecht* (2002) 942 ff.), these rules were also integrated into 'Proposals to Amend the "Draft Code of Crimes against the Peace and Security of Mankind"', in: Triffterer, *Acts of Violence and ICL*, Annex 2, (1997) 4 *Croatian AnnCrimL&Pract*, 872. On the role of these different drafts see also Eser, in: Cassese *et al.*, *Rome Statute I* (2002) 777.

<sup>6</sup> *Ad Hoc* Committee Report, pp. 18 ff., 48 ff.

<sup>7</sup> PrepCom, UN Doc. A/AC.249/CRP.9 (4 Apr. 1996), Annex: General Principles of Criminal Law. Cf., in addition, PrepCom II 1996, pp. 79 ff.

<sup>8</sup> Cf. PrepCom Decisions Feb. 1997, pp. 18 ff.

<sup>9</sup> See Arts. L–O, PrepCom Decisions Dec. 1997, pp. 18 ff.

<sup>10</sup> See Zutphen Draft, pp. 60 ff.



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1998<sup>11</sup> – the formal basis of the Rome Conf. –, all further modifications were less substantial. The Final Draft Statute as presented to the Diplomatic Conference was structured basically in the following way: Whereas mistake of fact or mistake of law (Article 30) as well as superior orders and prescription of law (Article 32) were regulated in special provisions and later merely renumbered to Articles 32 and 33 respectively, draft Article 31 was at that stage partly broader, recognizing a sort of necessity (para. 1(d)), but at the same time partly narrower due to its absence of a defence of property in case of war crimes (originally to be regulated in a specific Article 33, now within Article 31(1)(c)); it was also narrower in that it regulated the present para. 3 of Article 31 regarding other exclusionary grounds in a special Article 34. Whereas the chapeau of Article 31 as well as para. 1(a) and paras 2 and 3 remained almost unchanged in their substance, para. 1(b), (c) and (d) underwent various modifications in the course of the Rome Conf. Why, **when and in which way** this happened, will be seen in connection with the analysis of the respective grounds for excluding criminal responsibility (see below mn. 17 ff.).

- 4 In the Post-Rome activities of the PrepCommis in charge of defining certain ‘Elements of Crimes’ (EoC) and elaborating ‘Rules of Procedure and Evidence’ (RPE), the subject matter of defences did not play a major role: Whilst the Elements, in abstaining from any further concretization of the Statutory grounds for excluding criminal responsibility, remind the Prosecutor of his/her obligation under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally,<sup>12</sup> the Rules foresee only few procedural regulations of when and how to raise exclusionary grounds.<sup>13</sup> Similarly, exclusionary grounds are mentioned in the Regulations of the Court (RegC) only once.<sup>14</sup>
- 5 While the current provision, as will be seen, certainly has its merits, it must be made clear from the outset that both its heading is misleading and its contents **incomplete**. When speaking of ‘grounds for excluding criminal responsibility’ in such a general way, the provision seems to comprise all defences which may entail the exclusion of criminal responsibility. This impression is, however, misleading from two countervailing ends: On the one hand, as follows from para. 1 ([‘In addition’]), Article 31 is not the only place in the Statute where grounds for excluding criminal responsibility may be found (see below mn. 8 ff.); in this respect, the provision has a supplementary function in that it regulates grounds for excluding criminal responsibility not yet regulated in other provisions of the Statute. On the other hand, Article 31 is far from providing a complete list of all possible defences, as may be seen from the missing list (see below mn. 13 ff.). In fact, the provision solely deals with incapacity (mn. 20 ff.), intoxication (mn. 26 ff.), self-defence, including defence of property (mn. 32 ff.), and duress (mn. 46 ff.). It is up to the ‘Court’ to ‘determine’ the concrete ‘applicability’ of the respective exclusionary ground(s) (para. 2, see mn. 61 ff.), including other grounds pursuant to the applicable law (para. 3, see mn. 70 ff.).
- 6 Beyond being merely supplementary and still incomplete, the manner in which these grounds for excluding criminal responsibility are regulated is ambivalent insofar as it leaves open the question as to whether a specific ground may be considered a ‘justification’ of the offence or merely an ‘excuse’ of the offender, or whether other –

<sup>11</sup> PrepCom Draft 1998, pp. 66 ff.

<sup>12</sup> General Introduction, para. 5 EoC, fn. 1; cf. Kelt and v. Hebel, in: Lee, ICC (2001) 19, 38.

<sup>13</sup> Cf. Rule 79(1)(b) RPE (the defence shall notify the prosecutor of intent to raise a defence pursuant to Article 31(1)), Rule 80 RPE (procedures for raising a defence pursuant to Article 31(3)), Rule 121(9) RPE (procedures relating to pre-trial hearings). Cf. Brady, in: Lee, ICC (2001) 403, 414 ff., Friman, in: Lee, ICC (2001) 493, 521 ff.

<sup>14</sup> Cf. 54(p) RegC: at a status conference, the TC may issue any order on the defences, if any, to be advanced by the accused.



## PART 5 INVESTIGATION AND PROSECUTION

### Article 53\* Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
  - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
  - (b) The case is or would be admissible under Article 17; and
  - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
  - (a) There is not a sufficient legal or factual basis to seek a warrant or summons under Article 58;
  - (b) The case is inadmissible under Article 17; or
  - (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under Article 14 or the Security Council in a case under Article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
3. (a) At the request of the State making a referral under Article 14 or the Security Council under Article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.  
(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

**Literature:** Badagard, L., and Klamberg M., 'The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the ICC (2017) 48 *GeorgetownJIL* 639; Bitti, G., 'Article 53 – Ouverture

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\* The authors would like to acknowledge the contributions of Pieter Kruger to this comment.

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d'une enquête' in: Fernandez *et al.*, *Commentaire II* (2019) 1447; Buchanan, R., 'The Mavi Marmara Incident and the ICC', (2014) 25 *CLF* 465; Danner, A.M., 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the ICC' (2003) 97 *AJIL* 510; deGuzman, M., 'Gravity and the Legitimacy of the ICC', (2009) 32 *FordhamILJ* 1402; De Meester, K., 'Article 53: Initiation of an Investigation' in: Klamberg, *Commentary* (2017); De Souza Dias, T., '"Interests of Justice": Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the ICC', (2017) 30 *LeidenJIL* 731; Goldston, J. A., 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the ICC', (2010) 8 *JICJ* 383; Goldstone, R. J. and Fritz, N., 'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers', (2000) 13 *LeidenJIL* 655; Jacobs, D., 'A Samson at the ICC: The Powers of the Prosecutor at the Pre-Trial Phase', (2007) 6 *LAPE* 317; Longobardo, M., 'Everything is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair', (2016) 14 *JICJ* 1011; Magnoux, C., 'The Sound of Silence: Le pouvoir discrétionnaire du procureur de la Cour pénale internationale à travers l'utilisation des critères d'Intérêts de la justice et de gravité lors de l'ouverture d'une enquête' (2017) 9 *RQDI* 9; Ntanda Nsereko, D., 'Prosecutorial Discretion before National Courts and International Tribunals', (2005) 3 *JICJ* 124; Olásolo, H., 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?', (2003) 3 *ICLRev* 87; Razesberger, F., *The ICC: The Principle of Complementarity* (Peter Lang 2006); Schabas, W. A., 'Prosecutorial Discretion v. Judicial Activism at the ICC', (2008) 6 *JICJ* 731; Stahn, C., 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC', (2017) 15 *JICJ* 413; Stegmiller, I., 'The Pre-Investigation Stage of the ICTY and the ICC Compared', in: T. Krüßmann (ed.), *ICTY: Towards a Fair Trial?*, (2008) 322; Turone, G., 'Powers and Duties of the Prosecutor', in: Cassese *et al.*, *The Rome Statute II* (2002), 1137; Varaki M., 'Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court' (2016) 27 *EJIL* 769; *id.*, 'Revisiting the "Interests of Justice" Policy Paper', (2017) 15 *JICJ* 455; Ventura, M., 'The "Reasonable Basis to Proceed" Threshold in the Kenya and Côte d'Ivoire *Proprio Motu* Investigation Decisions: The ICC's Lowest Evidentiary Standard?', (2013) 12 *LAPE* 49; Webb, P., 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"', (2005) 50 *CLQ* 305; Wouters, J., Verhoeven, S. and Demeyere, B., 'The ICC's Office of the Prosecutor: Navigating between Independence and Accountability?', (2008) 8 *ICLRev* 273.

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### A. Introduction/General remarks

Article 53, despite its misleading title, does not only govern the processes by which 1 the Office of the Prosecutor ('OTP') decides to start an investigation or prosecution. It also regulates the review by the PTC of the decision not to proceed with an investigation or prosecution, as well as the power of the Prosecutor to reconsider decisions whether to start an investigation or prosecution based on new facts or information. Article 53(1) and (2) provide substantive criteria for the consideration of whether to start an investigation or a prosecution, respectively. Paragraph 3 regulates the scope of, and procedural requirements for, review of the Prosecutor's discretionary power not to proceed with an investigation or prosecution and the role of the PTC. At the core of the general notion of 'prosecutorial discretion' lies the power to decide whether or not to investigate and prosecute a case. This notion is an important manifestation of the statutory principle of functional prosecutorial independence found in Article 42, and is ultimately based on policy criteria that are not defined in the Statute, such as the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends.<sup>1</sup>

Article 13 of the Statute regulates the exercise of the Court's jurisdiction by the 2 organs of the Court, including the OTP. It provides that the Prosecutor's power to investigate can be triggered in three different ways. *First*, by a referral of a situation to the Prosecutor by a State Party in accordance with Articles 13(a) and 14; *second*, by a referral of a situation by the Security Council ('SC') acting under Chapter VII of the UN Charter, in accordance with Article 13(b); and, *third*, by an independent initiation of an investigation by the Prosecutor which has then been expressly authorised to proceed by the PTC pursuant to Articles 13(c) and 15. For Article 53 to come into play, the situation must have been triggered by one of the three trigger mechanisms. If the Prosecutor has initiated a preliminary examination pursuant to Articles 13(c) and 15(1) and (2), he or she 'shall consider the factors set out in Article 53(1)(a) to (c)' according to Rule 48 in the Rules of Procedure and Evidence. Additionally, if the Prosecutor is seized of a situation through Article 13(a) or (c), in accordance with Article 12, the territorial State or one State of nationality must either be Party to the Statute or have accepted the exercise of jurisdiction by the Court with respect to the crime in question. Article 53 also applies to the crime of aggression – the definition of which<sup>2</sup> was adopted in the first Review Conference held in Kampala<sup>3</sup> and which entered into force on 17 Jul. 2018 – following the activation of the Court's jurisdiction on 14 Dec. 2017.<sup>4</sup> The SC's determination of whether an act of aggression has occurred does not affect the conditions enshrined in Article 53. In fact, where no such determination is made, the

<sup>1</sup> See Varaki (2016) 27 *EJIL* 774.

<sup>2</sup> See Articles 8*bis*, 15*bis* and 15*ter* ICC Statute.

<sup>3</sup> See Res. RC/Res. 6 The crime of aggression <<http://www.legal-tools.org/doc/0d027b/>>.

<sup>4</sup> See Res. ICC-ASP/16/Res. 5 Activation of the jurisdiction of the Court over the crime of aggression.

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## Part 5. Investigation and Prosecution

Pre-Trial Division may still authorise an investigation in respect of a crime of aggression if the Prosecutor requests it (Article 15*bis*(8)).<sup>5</sup> On the other hand, if the Prosecutor declines to open an investigation, the State Party which referred the situation to the Court may appeal this decision before the PTC pursuant to Article 15*bis*(4).

3 The drafting history of Article 53 of the Statute should be viewed alongside that of the controversial Articles 12 and 13, which set the jurisdictional parameters of the Court and its Prosecutor. Drafts from both the Preparatory Committee ('PrepCom') and the ILC contained references to provisions on the triggering of the jurisdiction of the Court in the Article corresponding to final Article 53. Article 54 of the Draft Statute proposed by the PrepCom was very lengthy and contained provisions, which can now be found in Articles 53, 54, 55 and 57 of the Statute.<sup>6</sup> The provisions relevant to what is now Article 53 appeared in draft Article 54(1)–(3) with multiple brackets and tentative language on several of the issues involved. Article 54(1)–(3) reflected draft Article 47(1), 1*bis* and 1*ter* of the Zutphen Draft Statute.<sup>7</sup> Both of these drafts encapsulated the inconclusive and preliminary deliberations at the PrepCom regarding the content Article 53. Article 26(1), (4) and (5) of the ILC Draft Statute had formed the basis of the work of the Committee.<sup>8</sup> However, the Diplomatic Conference substantially contributed to what was finally adopted in Article 53.<sup>9</sup>

4 The close connection between Article 53 and the mechanisms triggering the Court's jurisdiction renders a comparison with the corresponding ICTY Statute provision (Article 18) of limited relevance to the interpretation and analysis of Article 53.<sup>10</sup> Article 18(1) of the ICTY Statute states that the Prosecutor 'shall initiate investigations *ex-officio* or on the basis of information obtained from any source'. This is a reflection of the SC's determination, when it established the Tribunal pursuant to Chapter VII of the UN Charter, that the Prosecutor needs no judicial or other authorisation in order to start an investigation. Through the creation of the Tribunal by virtue of a binding Chapter VII Resolution,<sup>11</sup> the SC mandated the Prosecutor to investigate and prosecute. As such, it differs from the ICC regime, which is premised on State acceptance of the Court's jurisdiction, trigger mechanisms, and on deference to national criminal justice systems in light of complementarity.

Article 18(1) of the ICTY Statute provides that the Prosecutor has prosecutorial discretion to 'decide whether there is sufficient basis to proceed' with an investigation based on his or her assessment of 'the information received or obtained'. This is, however, an *evidentiary* test and not one of *appropriateness*. The latter consideration, which some would be inclined to describe as more political, was exercised by the SC when it found that there was a situation involving serious violations of international humanitarian law in the former Yugoslavia justifying international judicial intervention.

Article 18(4) of the ICTY Statute resembles Article 53(2) of the ICC Statute only insofar as it provides that the Prosecutor, 'upon a determination that a *prima facie* case exists, shall prepare an indictment'.

<sup>5</sup> Article 15*bis*(8).

<sup>6</sup> See PrepCom Draft 1998, pp. 89–95.

<sup>7</sup> See Zutphen Draft, pp. 86–87.

<sup>8</sup> See ILC Draft Statute 1994, II, B, I, p. 90.

<sup>9</sup> See Bitti, in: Fernandez *et al.*, *Commentaire II* (2019) 1448–1452.

<sup>10</sup> Investigations are subdivided into two phases: a pre-investigation and the formal investigation, but the former is only relevant for the ICC, where it takes the form an autonomous stage: that of a 'preliminary examination'. In fact, the pre-investigative phase at the *ad hoc* tribunals consisted only of an initial assessment of the information received by the Prosecutor. See Ambos, *Treatise ICL III* (2016), 334–335.

<sup>11</sup> Res. 827 (1993), 25 May 1993 <<http://www.legal-tools.org/doc/dc079b>>.

## Article 61

### Confirmation of the charges before trial\*

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

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\* The views expressed herein are those of the authors alone and do not reflect the views of the International Criminal Court or the Kosovo Specialist Chambers.



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## Part 5. Investigation and Prosecution

- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
  - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
  - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to Article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

**Other relevant provisions:** Rules 121 to 130, see Annex I. Regulations 31, 52 and 53 of the RegC.

**Literature:** Ambos, K., 'International Criminal Procedure: "Adversarial", "inquisitorial" or mixed?' (2003) 3 *ICLRev* 1; *id.*, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LeidenJIL* 715; *id.*, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs Disclosure Obligations: The Lubanga Case and National Law', (2009) 12 *NCLRev* 543; Ambos, K. and Miller, D., 'Structure and Function of the confirmation procedure before the ICC from a comparative perspective', (2007) 7 *ICLRev* 335; Bekou, O., 'Prosecutor v Thomas Lubanga Dyilo – Decision on the Confirmation of Charges', (2008) 8 *HumRtsLRev* 343; *id.*, 'Enhancing the Quality of Investigations: What Role Can the In-Depth Analysis Charts Play?', in: X. Agirre *et al.* (eds.), *Quality Control in Criminal Investigation*, (Torkael Opsahl Academic EPublisher 2020), 587; *id.* and Bergsmo, M., 'The In-depth Evidence Analysis Charts at the International Criminal Court', in M. Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, (Torkael Opsahl Academic EPublisher 2011), 313; Bitti, G., 'Article 53', in Fernandez *et al.*, *Commentaire II* (2019), 1447; Brady, H. and Jennings, M., 'Appeal and Revision', in Lee, ICC (1999), 300; Bourguiba, L., 'Article 61', in Fernandez *et al.*, *Commentaire II* (2019), 1675; Clark, R., Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the ICC (2008) 6 *NZ YB Int'l L* 209; Cotte, B. and Saracco, M., 'Article 64', in Fernandez and Pacreau, *Commentaire II* (2012) 1443; de Smet, S., 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC', in Stahn and Sluiter, ICC (2008), 405; Friman H., Brady H., Costi M., Guariglia F. and Stuckenberg C.-F., 'Charges', in Sluiter *et al.*, *International Criminal Procedure* (2013), 381; Hofer, D., *Zur Zukunft des strafprozessualen Zwischenverfahrens*, Dissertation Universität Köln (2005); Jones, J.R.W.D., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998); Karnavas, M., 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: More of the Same Hybridity With Added Prosecutorial Transparency', (2020) 20 *ICLRev* 77; King, F.P., 'Public Disclosure in Rule 61 Proceedings before the former ICTY' (1997) 29 *NYJIL&Pol* 523; Mariniello, T., 'Questioning the Standard of Proof', (2015) 13 *JCIJ* 579; McDermott, Y., 'The ICC's Chambers Practice Manual: Towards a Return to Judicial Law Making in International Criminal Procedure?', (2017) 15 *JICJ* 873; Miraglia, M., 'First Decision of the ICC Pre-Trial Chamber', (2006) 4 *JICJ* 188; *id.*, 'Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga', (2008) 6 *JICJ* 489; Ochoa, J.C.S., 'The ICC's Pre-Trial Chamber I Confirmation of Charges Decision in the Case of Prosecutor v. Thomas Lubanga Dyilo: Between Application and Development of International Criminal Law', (2008) 16 *EJCLCJ* 39;



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**Art. 61 1–3**

*Part 5. Investigation and Prosecution*

**A. Introduction/General remarks**

**I. Historical development**

- 1 The confirmation process provided for in Article 61 is the mechanism by which the PTC determines whether the case should be sent to trial. The closest equivalent before the *ad hoc* tribunals is the so-called Rule 61 Procedure, introduced by the judges early in the work of the ICTY as a mechanism to appease those who felt there should be the capacity of *in absentia* trials.<sup>1</sup> Despite persistent denials,<sup>2</sup> it had many similarities with an *in absentia* procedure and was, in many respects, an honourable compromise between the different views of jurists from the Romano-Germanic and common law systems with respect to such proceedings.<sup>3</sup> Rule 61 hearings to confirm indictments were held in 1995 and 1996 by the ICTY, but later abandoned, and they were never used at the sister tribunal for Rwanda. This may be because the Prosecutor became too busy with defendants who were actually in custody, and for whom no such confirmation was required. Indeed, the Prosecutor may also have believed that such hearings could only benefit the accused while offering little or no assistance in obtaining a conviction. The *ad hoc* tribunals also provide for judicial authorisation of the issuance of an indictment, but this is really no different in principle from the earlier stage in the proceedings under the Rome Statute by which a warrant of arrest or summons is approved by the PTC.
- 2 Establishment of the confirmation procedure within the procedural architecture of the Rome Statute is an important example of the increased judicial control by the judiciary over the Prosecutor that sets the ICC apart from other international criminal justice institutions.<sup>4</sup> The confirmation of charges provision did not exist in the so-called Zutphen text. At the PrepCom meetings held in March–April 1998, a group of delegations submitted a proposal containing an alternative text for procedural matters. The confirmation hearing was comprised in a document entitled ‘Further option for Articles 58 to 61’,<sup>5</sup> which it was decided would be used as a basis for discussions at the Rome Conf. Article 61 of this text was entitled ‘Confirmation of the charges before trial’. The substantial parts of this draft provision were approved by the Rome Conf. and became Article 61, with the exception of paragraphs 8 and 11, which were added during the Conference.
- 3 At the February session of the PrepCommis in 1999, Article 61 was discussed extensively within the context of the drafting of the RPE, based upon proposals

<sup>1</sup> On the Rule 61 procedure, see: King (1997) 29 *NYJIL&Pol* 523; Quintal (1998) 36 *ColJTransnatL* 723; Thieroff and Amley Jr. (1998) 23 *YaleJIL* 231; Schabas, *ICC Commentary* (2016), 926–927.

<sup>2</sup> ICTY, *Prosecutor v. Rajić*, Review of the Indictment Pursuant to rule 61 of the Rules of Procedure and Evidence, IT-95-12-R61, 13 Sep. 1996, para. 3: ‘A Rule 61 proceeding is not a trial in absentia. There is no finding of guilt in this proceeding’. ICTY, *Prosecutor v. Nikolić*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-2-R61, 20 Oct. 1995, p. 2: ‘The Rule 61 procedure ... cannot be considered a trial in absentia; it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal’. Also affirmed by the STL in *Prosecutor v. Ayyash et al.*, Decision to Hold Trial in Absentia, STL-11-01/I/TC, 1 Feb. 2012, para. 37.

<sup>3</sup> The UN itself proposed, in Nov. 2006, the creation of an international tribunal with the power to hold *in absentia* trials. See Report of the SG on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, paras 32–33.

<sup>4</sup> On the common law-civil law divide at the Rome Conf. see Ambos (2003) 3 *ICLRev* 1, 8–9.

<sup>5</sup> UN Doc. A/CONF.183/2/Add.1.

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submitted by Australia and France.<sup>6</sup> In the course of the debate, discussion papers proposed by the Coordinator of the Working Group on Rules of Procedure and Evidence, entitled ‘Part 5 of the Rome Statute: Investigation and Prosecution’,<sup>7</sup> covering confirmation procedure and disclosure of evidence were introduced (hereafter referred to as the ‘proposed Rules’).

In national legislation, a procedure similar to that of Article 61 is found, for example, 4 in the German Criminal Procedure Code (§§ 199–211, ‘Das Zwischenverfahren’).<sup>8</sup>

## II. Purpose of the confirmation procedure

The purpose of the confirmation procedure under Article 61 is not explicitly men- 5 tioned in the Court’s statutory documents. In the Article 61(7) decisions, PTCs regularly lay down their understanding of the purpose of the confirmation of charges process.

The PTC has been ascribed a ‘gatekeeper function’ or ‘filter function’ according to 6 which only those cases for which the Prosecutor has presented ‘sufficiently compelling charges going beyond the mere theory of suspicion’,<sup>9</sup> shall proceed to trial. By implication, Article 61 ‘is designed to protect the rights of the Defence against wrongful and wholly unfounded charges’.<sup>10</sup> PTCs underscore that only those charges ‘which are sufficiently supported by the available evidence and which are clear and properly formulated, in their factual and legal aspects’, ought to be submitted to the TC.<sup>11</sup>

<sup>6</sup> Proposals submitted by Australia – Draft Rules of Procedure and Evidence of the International Criminal Court (UN Doc. PCNICC/1999/DP.1) and Proposals by France concerning the RPE (UN Doc. PCNICC/1999/DP.7, and DP.8, Add.1 and Add.2).

<sup>7</sup> UN Doc. PCNICC/1999/WGRPE/RT3 and RT4.

<sup>8</sup> See, for example, Roxin and Schünemann, *Strafverfahrensrecht* (29<sup>th</sup> ed. 2017), 338; Rieß, P., *Das Zwischen- oder Eröffnungsverfahren im Strafprozess*, (2002) *JURA* 735. Contrasting the ‘Zwischenverfahren’ with the ICC confirmation process, Hofer, *Zukunft* (2005).

<sup>9</sup> ICC, *Prosecutor v. Katanga and Ngudjolo*, PTC I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 Sep. 2008, para. 39; ICC, *Prosecutor v. Banda and Jerbo*, PTC I, Corrigendum of the ‘Decision on the Confirmation of Charges’, ICC-02/05-03/09-121-Corr-Red, 7 Mar. 2011, para. 31; ICC, *Prosecutor v. Mbarushimana*, PTC I, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 Dec. 2011, para. 41; ICC, *Prosecutor v. Gbagbo*, PTC I, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 Jun. 2013, para. 18; ICC, *Prosecutor v. Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, 23 Mar. 2016, para. 14; ICC, *Prosecutor v. Al Mahdi*, PTC I, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-84-Red, 24 Mar. 2016, para. 15; ICC, *Prosecutor v. Al Hassan*, PTC I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 Nov. 2019 (original decision registered on 30 Sep. 2019), para. 42; ICC, *Prosecutor v. Yekatom and Ngaïssona*, PTC II, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Red, 20 Dec. 2019 (original decision registered on 11 Dec. 2019), para. 14.

<sup>10</sup> ICC, *Prosecutor v. Lubanga*, PTC I, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 Jan. 2007, para. 37; reaffirmed in *Katanga and Ngudjolo*, ICC-01/04-01/07-717, para. 63; ICC, *Prosecutor v. Abu Garda*, PTC I, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 Feb. 2010, para. 39; *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red, para. 31; *Mbarushimana*, ICC-01/04-01/10-465-Red, para. 41; ICC, *Prosecutor v. Ruto et al.*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 Jan. 2012, para. 40; ICC, *Prosecutor v. Muthaura et al.*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 Jan. 2012, para. 52; *Gbagbo*, ICC-02/11-01/11-432, para. 18; *Ongwen*, ICC-02/04-01/15-422-Red, para. 14; *Al Mahdi*, ICC-01/12-01/15-84-Red, para. 14; *Al Hassan*, ICC-01/12-01/18-461-Corr-Red, para. 42; *Yekatom and Ngaïssona*, ICC-01/14-01/18-403-Red, para. 14.

<sup>11</sup> *Ongwen*, ICC-02/04-01/15-422-Red, para. 15; *Al Mahdi*, ICC-01/12-01/15-84-Red, para. 17; *Al Hassan*, ICC-01/12-01/18-461-Corr-Red, para. 43; *Yekatom and Ngaïssona*, ICC-01/14-01/18-403-Red,

## Article 67 Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;
- (d) Subject to Article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

**Literature:** AI, *International Criminal Court: Making the Right Choices, Part V* (AI 1997); Ambos, K., 'The Right of Non-Self-Incrimination of Witnesses Before the ICC', (2002) 15 *LeidenJIL* 155; *id.*, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law' (2009) 12 *NCLRev* 543; Baum, M., 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court', (2001) 19 *WisconsinILJ* 197; Beresford, S. and Lahiouel, H., 'The Right to be Defended in Person or Through Legal Assistance and the ICC', (2000) 13 *LeidenJIL* 949; Converti, A., in Lattanzi, ICC (1998) 219; Damaška, M., 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals', (2001) 36 *NCarolinaJIL&CommReg* 365; DePiazza, J., 'Denial of Fair Trial as an International Crime: Precedent for Pleading and Proving it under the Rome Statute', (2017) 15 *JICJ* 257; Elberling, B., *The Defendant in International Criminal Proceedings* (Hart 2012); Doswald-Beck, L., and Kolb, R., *Judicial Process and Human Rights: United Nations, European, American and African Systems* (Engel 2004); Jackson, J., 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the

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### A. Introduction/General remarks

During the Second World War, Churchill and other Allied leaders flirted with the idea of some form of summary justice for major war criminals.<sup>1</sup> The concept now is unthinkable. Indeed, only a few years later, one of the Nuremberg Tribunals held that prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held responsible for crimes against humanity. Such guarantees include the

<sup>1</sup> Kochavi, *Prelude to Nuremberg* (1998) 63–91.



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right of the accused to introduce evidence, to confront witnesses, to present evidence, to be tried in public, to have counsel of choice, and to be informed of the nature of the charges.<sup>2</sup> Certainly, the credibility of international justice depends on rigorous respect for the rights of the accused to a fair trial, an idea that was frequently expressed during the development of the ICC Statute. Nor can the exemplary role of international courts be gainsaid; their treatment of the accused provides a model to domestic justice systems throughout the world in the respect of fundamental human rights.

- 2 The Statute might well have omitted a general provision dealing with the rights of the accused. Many specific guarantees are incorporated in other Articles of the Statute and there can be little doubt that even in the absence of a more general text, the judges would feel bound by internationally recognized norms. Principle 5 of the UN Basic Principles on the Independence of the Judiciary provides: 'The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected'.<sup>3</sup> The Statute imposes a duty upon the TC to see that 'a trial is fair and expeditious and is conducted with full respect for the rights of the accused' (Article 64(1)). Furthermore, there is the constant danger that any codification, left in the hands of conservative judges, may tend to constrict the development of the law rather than enhance it. The original contribution of Article 67 may well be that rather than merely restate norms that have already been codified, it elaborates on the relatively laconic provisions of existing texts and, moreover, develops new rights which do not yet appear in human rights treaties and declarations.
- 3 The right to a fair trial is recognized in the UDHR,<sup>4</sup> and in the universal and regional human rights conventions that it inspired,<sup>5</sup> as well as in humanitarian law instruments.<sup>6</sup> The model for Article 67 of the Statute is Article 14 ICCPR,<sup>7</sup> although with some major distinctions. Article 14 ICCPR applies to civil and administrative proceedings, as well as criminal trials. Articles 14(1) and (4) contain provisions dealing with trial of juvenile offenders which are irrelevant to the work of the ICC because Article 26 ICCS excludes jurisdiction in the case of suspects who were under eighteen years of age at the time of the offence. The ICCPR fair trial provision also recognizes some specific rights that are enshrined elsewhere in the Statute, notably the presumption of innocence (Article 65), a

<sup>2</sup> *U.S. v. Alstötter et al.* ('Justice trial'), (1948) 3 TWC 1, 6 LRTWC 1, 14 LLR. 278, p. 97 (LRTWC); see further, DePiazza (2017) 15 JICJ 257.

<sup>3</sup> UN, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF.121/22/Rev.1, GA Res. 40/146, 26 Aug. – 6 Sep. 1985. The *Basic Principles* are cited in the preamble of the ICC's Code of Judicial Ethics, Doc. ICC-BD/02-01-05.

<sup>4</sup> Article 10 and Article 11 UDHR. 'Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11(3). Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'.

<sup>5</sup> Article 14 ICCPR; Article 8 ACHR; Article 6 ECHR; Article 7 AfricanChHPR; Article 40(2) Convention on the Rights of the Child.

<sup>6</sup> Article 84–87, 99–108 GC III Relative to the Treatment of Prisoners of War; Article 5, 64–76 GC(IV) Relative to the Protection of Civilians; Article 75 Add. Prot. I to the 1949 GC and Relating to The Protection of Victims of International Armed Conflicts, Article 6 Add. Prot. II to the 1949 GC and Relating to The Protection of Victims of Non-International Armed Conflicts.

<sup>7</sup> It was also the model for the provisions dealing with the rights of the accused in Article 21 ICTY Statute and Article 20 ICTR Statute. The SG's Report, UN Doc. S/25704, para. 106, stated: 'It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights'.



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right of appeal (Articles 81–84), to compensation in cases of erroneous conviction (Article 85), and to protection against double jeopardy (Article 20).

The ILC Draft Statute 1994 contained a provision entitled ‘Rights of the Accused’ that was essentially a copy of Article 14(3) ICCPR.<sup>8</sup> The only significant departure was inclusion of a second paragraph requiring the prosecutor to disclose exculpatory evidence to the defence. In addition, the ILC made the text gender neutral, replacing masculine pronouns with reference to ‘the accused’. In 1995, the *Ad Hoc* Committee of the GA examined the ILC Draft Statute, observing that ‘in view of the considerable powers [the Court] would enjoy in relation to individuals, [it] should be bound to apply the highest standards of justice, integrity and due process’.<sup>9</sup> Its discussion focussed on the issue of mandatory legal assistance, and on the need to establish rules on the qualifications, powers and remuneration of defence attorneys, and on the procedure for their appointment by the Court.<sup>10</sup>

Rights of the accused were considered by the informal WG at the August 1996 session of the PrepCom, and a number of detailed comments and suggestions on specific points appear in the report of these discussions.<sup>11</sup> The subject was again addressed by the PrepCom in August 1997. By this point, the innovative spirit of the PrepCom was becoming apparent, and there were many departures from the text of Article 14(3) ICCPR, several of them without square brackets, indicating that they had been agreed to by consensus.<sup>12</sup> There were also many cross-references to other provisions in the Statute, showing the Committee’s concern that the rights of the accused not only be recognized generally, but that they be reflected in specific procedural provisions. In addition to ‘improved’ versions of the rights set out in Article 14 of the ICCPR, the Committee’s 1997 draft also contained several new rights: to make an unsworn statement, to have the Court seek co-operation in gathering evidence, to be protected against any reverse onus or duty of rebuttal, to be free from unjust search and seizure, and a general entitlement to due process. The August 1997 PrepCom’s text was reproduced in the Zutphen compilation and the Final Draft of the PrepCom with little modification.<sup>13</sup>

The Rome Conf. quickly agreed on most of the provisions in Article 67. It was made quite clear to the delegates that the minimum guarantees enshrined in Article 14 ICCPR were being enlarged, and they were invited to accept or reject such an approach. The Conference adopted the latter route without hesitation. Negotiating difficulties with the provisions concerning appearance at trial, funded counsel and disclosure of evidence by the prosecution took slightly more time to be resolved. The proposals concerning search and seizure and due process were dropped as being redundant.

## B. Analysis and interpretation of elements

### I. Paragraph 1

#### 1. Chapeau

The *chapeau* provision of Article 67 is an amalgam of norms contained in paras. 1 and 3 of Article 14 of the ICCPR. In effect, it takes the *chapeau* of Article 14(3) of the

<sup>8</sup> ILC Draft Statute 1994, Article 41.

<sup>9</sup> *Ad Hoc* Committee Report, para. 129, p. 29.

<sup>10</sup> *Ibid.*, para. 175, p. 35.

<sup>11</sup> PrepCom I 1996, paras. 270–279, pp. 57–59.

<sup>12</sup> PrepCom Decisions Aug. 1997, pp. 34–36.

<sup>13</sup> Zutphen Draft, pp. 114–115; Draft Statute for the ICC, UN Doc. A/CONF.183/2/Rev.1, pp. 126–128.

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paragraph 2 ...'. In others, it was surely the intent to the Statute's drafters to except other provisions from the scope of Article 67. For example, despite the right to 'raise defences' set out in Article 67(1)(e), this cannot be unlimited, because other provisions of the Statute prohibit or limit the defences of official capacity and superior orders. What if a provision of the applicable law is not sheltered, either implicitly or explicitly, from Article 67? Can the Court determine that it is inoperative to the extent that there is an incompatibility with the provisions of Article 67? If the Court may indeed make such a determination, does this only cover procedural issues or does it also concern substantive law?

- 59 It is suggested that Article 67, given its unique formulation and its historical origin, may be entitled to a form of hierarchically superior status within the Statute. In appropriate cases, some of which may have been unthinkable in July 1998 but which may become apparent over time, the Court may be required to declare provisions of the Statute inoperative because they conflict with Article 67. The 'fair trial' norm in the *chapeau* of Article 67(1) is a powerful concept and one that will evolve, in keeping with the development of international human rights law. Provisions of the Statute that meet the fair trial standard in 1998 may no longer do so at some point in the future.

But for the sake of argument, even if it is assumed that the other norms in the Statute are either compatible with Article 67 or else they are implicit or explicit exceptions to it, it must be born in mind that much of the applicable law remains to be devised. The two other principal sources, the RPE and the EoC, are hierarchically subordinate to the Statute. Article 52(5) ICCS declares that in the event of conflict between it and the Rules, the Statute shall prevail. Rules of evidence adopted by the ASP may conflict with fair trial rights enshrined in Article 67,<sup>238</sup> and the Court is clearly entitled to disregard them or declare them inoperative in such cases. Moreover, the wording of Article 67 – particularly its reference to defences and to onus of proof – suggests that this extends to substantive as well as procedural matters.

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<sup>238</sup> For an example drawn from the Rules of the ICTY, see: La Rosa, (1997) 828 *RICR* 677, 680–684.

## Article 68

### Protection of victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against the children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in Article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in Article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential and sensitive information.

**Literature:** Aldana-Pindell, R., "In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes", (2002) 35 *VandJTransnatL* 1399; Ambos, K., 'The First Judgment of the ICC (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues', (2012) 12 *ICLRev* 115; Bassiouni, M.C., *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – Final report of the Special Rapporteur*, UN Doc. E/CN.4/2000/62; Bedont, B., 'Gender-Specific Provisions in the Rome Statute of the ICC', in: Lattanzi and Schabas, *Essays I* (1999) 179; *id.*, *Internal Report on the Diplomatic Conference of the International Center for Human Rights and Democratic Development* (1998); van Boven, T., *Study Concerning the Right to Restitution*,

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*Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/SUB.2/1993/8; *id.*, *The Basic Principles and Guidelines on the Right to Reparation for Victims of [gross] Violations of Human Rights and IHL*, UN Doc. E/CN.4/1997/104; de Brouwer, A.-M., Heikkilä, M., 'Victim Issues: Participation, Protection, Reparation, and Assistance', in Sluiter *et al.*, *International Criminal Procedure* (2013) 1392; Burnham, M., 'Fragmentation in ILC and the Rights of Victims', in van den Herik, L. and Stahn, C., *The Diversification and Fragmentation of ICL* (2012), 657; Clark, R.S., 'The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', in: G. Alfredsson and P. Macalister-Smith (eds.), *The Living Law of Nations* (N.P. Engel 1996) 355; de Hemptinne, J. and Rindi, F., 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', (2006) 4 *JICJ* 342; Donat-Cattin, D., 'The Role of Victims in ICC Proceedings', in: Lattanzi and Schabas, *Essays I* (1999) 251; *id.*, 'Victims' Rights in the International Criminal Court', in: M. Natarajan (ed.), *International Crime and Justice* (CUP 2011) 373; *id.*, 'Il diritto alla giustizia: crimini contro l'umanità e rimedi giurisdizionali per le vittime nel sistema della Corte penale internazionale' (Università degli Studi di Teramo, 2000, available at Biblioteca Nazionale Centrale Firenze, n. inv. CF980000111); FIDH, *Enhancing Victims' Rights before the ICC* (Paris 2013); Friman H., 'Victims', in Cryer *et al.*, *ICL* (2018) 482; International Criminal Court Society, *Compilation: Footnotes Relevant to the RPE Transmitted by the Committee of the Whole to the Drafting Committee at the Rome Diplomatic Conference on the Establishment of an ICC* (1998); Joinet, L., *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Final Report Pursuant to Sub-Commission Decision 1996/119*, UN Doc. E/CN.4/Sub.2/1997/20; Impunity Watch, *Discussion Paper – Victims Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?* (The Hague, April 2014); Jones, J., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Transnational Publishers, 1997); McDonald, A., 'A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law', (1999) 3 *Law, Democracy and Development* 139, available at <www.saflii.org/za/journals/LDD/1999/10.pdf> last accessed 21 Apr. 2019; McGonigle Leyh, B., *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011); Mueller, S. D., 'Kenya and the ICC: politics, the election and the law', (2014) 1 *JEastAfrStud* 25; Open Society Justice Initiative, *Witness Interference in Cases before the ICC* (November 2016) <www.justiceinitiative.org/publications/witness-interference-cases-international-criminal-court> accessed 22 Apr. 2020; Orentlicher, D., *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Docs. E/CN.4/2005/102 and E/CN.4/2005/102/Add.1; Pérez León Acevedo, J. P., *Victims' Status at International and Hybrid Criminal Court – Victims' Status as Witnesses, Victim Participants/Civil Parties and Reparation Claimants* (Åbo: Åbo Akademi University Press, 2014); UN CCPCJ, *Handbook on Justice for Victims on the Use and Application of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. E/CN.15/1998/CRP.4/Add.1.

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### A. Introduction/General remarks

#### I. Victims’ protection

Victims of crime are often left alone in society, even if there is an effective system 1 of justice to bring to adjudication alleged offenders. Victims are alone because their rights are not fully recognised by the law that is applicable to them, and their life, security and privacy are not always protected before, during and after the trial. Indeed, victims and their families may remain vulnerable to intimidation and retaliation as a result of criminal proceedings, long after the accused has been convicted or acquitted.

On the contrary, criminal justice systems provide for safeguards for those who – amongst the victims – are instrumental to a criminal prosecution as witnesses. Thus, protective measures are afforded until the testimony is given and the element of proof is collected. After that, it is much more difficult to find that the interest of the prosecution coincides with the protection of the rights of victims, even if they have given an essential contribution to the discovery of the truth in a given process.

The first three years of the Rwandan Tribunal showed that certain victims had gone 2 back home after having witnessed in Arusha (Tanzania), seat of the Tribunal, and were killed.<sup>1</sup> The Yugoslav Tribunal had a significant experience in this delicate field of protective measures: co-operation of States (e.g. Norway and the United Kingdom) went as far as making the granting of a new identity and a refugee status to victims/ witnesses in danger in the territories of Bosnia possible. The law and practice of both

<sup>1</sup> As reported by Morris and Scharf, *ICTR I* (1998) 536: ‘[t]wo witnesses who testified before the Rwanda Tribunal in the *Jean-Paul Akayesu* case and the *Obed Ruzindana* case, were also killed’. See Second Annual Report of the ICTR covering the period from 1 Jul. 1996 to 30 Jun. 1997, adopted on 6 Jun. 1997, UN Doc. A/52/582-S/1997/868 (1997), para. 51. Subsequent practice of the ICTR focused extensively on the protection of victims and witnesses, bringing about a uniform and effective methodology of protection.



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ICTY and ICTR<sup>2</sup> prepared a fertile terrain for the insertion of advanced provisions on victims' protection in Article 68(1), (2), (4) and (5).<sup>3</sup>

The by now more than sixteen years of ICC-practice confirm the interpretation of Article 68 given in the first edition of this *Commentary*, namely, that it affords a non-derogable right to protection to victims and witnesses and it imposes a corresponding unconditioned obligation on all organs of the Court, at all stages of the proceedings, to protect the life, dignity and the physical and moral integrity ('well-being') of victims and witnesses.<sup>4</sup> The rights and obligations defined in Article 68 stem from existing norms of international human rights law, including the right to life, dignity and physical and moral integrity enshrined in universally accepted treaties such as the ICCPR. The practice established by the OTP has shown that, when available measures of protection are not sufficient to safeguard a potential witness identified in a pre-trial investigation, the decision of the Office is to move to another witness or victim and/or, as appropriate, to wait for another opportunity, in time and space, to approach the same witness, hence pursuing compliance with the requirements of Article 68.<sup>5</sup> In its *Policy paper on case selection and prioritization*, the OTP recognised that the imperative to protect witnesses and victims may even influence the case-selection process on the basis of the notion of "interests of justice", which – according to this author – shall also encompass the right of victims to access to justice, whereby

<sup>2</sup> The ICTY and ICTR Statutes, respectively annexed to SC Res. 827 (1993) and 955 (1994), contain in Article 22 and 21 the same provision:

'The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.'

Rule 75 (*Protection of Victims and Witnesses*) of both Tribunals' RPE provides relevant specification to general norm of the cited Articles, including protective measures to be ordered by a Judge or a Chamber *proprio motu* or upon request of the prosecution, the defense, the victim or witness concerned, or the Victims and Witnesses Unit of the Registry. The same rule allows for *in camera* proceedings and closed session, redactions, non-disclosure to the public of records identifying victims, testimony via voice-distorting or image-altering devices or closed circuit television and use of pseudonyms. Additionally, and most notably from a procedural law perspective, Rule 75 prescribes that "A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation."

<sup>3</sup> Para. 6 of Article 68 is an ancillary norm to the ones contained in Article 72 (*Protection of national security information*).

<sup>4</sup> See Donat-Cattin, 'Article 68', in Triffterer, *Commentary* (1999) 874–875, mn. 12.

<sup>5</sup> The OTP reported on 22 Jun. 2005 and 28 Mar. 2007, during the institutional consultations between the Office and NGOs, that no incident had occurred to victims and witnesses contacted by Court officials in the first years of investigations in Northern Uganda. The OTP and the Presidency of the ICC made similarly positive reports in respect of other situations until the crisis relating to the situation in Kenya, which was summarized in survey-report issued by the Open Society Justice Initiative, released in Nov. 2016, that concluded that the phenomenon of 'witness interference has been alleged in nearly every case before the ICC' (cf. <[www.opensocietyfoundations.org/briefing-papers/witness-interference-cases-international-criminal-court](http://www.opensocietyfoundations.org/briefing-papers/witness-interference-cases-international-criminal-court)> last accessed 21 Apr. 2020). The ICC-Kenya crisis had its peak in March 2013, when a reportedly peaceful electoral process led to the victory of the two main accused of CaH before the ICC, Mr. Kenyatta and Mr. Ruto, who formed a so-called 'Jubilee' coalition through which they united two major 'tribal' factions that had participated in the post-electoral violence of 2007–08 investigated by the Prosecutor. Almost all Kenyan witnesses of the CaH perpetrated in the post-electoral violence were placed in the problematic position of being called to testify against their elected President and Vice-President. Such a situation was especially problematic in light of the fact that both Mr. Kenyatta and Mr. Ruto conducted a Presidential and post-presidential media campaign narrating the story of two African men resisting the politically-motivated accusations made by a Court in The Hague that was depicted as a neo-colonial enterprise. Therefore, the association of any Kenyan witness with that Court would have represented, in and of itself, a threat to the witness' safety, security, privacy and well-being, even in the absence of direct attacks or menaces. An impressive summary on intimidation of witnesses in Kenya, starting with individuals who testified before the Waki Commission of Enquiry, can be found in Mueller (2014) 1 *JEastAfrStud* 25, 33–35.



the OTP policy refers only to their interest.<sup>6</sup> The practice of the Registry on the realization of the Court's mandate has faced a critical emergency in the DRC situation in respect of some protected witnesses. An internal investigation concluded that extremely serious offences had been committed by Registry staff against protected persons.<sup>7</sup> Given the institutional design of the ICC – a permanent Court with jurisdiction over the most serious crimes of international concern but lacking the power to direct national law-enforcement and an international executive-power authority –, the protection of victims and witnesses is an essential characteristic of the justice system created by the Rome Statute given the almost inevitable threats and attacks by defendants against all types of evidence. Such threats and attacks are particularly insidious when are carried out by defendants who have *de jure* control over the Executive-power of a State or *de facto* control of powerful organization(s) such as armed groups.<sup>8</sup>

## II. Victims' participation

Unlike what occurred relating to victims' protection, the inclusion of norms on victims' participation in the Court's proceedings (Article 68(3)) was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and RPE of the *ad hoc* Tribunals.

In the aftermath of the Rwandan genocide, victims' participation and legal representation before the ICTR have been identified by some observers and defendants of human rights as a necessary instrument to render that Tribunal closer to Rwandan society. Indeed, the fact that Rwandan public opinion had not often understood that justice was done, because it was not seen to be done, was a major problem for the ICTR, which has been the first jurisdictional body in the history of humankind to have convicted perpetrators of the crime of genocide, starting with former Prime-Minister Jean Kambanda.<sup>9</sup>

<sup>6</sup> Cf. ICC, OTP, *Case selection* (2016), para. 33; 'Considerations relating to the interests of justice will continue to be assessed on a case by case basis by the Office as a matter of best practice in the exercise of prosecutorial discretion over case selection. As set out in the Office's Policy Paper on the Interests of Justice, para. 32 *inter alia*, the interests of victims include the victims' interest in seeing justice done, but also other essential interests such as their protection, which the Court as a whole is obliged to ensure pursuant to Article 68(1) of the Statute.' (<[www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](http://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)> last accessed 22 Apr. 2020).

<sup>7</sup> The relevant findings are only available as a redacted summary document of the 'Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the ICC in the DRC by a Staff Member of the Court – Independent Review Team' (also known as the "Hollis Report", from the name of Prosecutor Brenda Hollis, who chaired the review panel). This 5 pages' summary is available on a webpage of the ICC that appears not to be clickable from any sequential link: Cf. <[www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf](http://www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf)> (last accessed 22 Apr. 2020). In a meeting with States Parties held at UN Headquarters in New York in May 2018, the third Registrar of the ICC highlighted with great emphasis the disciplinary action undertaken on the basis of this report, as well as the fact that alleged sexual offenses were reported to competent authorities of the State of nationality of the staff in question. However, no information is available regarding the actual prosecution and adjudication in the DRC of this former staffer of the Registry accused of rape.

<sup>8</sup> Efforts to interfere with witnesses to destroy or distort evidence have been found in all ICC cases except one, cf. Open Society Justice Initiative, *Witness Interference* (2016).

<sup>9</sup> The other prime weakness of the ICTR is that it extended its prosecutions and trials to cases of genocide or other crimes related to the 'Rwandan genocide', thus failing to implement its statutory mandate to prosecute CaH and certain types of war crimes independently of their nexus to genocide. Given that the same selection of cases has being made before Rwandan penal and traditional Courts ('Gacaca'), it is justified to assess the delivery of international and domestic justice in the Rwandan situation as *victors' justice*. This critical reality – since 31 Dec. 2015, date of official closing of the *ad hoc*

## Article 69 Evidence\*

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with Article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

**Literature:** AI, 'Time to Clarify ICC Rules on Admission of Evidence', (2018) <https://hrij.amnesty.nl/time-to-clarify-icc-rules-admission-evidence/> last accessed 20 Oct. 2020; Brady, H., 'Disclosure of Evidence', in Lee, ICC (2001) 403; Cross, R. *Evidence* (4<sup>th</sup> ed. 1974); DeFrancia, C., 'Due Process in International Criminal Courts: Why Procedure Matters', (2001) 87 *VirgLR* 1381; Eggleston, M., *Evidence, proof and probability* (1978); Fernandez de Gurmendi, S., 'Victims and Witnesses', in Lee, ICC (2001) 427; Freeman, L., 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2018) 41 *Fordham ILJ* 283; Gaynor J., *et al.*, 'Law of Evidence' in Sluiter *et al.*, *International Criminal Procedure* (2013) 1028; Guariglia, F., 'Admission' v. 'Submission' of Evidence at the ICC: Lost in Translation', (2018) 16 *JICJ* 315; IBA, 'Evidence Matters in ICC Trials', (2016) 1 < <http://www.coalitionfortheicc.org/news/20160929/evidence-matters-icc-trials> > last accessed 20 Oct. 2020; James, G.F., 'Relevancy, Probability and the Law', (1941) 28 *CallRev* 689; Jones, J.W.R.D., *Practice of the ICTY* (1997) 165; Klamberg, M., 'Article 69', in: Klamberg, *Commentary* (2017) 532; Knoops, G.-J.A., 'The Proliferation of Forensic Sciences and Evidence Before

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## Part 6. The Trial

International Criminal Tribunals From a Defence Perspective', (2019) 30 *CLF* 33 <<https://doi.org/10.1007/s10609-018-9351-1>> last accessed 20 Oct. 2020; Kwon o-Gon, 'The Challenge of an International Criminal Trial as Seen from the Bench', (2007) 5 *JICJ* 360; McCormick, C.T. *McCormick on evidence* (4<sup>th</sup> ed. 1992); Piragoff, D.K., 'Evidence', in Lee, ICC (2001) 349; *id.*, *Similar fact evidence: probative value and prejudice* (1981); Sloan, J., 'Commentary on Article 69 of the Rome Statute' in: Steiner and Nemer, *Comentarios* (2016) 987 <<http://eprints.gle.ee.uk/124066/>> last accessed 20 Oct. 2020; Thaman and Brodowski, 'Exclusion or Non-Use of Illegally Gathered Evidence in the Criminal Process: Focus on Common Law and German Approaches' in Ambos *et al.*, *Core Concepts I* (2020) 428; Trapp and Lonsale, 'The ICC: Excluding Evidence under Article 69(7)', *unpublished manuscript* (1998), Faculty of Law, McGill University, Canada.

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## A. Introduction/General remarks

### I. Historical development

#### 1. Paragraph 1 (an undertaking as to truthfulness)

Apart from the addition of the words ‘of Procedure and Evidence’ after the word ‘Rules’, paragraph 1 remained unchanged from Article 44(1) of the ILC Draft Statute. However, the ILC Draft Statute did not grant the Court itself the power to punish false testimony before the Court.<sup>1</sup> Article 70(1)(a) of the Statute now gives the Court the jurisdiction to punish the giving of false testimony when an undertaking under Article 69(1) has been given. There was little discussion of this provision after the Preparatory Committee (‘PrepCom’) on the Establishment of an ICC decided to leave the form of the undertaking and any supplementary rules, such as the question of undertakings by children, to the RPE.<sup>2</sup> In the drafting of Rule 66(2), consensus was reached on giving discretion to the Court to allow children or persons with an impairment to testify absent an undertaking. This was viewed as preferable to creating an arbitrary bar on such testimony or requiring corroboration. Consensus was achieved by making explicit reference to the ‘beyond a reasonable doubt’ standard for conviction in Article 66, such that the Court could consider such evidence in the context of evaluating all of the evidence admitted.

#### 2. Paragraph 2 (testimony shall be given in person)

Paragraph 2 did not have any counterpart in the 1994 ILC Draft Statute.<sup>3</sup> Following a general discussion of a number of procedural law issues at the March–April 1996 session of the PrepCom, a number of proposals were made at its August 1996 session, which are the origins of paragraph 2. These included a proposal that witnesses shall in

<sup>1</sup> ILC Draft Statute 1994, Article 44, p. 120.

<sup>2</sup> Report of the WG on Procedural Matters, UN Doc. A/AC.249/1998/L.17, and UN Doc. A/AC.249/1998/WG.4/CRP.2.

<sup>3</sup> ILC Draft Statute 1994, see note 1.

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principle be heard directly and in person, unless a Chamber orders that the witness be heard by means of a deposition,<sup>4</sup> and a proposal that

*‘a document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause’.*<sup>5</sup>

The proposed Article 44 was not considered again until the December 1997 session when a paragraph 1bis was added:

*‘The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 43 or in the rules of evidence. These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused’.*<sup>6</sup>

- 3 Debate in the Committee concerned the possibility of witnesses testifying without revealing personal data, and the Committee therefore added the link to the proposed article on protection of victims and witnesses but with a caveat regarding the rights of the accused. Shortage of time prevented any further discussion. At the March–April 1998 session, the second sentence of the present paragraph 2 was added to permit the reception of testimony through live or recorded video and audio technology, as well as the introduction of documents or written transcripts. Although some delegations had wanted to include in the Statute a list of the justifications or limitations concerning when electronic technologies could be used (e.g., illness, injury, age or other justifiable reason), the decision was taken that these matters could be left for the RPE, or the jurisprudence of the Court. At the Rome Conference, there was again some discussion about including within the Statute the justifications for the use of technologically transmitted or recorded testimony, but the final decision was to confirm that these were matters of detail for the Rules or the Court to elaborate. The two options regarding the phrases ‘prejudicial to’ and ‘inconsistent with’ the rights of the accused were resolved uniformly in a disjunctive manner in a number of articles throughout the Statute where the same issue arose.

The debate over the optimal balance between the rights of the accused and the rights of victims and witnesses continued during the development of the Rules by the Preparatory Commission. The result was an approach to the use of protective measures in Rule 87 that emphasized protection of the identity or personal matters of witnesses and victims from press and public exposure rather than protection from disclosure to the accused. However, an element of ambiguity on the possible use of anonymous witnesses was preserved in Rule 88 on special measures. While this rule is generally designed to assist vulnerable witnesses rather than protect them, the list of special measures available to the Court was made non-exhaustive and the rule permits *ex parte* and *in camera* hearings on the adoption of special measures.

Rule 68 on prior recorded testimony emerged from the Preparatory Commission in a form that would preclude the use of recorded testimony in the absence of a meaningful opportunity by the defence to directly examine the witness. This places more stringent conditions on the use of prior recorded testimony at the ICC compared to the practice of the *ad hoc* Tribunals.

<sup>4</sup> PrepCom Report II 1996, pp. 217 and 220.

<sup>5</sup> PrepCom Report II 1996, p. 217.

<sup>6</sup> PrepCom Decisions Dec. 1997, p. 37.



## PART 7 PENALTIES

### Article 77 Applicable penalties

1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute:
  - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
  - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
  - (b) A forfeiture of proceeds, property and assets derived directly or the International Criminal Court, the Making of the Rome Statute: Issues, Ne indirectly from that crime, without prejudice to the rights of bona fide third parties.

**Literature:** Ambos, K., 'On the Rationale of Punishment at the Domestic and International Level' in: Henzelin and Roth (eds.), *Le Droit Pénal à l'épreuve de l'internationalisation* (LGDJ Paris 2002) 305; Ashworth, A., *Sentencing and Criminal Justice* (6<sup>th</sup> ed. CUP 2015); Bassiouni, M.C. 'Qesas Crimes', in: M.C. Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publishing 1982) 203; Bassiouni, M.C. and Manikas, P., *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers Inc. 1996); Corell, H., Türk, A. and Thune, S., *Proposal for an International War Crimes Tribunal for The Former Yugoslavia* (CSCE 1993); Duff, R. A., *Punishment, Communication and Community* (OUP 2001); Duff and Garland (eds.), *A Reader on Punishment* (OUP 1994); Fife, R.E., 'Penalties', in: Lee, ICC (1999) 319; *id.*, 'Penalties', in: Lee, ICC (2001) 555; Frase, R., Momsen, C., O'Malley, T., Washington, S., 'Proportionality of Punishment in Common Law Jurisdictions and in Germany', in: Ambos *et al.*, *Core Concepts I* (2020) 213; Garland, D., *Punishment and Modern Society* (Oxford, 1990); Henham, R., *Punishment and Process in International Criminal Trials* (Aldershot 2005) 16–24; Jescheck, H.-H and Triffterer, O. (eds.), *Ist die lebenslange Freiheitsstrafe verfassungswidrig? Dokumentation über die mündliche Verhandlung vor dem Bundesverfassungsgericht am 22. und 23. März 1977* (Nomos 1978); La Rosa, A.-M., *Juridictions Pénales Internationales: La Procédure et la Preuve* (Presses universitaires de France 2003); Lines, R., *Drug Control and Human Rights in International Law* (CUP 2017); Mansour, A.A., 'Hudud Crimes', in: M.C. Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publishing 1982) 195; Marchesi, D., 'Imprisonment for Life at the ICC', (2018) 14 *UtrechtLRev* 97; Merle, R., *La Pénitence et la Peine* (Editions du Cerf 1985); Morawetz, T. (ed.), *Criminal Law* (Dartmouth and Ashgate 2000); Mulgrew, R., *Towards the Development of the International Penal System* (Cambridge, 2013); Pradel, J., *Droit pénal général* (22<sup>nd</sup> ed. Cujas, 2019); Roberts, J. and Harrendorf, S., 'Criminal History Enhancements at Sentencing', in: Ambos *et al.*, *Core Concepts I* (2020) 261; Rodley, N., *Treatment of Prisoners Under International Law* (Clarendon Press 1987); Sander, B. 'Justifying International Criminal Punishment: A Critical Perspective', in: Bergsmo and Buis, *Foundations ICL* (2019)167; Scalia, D., 'Article 77' in Fernandez *et al. Commentaire* (2019) 2015; Schabas, W.A., 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *DukeJComp&IL* 461; *id.*, 'War Crimes, Crimes Against Humanity and the Death Penalty', (1997) 60 *AlbanyLJ* 736; *id.*, 'Penalties', in: Lattanzi, ICC (1998) 273; *id.*, 'Penalties', in: Cassese *et al.*, *Rome Statute II* (2002) 1497; Simonato, M., 'Confiscation and Fundamental Rights across Criminal and Non-Criminal domains' (2017) 18 *ERA Forum* 365; Taylor, T., *The Anatomy of the Nuremberg Trials* (Knopf Doubleday Publishing 1992); UN Office at Vienna, Crime Prevention and Criminal Justice Branch, *Life Imprisonment* (United Nations 1994); van Zyl Smit, D. 'Life Imprisonment as the Ultimate Penalty in International Law: a Human Rights Perspective' (1998) 9 *CLF* 5; *id.*, 'International Imprisonment', (2005) 54 (2) *I&CompLQ* 357; van Zyl Smit, D. and Appleton, C., *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press 2019); Van Zyl Smit, D. and Ashworth, A., 'Disproportionate Sentences as Human Rights Violations', 67 (4) *MLRev* 2004 541.



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## Part 7. Penalties

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### A. Introduction/General remarks

- Article 77 establishes the power of the ICC to impose penalties on persons convicted by the Court of crimes referred to in Article 5. It defines three possible penalties that may be applied by the Court. Imprisonment is the basic punishment, while fines or forfeiture may only be imposed as additional penalties. In accordance with the principle of *nulla poena sine lege* reflected in Article 23,<sup>1</sup> this list of applicable penalties is exhaustive.
- The Article builds on the principle of equality of justice through a uniform penalties regime for all persons convicted by the Court. Accordingly, the Article makes no reference to national laws. The application of penalties will be made irrespective of the nationality of the convicted person or the place where the crime was committed. Acknowledging the need for flexibility in that it may be difficult to foresee all possible needs, the penalties provisions are formulated in a general way for all crimes enumerated under Article 5, without specifying penalties for different categories of crimes. The approach also reflects the general principle of international law whereby very heavy penalties may be imposed for the most serious crimes against the person.<sup>2</sup> The ordinary

<sup>1</sup> The provision stating the principle of *nulla poena sine lege* emanated from the discussions on Article 77 in the Working Group on Penalties at the Diplomatic Conference. Nevertheless, this provision was included in Part 3 of the Statute, rather than in Part 7, because it was deemed to be a general principle of criminal law.

<sup>2</sup> This was confirmed, in the context of crimes against humanity, by the reasoning in ICTY, *Prosecutor v. Erdemović*, TC, Sentencing Judgment, IT-96-22-T, 29 Nov. 1996, para. 40. On this issue, see Schabas (1997) 7 *DukeJComp&IL* 461, 479. Closely related to this principle, the inherent gravity of the criminal conduct is central to sentencing, see notably decisions referred to by ICTY, *Prosecutor v. Kupreškić et al*, AC, Judgment, IT-95-16A, 23 Oct. 2001, para. 442 ('The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused'). On gravity see also Ambos, *Treatise ICL II* (2014), 291 ff.

## Applicable penalties

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penalty to be applied by the Court for crimes under Article 5 of the Statute is imprisonment. The possibility of life imprisonment is provided for on certain conditions, including the system for mandatory review specified in Article 110. Fines and forfeiture of proceeds and property derived from the crime may be imposed as additional penalties to imprisonment.

Various purposes of penalties have been put forward in legal theory and practice, also in the particular context of international criminal justice. They include retribution, general prevention or deterrence, individual prevention, reformation of criminals, protection of society, collective reconciliation and reparation to crime victims.<sup>3</sup> At the Diplomatic Conference, stressing that the penalties under consideration were related to the most serious crimes of international concern including in situations of armed conflict, a number of delegations stressed the importance of severe penalties commensurate to the gravity of the crimes. Against this background they supported the inclusion of the death penalty, or in some cases life imprisonment, as a prerequisite for the credibility of the Court and its deterrent functions. A number of other delegations underlined limitations derived from human rights law on the modes of punishment. They insisted on the paramount need for treating individual criminals humanely and maintaining the possibility for their eventual rehabilitation. On the discussions on the death penalty and life imprisonment, in addition to certain remarks below, see comments made under Article 80 of the Rome Statute.

The ICC handed down its first sentence on 10 Jul. 2012 in ‘Prosecutor v. Thomas Lubanga Dyilo’ where a conviction for recruitment and use of child soldiers in armed conflict in the Democratic Republic of Congo led to the imposition of imprisonment for 14 years, which was confirmed on appeal on 1 Dec. 2014. In ‘considering the purposes of punishment of the ICC’ Trial Chamber I notably ‘took into account the Preamble of the Statute’ and referred to paragraphs 4, 5 and 9 of the latter. These provide, respectively, that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’, that the States Parties to the Statute are ‘determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’ and that the ICC was established ‘to these ends and for the sake of present and future generations’.<sup>4</sup> This line of reasoning has been supplemented, *inter alia* in the sentence on 23 May 2014 in ‘Prosecutor v. Germain Katanga’, where TC II confirmed that, while Articles 77 and 78 do not specify the purpose of the criminal punishment imposed, the Preamble provided guidance to this end. There must, on this basis, be punishment for crimes which “threaten the peace,

<sup>3</sup> On purposes of penalties in an ICL context, see *inter alia* Ambos, *Treatise ICL I* (2021) 115 ff.; Ambos, in Henzelin and Roth, *Droit Pénal* (2002) 305; Cryer, in Cryer et al., *ICL* (2019) 28–30; David, *Éléments* (2018) 1023–1042; Henham, *Punishment* (2005) 16–24; La Rosa, *Juridictions Pénales* (2003) 172; Mulgrew, *International Penal System* (2013) 207–209; Schabas (1997) 7 *DukeJComp&IL* 461, 479, 499. Different legal cultures and conceptions relating to punishment manifested themselves in the negotiations at the Diplomatic Conference. For traditional criminal law arguments and theories of punishment in the Anglo-American tradition, see Duff, *Punishment, Communication and Community* (2001), Garland and Duff, *A Reader on Punishment* (Oxford 1994); Morawetz (ed.), *Criminal Law* (2000). For comparative studies of foundational concepts and principles as regards purposes of punishment particularly in Anglo-American and German criminal justice systems, see Frase et al., in Ambos et al., *Core Concepts I* (2020) 213 and Roberts and Harrendorf, *ibid.*, 261–303. In the French civil law tradition, see Merle, *Pénitence* (1985) and Pradel, *DPGénéral* (2019). On purposes of penalties in Islamic law, see Mansour, in: Bassiouni, *Islamic Criminal Justice* (1982) 195 and Bassiouni, in: *ibid.*, 203. For a critical analysis, see Sander, in Bergsmo and Buis, *Foundations ICL* (2019), 167–240.

<sup>4</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, TC I, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 Jul. 2012, para. 16; see also *Prosecutor v. Lubanga*, AC, Judgement, ICC-01/04-01/06 A 4 A 6, 1 Dec. 2014, para. 16.

## **PART 8 APPEAL AND REVISION**

### **Article 81**

#### **Appeal against decision of acquittal or conviction or against sentence\***

1. A decision under Article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
  - (a) The Prosecutor may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact, or
    - (iii) Error of law;
  - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact,
    - (iii) Error of law, or
    - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
  - (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under Article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with Article 83;
  - (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
  - (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;
  - (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
    - (i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the

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\* The original commentary was written by Christopher Staker whose contribution is greatly acknowledged and served as a basis for the version of the previous edition of this commentary. Any views expressed in this contribution are those of the author alone and do not reflect the views of the ICC, the KSC or any other institution to which the author is or was attached.

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probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

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**A. General Remarks**

**I. Introduction**

Article 81 provides for appeals against a decision on acquittal or conviction or against 1  
sentence. This appellate review is the **highest level of judicial review** available under the  
ICC Statute. Except where the ICC AC orders a new trial, its judgment brings finality to  
the proceedings.<sup>1</sup>

IMT and IMTFE Charters did not provide for a right to appeal of the convicted 2  
person to a higher judicial authority.<sup>2</sup> With the UDHR and the ICCPR, the right to  
an effective remedy and specifically the **right to appeal** against a decision on  
conviction and the imposition of a sentence were established as fundamental human  
rights.<sup>3</sup> The right to appeal was consequentially included in the ICTY and ICTR  
Statutes.<sup>4</sup>

The ICCPR, as a human rights instrument, refers to a **right of appeal by a convicted 3  
person**. However, as in the case of ICTY and ICTR, and as included in the ILC Report  
1993 and the ILC Draft Statute 1994,<sup>5</sup> the ICC Statute also allows for **appeals by the  
Prosecutor against acquittals**, a possibility recognised in some national legal systems,

<sup>1</sup> The revision of conviction or sentence is regulated by Article 84.

<sup>2</sup> Article 26 IMT Charter provides that ‘[t]he judgment of the Tribunal as to the guilt or the innocence  
of any defendant ... shall be final and not subject to review’. Article 17 IMTFE Charter provides that the  
record of the trial was to be transmitted directly to the Supreme Commander for the Allied Powers, who  
could reduce or otherwise alter the sentence, except to increase its severity.

<sup>3</sup> Article 14(5) ICCPR reads: ‘Everyone convicted of a crime shall have the right to his conviction and  
sentence being reviewed by a higher tribunal according to law.’; Article 8 UDHR reads: ‘Everyone has the  
right to an effective remedy by the competent national tribunals for acts violating the fundamental rights  
granted him by the constitution or by law.’, see Article 13 ECHR, Protocol 7, Article 2 ECHR, Article 47  
CFREU; Article 8 ACHR.

<sup>4</sup> Article 25 ICTY Statute, Article 24 ICTR Statute; see below mn. 10–21.

<sup>5</sup> See below mn. 10–21.



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an effective remedy beyond the legal framework but within the inherent powers of the relevant AC did not anymore arise.<sup>19</sup>

- 9 Article 81(1), (2)(a) and (3)(c)(ii), and Article 82(1), (3) and (4) indicate that appeals under these provisions are to be in accordance with the **RPE**. The relevant provisions of the RPE dealing with appellate proceedings (Rules 149 to 153 RPE) are primarily of procedural character and together with Regulations 57 to 65 ICC RegC in more detail addressed in Eckelmans below Article 83 mn. 44–85.

## II. Short history and comparison of provisions

- 10 The provisions regulating appeals against conviction, acquittals and sentence before international and internationalized criminal tribunals today have a common origin but can be broadly distinguished in **two strands** – the provisions of the ICC Statute and those of the MICT/ICTY/ICTR Statute and RPE.
- 11 The ILCs mandate to elaborate a draft Code of Offences against the Peace and Security of Mankind was renewed in 1981.<sup>20</sup> In this context, the possible role and jurisdiction of an international criminal court became more important as of 1989. In 1992, the International Law Commission decided that an international criminal court should have **original jurisdiction** and not only jurisdiction to hear appeals from or review national court's decisions.<sup>21</sup> The ILC was aware that this meant that a right to appeal a conviction or sentence had to be ensured as required by Article 14 ICCPR.<sup>22</sup>
- 12 Reacting to the developments in the territory of Yugoslavia, by **UNSC Res. 808 (1993)** the UNSG was requested to report on the creation of an international tribunal and include in this report specific proposals for a statute, within a period of sixty days. The UNSG provided on 3 May 1993 his report setting out the background to the proposed text of the Statute. He set out by reference to the ICCPR:<sup>23</sup>

*'117. The right of appeal should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice. The Prosecutor should be entitled to initiate appeal proceedings on the same grounds.'*

where a decision on contempt of the Tribunal is given by the AC sitting as a Chamber of first instance, an appeal shall be decided by five different Judges as assigned by the President: see Rule 77 lit. K ICTY RPE.

<sup>19</sup> See e.g. SCSL, *Prosecutor v. Norman et al.*, AC, Decision on Prosecution Appeal Against the Trial Chamber's Decision on 2 Aug. 2004 Refusing Leave to File an Interlocutory Appeal, SCSL-04-14-T-319, 17 Jan. 2005.

<sup>20</sup> UNGA Resolution 36–106 of 10 Dec. 1981.

<sup>21</sup> ILC Report 1991 (A/46/10), paras. 116, 136; see also ILC Report 1990 (A/45/10), p. 25 (setting out that an international criminal court having only review competence would not require a further procedure for appeal).

<sup>22</sup> ILC Report 1992 (Vol. I), 4–5, with particular attention to the ensuing discussion about the 'double hearing'; see also ILC Report 1993, paras. 91 ff., provides for a Part Six entitled 'Appeal and Review' and accordingly for a right to appeal against judgement or sentence; see also ILC Report 1996 (Draft Code of Crimes against the peace and security of mankind), paras. 50 ff., Article 11(2) states '[a]n individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law', referring on p. 36 to the development of the law since the IMT (that did not provide for a right to appeal) and in particular to the ICCPR and the ICTY/ICTR Statutes. The Report then reads: 'the appeal may be conducted by a higher court which is part of the same judicial structure comprising a single "tribunal" as in the case of the two ad hoc tribunals established by the Security Council. The essence of the right of appeal is the right of a convicted person to have the adverse judgement and the resulting punishment reviewed by a "higher" judicial body which has the authority as a matter of law to conduct such a review and, where appropriate, to reverse the decision or revise the punishment with binding legal effect'.

<sup>23</sup> UNSG, Report of the Secretary-General pursuant to paragraph 2 of SC Res. 808 (1993), S/25704, 3 May 1993, paras. 117 and 118.



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118. *The judgement of the Appeals Chamber affirming, reversing or revising the judgement of the Trial Chamber would be final. It would be delivered by the Appeals Chamber in public and be accompanied by a reasoned opinion to which separate or dissenting opinions may be appended.*<sup>24</sup>

This formed the basis for **Article 25 ICTY Statute** and soon after for Article 24 ICTR Statute.

The ILC Working Group, which was established on 17 May 1993, cast the appeals provisions of a first draft statute for an international criminal court (**ILC Report 1993**) in a very similar provision to that included in Article 25 ICTY Statute and even referred to this Article along with the ICCPR as requiring an appeals mechanism. In the same way as Article 25 ICTY Statute, the draft provided in one provision for the grounds of appeal and the standard of review. The provision read:

*‘[The Prosecutor and] the convicted person may, in accordance with the rules, appeal against a decision under Articles 51, 52 or 53 on any of the following grounds: (a) material error of law; (b) error of fact which may occasion a miscarriage of justice; or (c) manifest disproportion between the crime and the sentence’. Another provision entitled ‘Proceedings on appeal’ provided that ‘The Appeals Chamber has all the powers of the Chamber, and may affirm, reverse or amend the decision which is the subject of the appeal’.*<sup>24</sup>

This text got fully revised for the purposes of the **ILC Draft Statute 1994** and accordingly, the ICC Statute appeals provisions developed differently from Article 25 ICTY Statute. The ILC Draft Statute 1994 set the scene in many respects for the current Articles 81 and 83. The draft:

- enumerated thoroughly the grounds of appeal, as error of law, procedural error and error of fact or, (for the sentence in particular), disproportion between the crime and the sentence.<sup>25</sup>
- set out the standard of review in a separate provision that also addressed the AC’s powers. The draft provided that the ‘Appeals Chamber has all the powers of the Trial Chamber’ and ‘If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may: (a) If the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial; (b) If the appeal is brought by the Prosecutor against an acquittal, order a new trial’.<sup>26</sup>

Before the provisions were adopted in their final form at the **Rome Conf. in 1998**, they were further amended, as follows (not a conclusive list):

- a further ground of appeal was added – ‘any other ground that affects the fairness or reliability of the proceedings or decision’, which led consequently to two separate paragraphs setting out the grounds of appeal for the Prosecutor and those for the convicted person or the Prosecutor ‘on that person’s behalf’.
- A sentence was added in Article 83 setting out that the AC can remand a factual issue to the original TC or may itself call evidence;
- It was clarified that an appeal of only the convicted person may not lead to an amendment of the conviction to his or her detriment.

Before and at the Rome Conf., many States and organisations were involved in fine-tuning Articles 81 and 83 and thereafter at the Preparatory Commission in drawing up

<sup>24</sup> ILC Report 1993, p. 126.

<sup>25</sup> ILC Draft Statute 1994, p. 61.

<sup>26</sup> *Ibid.*, p. 61.

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the relevant provisions of the ICC RPE. This process ended in 2002, when the ICC RPE were adopted in their current form. The RegC adopted in May 2004 contain the provisions regulating pursuant to Article 52 the **routine functioning** of the Court. Regulations 57 to 66 RegC are the relevant provisions, providing e.g. for the variation of grounds of appeal and additional evidence.

- 17 Given the brevity of Article 25 ICTY/24 ICTR Statute, the jurisprudence of ICTY and ICTR was essential to setting out more detailed grounds of appeal and defining the standard of review and also addressing in more detail the AC's powers. In the practice of the ICTY/ICTR ACs, procedural errors, lack of reasoning and errors relevant to the rights of the accused and a fair trial have been treated as '**errors of law**', thereby underlining the requirement that the error must invalidate the impugned decision. In addition, decisive for the legal framework are the **MICT/ICTY/ICTR RPE**, which have been amended continuously based on lessons learned of the ICTY/ICTR/IRMCT Judges. The MICT RPE were amended last in December 2019. Accordingly, when comparing ICC and ICTY/ICTR/IRMCT jurisprudence and interpreting the relevant provisions, it needs to be kept in mind that they are based **on two different legal frameworks**, that have as a common basis the understanding that **Article 14 ICCPR** provides for a right to appeal of the convicted person.
- 18 The **jurisprudence** of ICTY/ICTR and ICC relevant to final appeals developed primarily **consecutively**. The ICC delivered to date AJs in four cases; the first ones in 2014. The ICTY issued since its inception until its closure 49 judgements<sup>27</sup> on conviction, acquittal and sentence. The ICTR issued just before its closure a high number of AJs. In addition, the IRMCT has issued to date AJs in three cases. The IRMCT held in relation to the prior jurisprudence of ICTY and ICTR:

*"The Statute and the Rules of Procedure and Evidence of the Mechanism ("Statute" and "Rules", respectively) reflect normative continuity with the Statutes and the Rules of Procedure and Evidence of the ICTR and the ICTY ("ICTR Rules" and "ICTY Rules", respectively)." The Appeals Chamber considers that it is bound to interpret the Statute and the Rules of the Mechanism in a manner consistent with the jurisprudence of the ICTR and the ICTY.<sup>28</sup> Likewise, where the respective Rules or Statutes of the ICTR or the ICTY are at issue, the Appeals Chamber is bound to consider the relevant/precedent of these tribunals when interpreting them...*

*While not bound by the jurisprudence of the ICTR or the ICTY, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTR and the ICTY Appeals Chambers and depart from them only for cogent reasons in the interest of justice, that is, where a previous decision has been decided on the basis of a wrong legal principle or has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".<sup>30</sup> It is for the party submitting that the Appeals Chamber should depart from such jurisprudence to demonstrate that there are cogent reasons in the interest of justice that justify such departure.<sup>28</sup>*

- 19 Most likely due to the jurisprudence of the ICTY and ICTR, which can easily be used as a source of reference and the straightforward legal framework, the approach and formulation set out in Article 25 ICTY Statute were taken up by **internationalized criminal**

<sup>27</sup> Author's count based on the list of ICTY judgements, <<https://www.icty.org/en/cases/judgement-list>>, accessed 10 May 2020.

<sup>28</sup> IRMCT, *Prosecutor v. Karadžić*, AC, Judgement, MICT-13-55-A, 20 Mar. 2019, para. 13 [footnotes omitted]; see also IRMCT, *Prosecutor v. Šešelj*, AC, Judgement, MICT-16-99-A, 11 Apr. 2018, para. 11.

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**tribunals**, such as the SCSL, STL and more recently the KSC.<sup>29</sup> The latter partly even incorporated jurisprudence of international criminal tribunals in the KSC Law.<sup>30</sup> Also, the ECCC Rules incorporate the ICTY and ICTR approach.<sup>31</sup> The MICT Statute and MICT RPE follow the example of the ICTY and ICTR legal texts, subject to minor amendments.<sup>32</sup>

The below table shows a comparison of relevant legal provisions of the ICC and IRMCT appeal framework:

ICC legal framework	IRMCT legal framework
<p><b>Grounds of appeal:</b> Article 81 ICC Statute:</p> <p>1. A decision under Article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:</p> <p>(a) The Prosecutor may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, or (iii) Error of law;</p> <p>(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, (iii) Error of law, or (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.</p> <p>2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;</p> <p>(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under Article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with Article 83;</p> <p>(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).</p>	<p>Article 23 MICT Statute (= Article 25 ICTY Statute):</p> <p>1. The AC shall hear appeals from convicted persons or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice.</p>

<sup>29</sup> See Article 26 STL Statute, mirroring precisely Article 25 ICTY Statute; Article 20 SCSL Statute, adding to Article 25 ICTY Statute a "procedural error" (without addressing the standard of review) and setting out that the AC 'shall be guided by the decisions of the' ICTY and ICTR AC; Article 46 KSC Law, adding to Article 23 MICT Statute "an error in sentencing" (without a standard of review) and the clarification that "[a]n appeal is not a trial *de novo*".

<sup>30</sup> Article 46(4) and (5) KSC Law sets out how the Court of Appeals Panel shall proceed when determining a legal or factual error respectively. Article 47(6) KSC Law determines the course of action to be taken when the Court of Appeals Panel needs to overturn a finding of guilt based on one mode of liability.

<sup>31</sup> Despite the formulation of Article 36 new ECCC Law that reads that the ECCC Supreme Court 'shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.', Rule 105(2) ECCC Rules follows the example of Article 25 ICTY Statute but adds a ground of appeal relevant to the Trial Chamber's exercise of discretion. Rule 110 on the 'Effect of the Appeal' deals with the scope of the appeal and the powers of the Supreme Court Chamber, setting e.g. out that the Supreme Court Chamber may change the legal characterisation of the facts. Also, an acquittal cannot, on appeal, be changed into a conviction (Rule 110(4) ECCC Rules).

<sup>32</sup> Attention is drawn, in particular, to the addition of the 'single judge' in paragraph 2.

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<p><b>Custody:</b> Article 81(3) ICC Statute</p> <p>3. (a) Unless the TC orders otherwise, a convicted person shall remain in custody pending an appeal;</p> <p>(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;</p> <p>(c) In case of an acquittal, the accused shall be released immediately, subject to the following:</p> <p>(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the TC, at the request of the Prosecutor, may maintain the detention of the person pending appeal;</p> <p>(ii) A decision by the TC under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.</p>	<p>Rule 126 MICT RPE:</p> <p>(A) The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 67.</p> <p>Rule 123 MICT RPE:</p> <p>(A) Subject to paragraph (B), in the case of an acquittal or the upholding of a challenge to jurisdiction, the accused shall be released immediately.</p> <p>(B) If, at the time the judgement is pronounced, the Prosecutor advises the TC in open court of the Prosecutor's intention to file notice of appeal pursuant to Rule 133, the TC may, on application by the Prosecutor and upon hearing the Parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal.</p>
<p><b>Suspension:</b> Article 81 ICC Statute</p> <p>4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.</p>	<p>Rule 126 MICT RPE</p> <p>(A) The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 67.</p>
<p><b>Powers of the AC (generally):</b></p> <p>Article 83 ICC Statute</p> <p>1. For the purposes of proceedings under Article 81 and this article, the AC shall have all the powers of the TC.</p> <p>Rule 149 RPE</p> <p>Parts 5 and 6 and rules governing proceedings and the submission of evidence in the PTCs and TCs shall apply <i>mutatis mutandis</i> to proceedings in the AC.</p>	<p>Rule 131 MICT RPE</p> <p>The rules of procedure and evidence that govern proceedings in the TCs and before the Single Judge shall apply <i>mutatis mutandis</i> to proceedings in the AC.</p>
<p><b>Standard of review:</b> Article 83 ICC Statute</p> <p>2. If the AC finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error...</p> <p>3. If in an appeal against sentence the AC finds that the sentence is disproportionate to the crime...</p>	<p>Article 23 MICT Statute (= Article 25 ICTY Statute):</p> <p>1. The AC shall hear appeals from convicted persons or from the Prosecutor on the following grounds: (a) an error on a question of law <i>invalidating the decision</i>; or (b) an error of fact <i>which has occasioned a miscarriage of justice</i>.</p>
<p><b>Specific powers on appeal:</b> Article 83 ICC Statute:</p>	<p>Article 23 MICT Statute:</p> <p>2. The AC may affirm, reverse or revise the decisions taken by the Single Judge or TC.</p>

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<p>(2) ...it may: (a) Reverse or amend the decision or sentence; or (b) Order a new trial before a different TC. (3) ...it may vary the sentence in accordance with Part 7.</p>	<p>Rule 144 MICT RPE (C) In appropriate circumstances the AC may order that the accused be retried before a TC designated by the President.</p>
<p><b>Evidential basis on appeal:</b> Article 83(2), second sentence, regulation 62 RegC Article 83(2) ‘... For these purposes, the AC may remand a factual issue to the original TC for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue...’ Regulation 62 RegC 1. A participant seeking to present additional evidence shall file an application setting out: (a) The evidence to be presented; (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the TC. 2. The AC may: (a) Decide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the AC; or (b) Decide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to both file a response setting out arguments on that application and to adduce any evidence in response. 3. The responses described in sub-regulation 2 shall be filed within a time limit specified by the AC and shall be set out and numbered, to the extent possible, in the same order as in the application to present evidence. 4. If several defendants are participants in the appeal, the evidence admitted on behalf of any of them shall, where relevant, be considered in respect of all of them.</p>	<p>Rule 144 MICT RPE (A) The AC shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been admitted by it. Rule 142 MICT RPE (A) A Party may apply by motion to present additional evidence before the AC. Such motion shall clearly identify with precision the specific finding of fact made by the TC to which the additional evidence is directed, and must be served on the other Party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. The opposing Party shall file a response within thirty days of the filing of the motion. The moving Party may file a reply within fourteen days of the filing of the response. (B) Rebuttal material may be presented by any Party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed; or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material. (C) If the AC finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the AC will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 144. Where the AC finds that the evidence was available at trial, it may still allow it to be admitted provided that the moving Party can establish that the exclusion of it would amount to a miscarriage of justice. (D) The AC may decide the motion prior to the appeal hearing, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing. (E) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.</p>



## Article 96

### Contents of request for other forms of assistance under Article 93

1. A request for other forms of assistance referred to in Article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in Article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

- (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
- (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
- (c) A concise statement of the essential facts underlying the request;
- (d) The reasons for and details of any procedure or requirement to be followed;
- (e) Such information as may be required under the law of the requested State in order to execute the request; and
- (f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

**Directly Relevant Rules of Procedure and Evidence:** Rule 190.

**Literature:** See Preliminary Remarks on Part 9.

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## A. Introduction/General remarks

Article 96 is procedural in nature and in content. It provides important practical information for the requests for other forms of cooperation. It is similar in that respect to Article 91, which outlines the content of a request for arrest and surrender. This article details what information must be included in a request for other forms of cooperation.

Like Article 91, this article recognizes that cooperation will be effected through reliance upon national procedural laws and that therefore it will be necessary for the Court to provide sufficient information to comply with those procedures. Article 96(2)(e), which parallels Article 91(2)(c), requires that the request include such information as may be required by the law of the requested State for the request to be executed. Article 96(2)(e) however is more restricted than Article 91(2)(c) in that the requirement is specific to information, in recognition of the practical differences between procedures for the production of evidence and those for the surrender of a person. This subparagraph raised similar concerns to those described under Article 91, but here the matter was much less controversial as most States, of all legal traditions, require some minimum information to carry out measures such as a search or to compel a person to provide a testimony.

## B. Analysis and interpretation of elements

### I. Paragraph 1: Requests in writing, urgent cases and their confirmation

The provision states that, as a rule, requests for assistance should be in writing.

In *urgent cases*, a request may be delivered by means of modern telecommunication such as fax or e-mail, under the condition that a written record of the request will be created by that method of communication.

If the request was transmitted by fax or e-mail or any other means of communication referred to above, it has to be confirmed through the diplomatic channel or those channels that the State Party has designated upon ratification, acceptance, approval of or accession to the Rome Statute pursuant to Article 87(1)(a).

A request submitted by a State Party or a non-State Party to the Court pursuant to Article 93(10) of the Statute requires no such confirmation as Article 87(1) only deals with requests issued by the Court.

### II. Paragraph 2: Minimum requirements

The provision lists the various types of information that shall be contained in or attached to the request by the Court or by the requesting State.<sup>1</sup>

#### 1. Concise statements of the purpose and the assistance sought

The request has to depict the object of the request and the reason for the assistance sought, as well as the form of assistance and measures of execution required. Although the legal basis for the request is the applicable provisions of the Rome Statute, the request should explicitly refer to those articles.

<sup>1</sup> The provision is much more detailed than the comparable provision on the contents of a request in Article 14(1) of the EuCMACM, however it is similar to Article 5 of the UN Model Treaty and Article 7 (10) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

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### 2. ‘As much detailed information as possible’

8 In order to facilitate the execution of the request, the Court or the requesting State shall provide as much information available or disclosable about the location or identification of any person or place, where that information is critical for the execution of the request. This is important, on a practical level: it will not be possible to execute a search and seizure, unless the Court describes the precise location, which should be the subject of that search.

9 TC IV in examining a Defence application for the transmission of a request for cooperation relied on Rule 116<sup>2</sup> and rejected the request because of its lack of compliance with the requirements for specific information as set out in Article 96(2)(a) and (b).<sup>3</sup> In the case the Defence sought assistance with a visit to a non-exhaustive list of places in Sudan for the purpose of an interview of unspecified witnesses. The Court rightly categorized this request as the Defence seeking ‘permission to undertake an open-ended expedition to the Sudan in order to find out whether there might be something or someone potentially useful to the Defence case.’<sup>4</sup>

The emphasis placed by the Chamber on the need for specificity provides important guidance with regard to cooperation applications. It is an interpretation which is essential to preserve the integrity and workability of Part 9, which is dependent on requests for cooperation being presented which have sufficient information for practical execution by States. At the same time, the Chamber, recognizing the importance of assisting the Defence in gathering evidence for its case, offered the possibility to the Defence of either ‘requesting an *ex parte* hearing to explore the avenues of investigation and details required by Article 96(2) of the Statute with the Chamber or to set these out in *ex parte* submissions.’<sup>5</sup> In so doing the TC in this instance sets a proper balance between safeguarding the essential requirements or Article 96 and Part 9 generally while supporting the defence efforts to prepare its case.

### 3. Concise statements of the essential facts

10 A statement of the essential facts of the case, underlying the request, may enable the requested State to decide which measures are necessary and appropriate for its execution, as well as the appropriate approach to the same.<sup>6</sup> It also may be information required for the applicable procedures in the requested State. The Court or the requesting State may determine how much information can be shared without endangering the investigation or prosecution of the case.

### 4. Reasons for and details of procedure or requirement to be followed

11 The Court may specify in the request the measures to be taken and the procedures to be adopted for the execution of the request. If it does so, it should also give a reason for demanding such measures and procedures as specified in the request. The same applies

<sup>2</sup> Rule 116(b) requires that requests for cooperation under Part 9 by the Defence must contain sufficient information to comply with Article 96(2).

<sup>3</sup> ICC, *Prosecutor v. Banda and Jerbo Jamus*, TC IV, Decision on ‘Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, ICC-02/05-03/09-169, 1 Jul. 2011.

<sup>4</sup> *Prosecutor v. Banda and Jerbo Jamus*, ICC-02/05-03/09-169, para. 22.

<sup>5</sup> *Prosecutor v. Banda and Jerbo Jamus*, ICC-02/05-03/09-169, para. 33.

<sup>6</sup> Article 14(1) EuCMACM, for instance, does not explicitly require a statement of the facts underlying the request.

## Article 98

### Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Directly Relevant Rules of Procedure and Evidence: Rule 195.

**Literature:** See Preliminary Remarks on Part 9 and: Ahlbrecht, H. and Ambos, K., *Der Fall Pinochet(s)* (Nomos 1999); Akande, D., 'Customary International Law and the Addition of New War Crimes to the Statute of the ICC', (January 2, 2018) *EJILTalk* <<https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/>> accessed 14 Jun. 2020; *id.*, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 *JICJ* 299; *id.*, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 *JICJ* 333; *id.*, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407; *id.* and Shah, S., 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2010) 21 *EJIL* 815; Ambos, K., 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution to a Consistent Theory of International Criminal Law', (2013) 33 *OJLS* 293; Ascensio, H. and Bonafe, B.I., 'L'absence d'immunité des agents de l'Etat en cas de crime international: Pourquoi en débattre encore?', (2018) 122 *RGDIP* 821; Barkholdt, J. and Kulaga, J., *Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on Immunity of State Officials from foreign criminal jurisdiction, United Nations General Assembly, Sixth Committee, 2017*, KFG Working Paper Series, No. 14, Berlin Potsdam Research Group "The International Rule of Law: Rise or Decline?", Berlin 2018; Benzing, M., 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties', (2004) 8 *MPYbUNL* 181; Bianchi, A., 'Immunity versus Human Rights: The Pinochet Case', (1999) 10 *EJIL* 237; Blommesteijn, M. and Ryngaert, C., 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity', (2010) 5 *ZIS* 428; Bogdan, A., 'The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98', (2008) 8 *ICLRev* 1; Boschiero, N., 'The ICC Judicial Findings on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593', (2015) 13 *JICJ* 625; Buzzini, G.P., 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v. France* Case', (2009) 22 *LeidenJIL* 455; Broomhall, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003); *id.* and Kreß, C., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: Kreß *et al.*, *Rome Statute II* (2005) 515; Byers, M., *Custom, Power and the Power of Rules* (CUP 1999); Cassese, A., 'When may senior State officials be tried for international crimes?', (2002) 13 *EJIL* 853; Chasapis-Tassinis, O., 'Customary International Law: Interpretation from the Beginning to the End', (2020) 31 *EJIL* (235); Cosnard, M., 'Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet', (1999) 103 *RGDIP* 309; Crawford, J., *Brownlie's Principles of Public International Law* (OUP 9<sup>th</sup> edition 2019); *id.*, Sands, P. and Wilde, R., *In the Matter of the Statute of the ICC and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute*, (2003) <<http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>> accessed 14 Jun. 2020; Damaška, M., 'What is

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## A. Introduction/General remarks

The subject-matter of Article 98 did not hold a prominent place in the negotiations on Part 9 for a long time. When the *Ad Hoc* Committee dealt with possible grounds for refusal in the context of surrender, the immunity issue was not specifically mentioned. Instead, all emphasis was placed on the competition between different surrender and extradition requests<sup>1</sup> which has received a detailed regulation in Article 90. The Preparatory Committee Draft 1998 then contained, in its Article 87, a bracketed ‘Option 2 (e)’ for a ground to refuse the execution of a request of surrender where ‘compliance with the request would put it [the State Party] in breach of an obligation that arises from [a peremptory norm of] general international law [treaty obligation] undertaken to another State’.<sup>2</sup> This draft, on the one hand, indicates that the issue of possible conflicting international obligations was now seen as going beyond the competition of surrender and extradition requests; on the other hand, the series of brackets testify to the fact that there was no unanimous view regarding this matter.

In fact, the issue of conflicting immunities was rather reluctantly addressed by some delegations, which were of the view that developments in general international law had substantially reduced, if not eliminated, immunities with respect to crimes under international law as listed in Article 5 of the Statute. However, on the insistence of some other delegations and without there being time for a sufficiently thorough discussion in the course of the Rome Conf., a provision on possibly conflicting immunities was included, and hereto was added another provision referring, in particular (without spelling this out explicitly), to Status of Forces Agreements.<sup>3</sup> In this latter respect, there was one additional reason for those States in favour of an efficient cooperation regime to approach the matter with very considerable reservation. It was thought that the right of every sending State – *i.e.* not only a sending State that is a party to the Statute – to make use of the complementarity regime pursuant to Articles 17 to 20 to invoke its primary right to exercise criminal jurisdiction both under the Statute and under the relevant agreement constituted sufficient protection for such a State’s legitimate interests.

The solution found in Article 98 is a rather complex one. It was recognized to be both impossible in the time available and undesirable to set up a list of those international obligations regarding immunities and primary treaty rights to criminal jurisdictions held by sending States that would indeed conflict with the obligation to surrender under Article 89(1). It followed that the determination as to whether a real conflict existed had

<sup>1</sup> See *Ad Hoc* Committee Report, para. 218.

<sup>2</sup> The text and its earlier versions is reprinted in: Bassiouni and Schabas (eds.), *History ICC II* (2016) 766.

<sup>3</sup> Kaul and Kreß (1999) 2 *YbIHL* 143, 164.



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to be taken on a case-by-case basis. Article 98 thus places an obligation on the Court not to put a State in the position of having to violate its international obligations with respect to immunities. To the extent that a conflict of obligations would arise in case of a request, the Court must obtain the cooperation from the third or sending State, before issuing the request. Rule 195(1) further elaborates on the pivotal role accorded to the Court and states as follows:

*'When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of Article 98, the requested State shall provide any information relevant to assist the Court in the application of Article 98. Any concerned third State or sending State may provide additional information to assist the Court.'*<sup>4</sup>

It has been argued that the text of Article 98(1) is inconclusive as to whether the Court or the State Party concerned are competent to decide whether a request by the Court would give rise to a conflict of international legal obligations. In support of this argument, attention has been drawn to the fact that the French version begins by saying '(l)a Cour ne peut poursuivre l'exécution d'une demande' and that Rule 195(1) enables the requested State to raise a problem of execution with the Court. On that basis, it has been suggested that the 'better view seems to be that it is for the requested State to first determine whether the implementation of a request for surrender or assistance under Article 98 would result in a violation of its other international obligations subject, perhaps, to the 'exceptional circumstances' reviewing authority of the Court'.<sup>5</sup> This argument is unpersuasive. It is true that the French version of Article 98(1) differs from the English version in that it uses the word 'exécution'.<sup>6</sup> While the French formulation is, by itself, unclear as to whether the State concerned to 'execute' the request, nothing even in the French version suggests that the requested State should have the last say on the question of a conflict of international legal obligations. The wording of Article 98(1) rather places the emphasis on the Court. This strongly suggests that the competence lies with it. Rather than contradicting this impression, the formulation of Rule 195(1) confirms it. While the requested State may indeed 'raise a problem of execution', Rule 195(1) goes on to say that it is the Court that applies Article 98(1). It is also in full consonance with the most important vertical element of the cooperation scheme set up in Part 9<sup>7</sup> that the competence to decide the question of a conflict of obligations must ultimately lie with the Court. Leaving this fundamentally important matter to be decided by the requested State Party would not only constitute an exception within Part 9, but it would also strike at the core of the idea of efficient cooperation. This problem is recognized by the contrary view to the extent that it accepts the possibility of an "exceptional circumstances" reviewing authority of the Court'. But this is a half-hearted remedy and one prone to give rise to the most serious problems in practice. The correct interpretation of Article 98(1) therefore is that the competence authoritatively to decide the question of a conflict of obligation lies with the Court.<sup>8</sup> It may be

<sup>4</sup> This sub-rule goes back to a French proposal; for the relatively uncontroversial drafting process on this sub-rule, see Harhoff and Mochochoko, in: Lee, *ICC* (2001) 637, 666.

<sup>5</sup> Mettraux *et al.* (2018) 18 *ICLRev* 577, 615.

<sup>6</sup> But see the Spanish version that, in line with the English version, uses the words 'no dará curso'.

<sup>7</sup> Kreß and Prost above Preliminary Remarks mn. 5.

<sup>8</sup> This would appear to be the predominant view in international legal scholarship; see Benzing (2004) 8 *MPYbUNL* 199; Crawford *et al.*, *Matter of Statute* (2003) para. 23; Kreicker, *Exemptionen II* (2007) 1385; Meißner, *Zusammenarbeit* (2003) 120; Sluiter, *Evidence* (2002) 171; Ubéda-Saillard, in: Fernandez *et al.*, *Commentaire II* (2019) 2309, 2312.



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added that the point was very much in the minds of the negotiators and that the competence was given to the Court in full recognition of the fact that the Court's determination will not bind a State concerned that is not party to the Statute, and that for this reason, any determination by the Court, that no conflicting international obligation exists, will leave the requested State Party with the risk that the Court's determination of the international legal obligation is wrong.<sup>9</sup> In the course of the negotiations, it was felt that this risk is a tolerable one to bear in light of both the judicial expertise united on the bench and the persuasive authority that any relevant determination by the Court is bound to carry with it.<sup>10</sup> The Court's case law is in full conformity with the foregoing considerations. For example, PTC II found as follows:

*'(A)rticle 98 of the Statute addresses the Court, and is not a source of substantive rights (or additional duties) to State Parties. While it does indicate that a tension may exist between the duty of a State Party to cooperate with the Court and that State's obligation to respect immunities under international law, it leaves to the Court, and not to the State Party the responsibility to address the matter. The text of rule 195 of the Rules confirms this understanding.'*<sup>11</sup>

While it would appear that the implementing legislation of France, Germany,<sup>12</sup> New Zealand and Spain is fully in line with this basic scheme underlying the operation of Article 98, the picture is less clear in other States<sup>13</sup> (for further analysis, see below mn. 13).

Compared to provisions such as, in particular, Article 99(4), **Article 98 did not 4 absorb too much negotiation time in Rome.** It is also probably fair to say that the latter article was not considered to be of utmost political sensitivity by most participants in the negotiations. This also explains the rather short commentary devoted to Article 98 in the first edition of this volume. This assessment has proven wrong for two reasons. First, shortly after the Rome conference, the U.S. made an attempt to use Article 98(2) as one component of a more comprehensive strategy to, as it were, renegotiate the compromise on the Court's jurisdiction that had finally been struck in Rome. Second, the Court's case law regarding the application of Article 98(1) in the case of the (at the time: incumbent) head of state of Sudan, Al Bashir, has provoked criticisms particularly from African States.

<sup>9</sup> This risk is rightly alluded to by Akande (2004) 98 *AJIL* 407, 431.

<sup>10</sup> Kreicker, *Exemption II* (2007) 1385 ff.

<sup>11</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC II, Decision under Article 87(7) of the Rome Statute on the non-compliance of Jordan with the request by the Court for the arrest and surrender of Omar A-Bashir, ICC-02/05-01/09-309, 11 Dec. 2017 (hereafter: Jordan Decision), para. 41; there is a line of entirely consistent case law on that point; see ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC II, Decision under Article 87(7) of the Rome Statute on the non-compliance of South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, 6 Jul. 2017 (hereafter: South Africa Decision), para. 100; ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 Apr. 2014 (hereafter: DRC Decision), para. 16; ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, 12 Dec. 2011 (hereafter: Malawi Decision), para. 11.

<sup>12</sup> The German legislator has introduced a new Section 21 into the Gerichtsverfassungsgesetz (Law on the Organization of the Judiciary) which makes it clear that German authorities will not enter into an autonomous examination of the international legal issue once the Court has made a request; the purpose of this section to recognize the Court's decision-making power is correctly identified by Kreicker, *Exemption II* (2007) 1386.

<sup>13</sup> Broomhall and Kreß, in: Kreß *et al.*, *Rome Statute II* (2005) 525 ff.

## **PART 11 ASSEMBLY OF STATES PARTIES**

### **Article 112 Assembly of States Parties**

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
  - (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
  - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
  - (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
  - (d) Consider and decide the budget for the Court;
  - (e) Decide whether to alter, in accordance with Article 36, the number of judges;
  - (f) Consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-cooperation;
  - (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.
3.
  - (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
  - (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
  - (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

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- (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
  - (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

**Literature:** Ambach, P., and Rackwitz, K. U., 'A Model of International Judicial Administration? The Evolution of Managerial Practices at the ICC', (2013) 76 *L&ContempProbs* 119; Ambach, P., 'Assessing the ICC's major challenges in its 12<sup>th</sup> year: the "lessons learnt" initiative to increase efficiency of the criminal process', in Stahn, Practice (2015) 1277; Ambach, P., 'Performance Indicators for International(ised) Criminal Courts – Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?', (2018) 18 *ICLRev* 426; Ambach, P., 'The "Lessons Learnt" process at the ICC – a suitable vehicle for procedural improvements?', (2016) 12 *ZIS* 854; Clark, R. S., 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', (2009) 20 *EJIL* 1103; O'Donohue, J., 'Financing the ICC', (2013) 13 *ICLRev* 269; id., 'The ICC and the ASP', in Stahn, Practice (2015) 105; Woolaver, H./Palmer, E., 'Challenges to the Independence of the ICC from the ASP', (2017) 15 *JICJ* 641.

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### A. General remarks

During the ILC’s preparation of the Draft Statute of an ICC, as well as before the Ad Hoc Committee on the Establishment of an ICC (*Ad Hoc Committee*),<sup>1</sup> the idea of an Assembly of States Parties was not yet addressed, as it was still open how the ICC would be established. It was only in 1996 that a French Working Paper on the Draft Statute of the Court submitted to the PrepCom contained for the first time a provision on the establishment of a ‘**general assembly of states parties**’.<sup>2</sup> It attracted the attention of the PrepCom in 1997, and the first focused discussion took place in the relevant Working Group of the PrepCom in its penultimate session in 1998.

The original proposal of an Assembly of States Parties continued to surface in a number of structural and institutional discussions. In the context of the relationship between the ICC and the UN, the French delegation, in its response to a background note circulated by the UN Secretariat,<sup>3</sup> indicated the linkage between an Assembly of States Parties and the **financing** of the Court, and that the financing in turn depended on the **institutional nature** of the Court. The French preference was for the Court to be a specialized agency of the UN.<sup>4</sup> The United States delegation in the subsequent discussion in the PrepCom considered the Assembly useful as an oversight mechanism.

The draft provision encompassed several issues relating to participants, functions, composition and decision making in the Assembly of States Parties. The Working Group of the PrepCom on the subject produced a draft text and the same was forwarded to the Rome Conference as a part of the Draft Statute.<sup>5</sup>

After a lengthy but a relatively uncontroversial debate, the Rome Conference agreed on Article 112 of the Statute in its present form.<sup>6</sup> Briefly, the salient features of Article 112 are as follows. The Assembly is open to States Parties as members and to other States as observers.<sup>7</sup> It has **seven functions which are listed in paragraph 2 of Article 112**, namely: the Assembly considers and adopts the recommendations made by the PrepCom; conducts management oversight of the operations of the Court; considers the reports and activities of its Bureau; decides on the Court’s annual budget; decides on the alteration of the number of judges; deals with non-cooperation; performs any other

<sup>1</sup> The *Ad Hoc Committee* heard some comments by delegations on the issue of administration and budget but not on the idea of an ASP as such. See Part F on ‘Budget and Administration’ in the *Ad Hoc Committee Report*, paras. 244–49.

<sup>2</sup> UN Doc. A/AC.249/L.3 (1997).

<sup>3</sup> UN Doc. A/AC.249/1998/L.10 (1998).

<sup>4</sup> UN Doc. A/AC.249/L.12 (1998). See also Ambach above Article 2 mn. 12 ff.

<sup>5</sup> UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, Article 102.

<sup>6</sup> UN Doc. A/CONF.183/9 (1998).

<sup>7</sup> *Ibid.*, Part 11 on the ASP, Article 112 para. 1.

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function in accordance with the Statute (like the election of judges, Article 36) and the Rules of Procedure and Evidence. In particular the first function, namely to consider and adopt the recommendations made by the PrepCommis, is no longer of relevance today; it is also noteworthy that the function to alter the number of judges (Article 112(2)(e)) has not been considered to date.<sup>8</sup> The remaining functions have become standard activity items in the yearly Assembly meetings. More than 17 years after its establishment, the Assembly has developed into a **dynamic inter-governmental body** fulfilling its mandates under Article 112. In addition, over the years the Assembly has taken over a number of diplomatic functions that were not explicitly contemplated in the Statute.<sup>9</sup> Assembly discussions during the yearly meetings in a general debate setting during the more recent sessions have provided some content to the **Assembly's governance function** also relating to the Rome Statute system as a whole. An example of this, notably with effects reaching into the present,<sup>10</sup> is the 2016 discussion on performance indicators for the Court, following a number of Court reports on the matter.<sup>11</sup> Other – some of them recurrent – examples include universality, (non-) cooperation, arrests and the role of victims before the ICC.<sup>12</sup> A **permanent Secretariat** of the Assembly provides services, legal, administrative and technical assistance to the Assembly, the Bureau and the subsidiary bodies.<sup>13</sup>

## B. Analysis and interpretation of elements

### I. Paragraph 1: 'Each State Party' and 'Other States'

- 5 Paragraph 1 stipulates that each State Party participates in the Assembly with one representative, conferring **equal voting rights** among all States Parties independently from their monetary contribution. The inclusion of 'alternates and advisers' in paragraph 1 has led in practice to an increase in delegations' size during the yearly Assembly meetings. During the negotiations regarding States' participation in the Assembly, there were **initially two major trends**, the common thread of them being that States Parties have an inherent right to participate in the proceedings of the Assembly. However, there were differences regarding the non-States Parties' role. One view was that equal entitlement of representation of non-States Parties and States Parties would not be legally fair to States Parties and it would serve as a disincentive

<sup>8</sup> On this point see also Bohlander Article 36 above mn. 1.

<sup>9</sup> See ICC Review Conference 2010 – Stocktaking of International Criminal Justice, featuring topics like (i) the impact of the Rome Statute system on victims and affected communities; (ii) peace and justice; (iii) complementarity; and (iv) cooperation, <[https://asp.icc-cpi.int/en\\_menus/asp/reviewconference/stocktaking/Pages/stocktaking.aspx](https://asp.icc-cpi.int/en_menus/asp/reviewconference/stocktaking/Pages/stocktaking.aspx)> last accessed 11 Mar. 2020.

<sup>10</sup> See Res. ICC-ASP/18/Res. 1 (Budget resolution), 6 Dec. 2019, *lit.* L, para. 6, referring to performance indicators 'as an important tool to fulfil its functions, in particular with regard to effective leadership and management'.

<sup>11</sup> See ASP/15, Panel Discussions, <[https://asp.icc-cpi.int/en\\_menus/asp/sessions/documentation/15th-session/Pages/ASP15-Plenary.aspx](https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/15th-session/Pages/ASP15-Plenary.aspx)> last accessed 11 Mar. 2020; and the Second Court's report on the development of performance indicators for the ICC, 11 Nov. 2016, <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP15-SGG-PD-Second-Court-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP15-SGG-PD-Second-Court-Report-ENG.pdf)> last accessed 11 Mar. 2020. On performance indicators, see Ambach, P., (2018) 18 *ICLRev* 426.

<sup>12</sup> See, e.g., ASP 18 Panel Discussions (2019) focusing on inter-state and inter-institutional cooperation, <[https://asp.icc-cpi.int/en\\_menus/asp/sessions/documentation/18th%20session/pages/asp-18-panel-discussions.aspx](https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/18th%20session/pages/asp-18-panel-discussions.aspx)> last accessed 11 Mar. 2020.

<sup>13</sup> ICC-ASP/2/Res. 3, 'Establishment of the Permanent Secretariat of the ASP to the ICC', 12 Sep. 2003, (see also the Annex to the Res.). See also Rule 37 of the Assembly's Rules of Procedure for the Secretariat's specific Assembly-related functions.



## Article 127 Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

**Literature:** Heller, K. J., 'A Dissenting Opinion on the ICC and Burundi', *Opinio Juris* 29 Oct. 2017, <<http://opiniojuris.org/2017/10/29/does-the-icc-still-have-jurisdiction-over-crimes-in-burundi/>> accessed 30 Sep. 2020; Jacobs, D., 'Burundi withdraws from the ICC: what next for a possible investigation?', <<https://dovjacobs.com/2017/10/28/burundi-withdraws-from-the-icc-what-next-for-a-possible-investigation/>> accessed 30 Sep. 2020; Slade T.N., and Clark, R.S., 'Preamble and Final Clauses', in: Lee, ICC (1999) 421; Whiting, A., 'If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?', *Just Security* 12 Oct. 2016 <<https://www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there/>> accessed 30 Sep. 2020.

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### A. Introduction/General remarks

- 1 The language of this Article is essentially that provided by the UN Secretariat in New York, late in the preparations for Rome. Although some discussion took place, only minor textual changes were made in Rome.<sup>1</sup> Some general comments about the power to withdraw have already been made in the discussion of Article 121 concerning

<sup>1</sup> See Slade and Clark, in: Lee, ICC (1999) 421, 422 and, for discussion see 446–447.

amendments. The reader is referred to that discussion which need not be repeated here. While Article 121 deals with the right to withdraw in a relatively narrow set of circumstances, namely where there is an amendment to the Statute to which the State objects, Article 127 is entirely open-ended. In this respect, it is similar to withdrawal provisions in the constitutive instruments of many of the Specialized Agencies. There is no articulated limitation on the right of States to withdraw on any grounds, 'good' or 'bad'. In the case of the Specialized Agencies, a custom developed that States explain why it is that they are withdrawing, in order to give the entity an opportunity to alter any course of action that the withdrawing State finds unacceptable. Withdrawal of significant parties is a nightmare that everyone fears, particularly those with memories of the ultimate unravelling of the League of Nations.

## B. Analysis and interpretation of elements

### I. Paragraph 1

#### 1. Withdrawal by notification to Secretary-General

Again, the SG exercises a standard depositary function in receiving written notifications of withdrawal. 2

#### 2. Takes effect one year after notification unless the notification specifies a later date

A State may make a notification at any time, but except in those cases to which Article 121 applies where immediate withdrawal is possible,<sup>2</sup> the withdrawal will not be effective for at least one year. A withdrawing State remains a State Party in the period between the communication of the notification of withdrawal and the end of the one-year period.<sup>3</sup> A State which is using a threat to withdraw as a tool to try to shape the direction taken by the Court may perhaps offer a longer period than a year before its withdrawal is effective. The power of the withdrawing State to specify some longer period than a year for its withdrawal appears to be legally unfettered and dependent entirely on the discretion of the State concerned, although one might argue that a major contributor which uses a lengthy period as a threat hanging over the Court is behaving unreasonably. While the Article is silent on the matter, a State can lawfully revoke its notification at any time before the withdrawal becomes effective.

In practice, four notifications of withdrawal have been made and two, those by Gambia and South Africa, were rescinded before they became effective.<sup>4</sup> Gambia's revocation followed a change of government and South Africa's followed a domestic court decision that the Executive could not legally withdraw unilaterally without the consent of the legislature. A decision by Burundi to withdraw became effective on 27 Oct. 2017 and a withdrawal by the Philippines became effective on 17 Mar. 2019.<sup>5</sup> 4

<sup>2</sup> See above Clark/Heinze Article 121 mn. 16 ff.

<sup>3</sup> ICC, *Situation in the Republic of Burundi*, ICC-01/17-X, PTC III, *Situation in the Republic of Burundi*, ICC-01/17-X, PTC III, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 Oct. 2017, 9 Nov. 2017, para. 24.

<sup>4</sup> Depositary Notification C.N.786.2016.TREATIES-XVIII.10 (South Africa); Depositary Notification C.N.862.2016.TREATIES-XVIII.10 (Gambia).

<sup>5</sup> Depositary Notification CN/2016/CN.805.2016.TREATIES-XVIII.10 (Burundi); Depositary Notification C.N.138.2018.TREATIES-XVIII.10 (Philippines).