THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT

Edited by
Carsten Stahn and Göran Sluiter

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With a foreword by

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Abreviations

ABA	American Bar Association
AC	Appeals Chamber
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACLT	Advisory Committee on Legal Texts
ASP	Assembly of States Parties
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CEELI	Central and Eastern European Law Initiative
CIJ	Coalition for International Justice
CPCC	Code of Professional Conduct for Counsel
DRC	Democratic Republic of the Congo
ECHR	European Court of Human Rights
EU	European Union
FNI	Front des Nationalistes et Intégrationistes
FRPI	Force de résistance patriotique en Ituri
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IT	Information Technology
JICJ	Journal of International Criminal Justice
LRA	Lord's Resistance Army
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
NGO	Non-governmental organization
NMT	Nuremberg Military Tribunal
OPCV	Office of Public Counsel for Victims
OHR	Office of the High Representative

OSCE	Organization for Cooperation and Security in Europe
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RP	Rassemblement pour la Paix
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UPC	Union des patriotes congolais
UPDF	Uganda People's Defence Force
VCLT	Vienna Convention on the Law of Treaties
VPRS	Victims Participation and Reparation Section
VWU	Victims and Witnesses Unit
WTO	World Trade Organization

Foreword

*Adriaan Bos**

1. Introduction

I was asked to muse upon developments in the first five years since the entry into force of the Statute of Rome in the light of the negotiations preceding the adoption of the Statute at Rome.

It is a very striking experience to compare the overall situation of these negotiations with the actual state of international criminal law five years on. One may easily feel like Alice in Wonderland.

In the second part of the last decade of the 20th century, discussions on the establishment of an International Criminal Court (ICC) were strenuous efforts to cover new ground in the still largely unexplored territory of international criminal law. The enforcement of criminal justice was seen as one of the prerogatives of sovereignty. We had at our disposal, amongst others, the report of the International Law Commission, the jurisprudence of the Nuremberg and Tokyo Tribunals and a long history of unsuccessful efforts to create an international criminal tribunal. It was first and foremost necessary to convince people of the desirability to create an international criminal court.

At present, the readers of this book can acquaint themselves with an International Criminal Court that is well organized and equipped, in full swing and already facing fundamental questions about its place in a globalized world where alternatives for the ICC are already created and where questions are asked whether the ICC fits properly into the judicial systems of all states and whether judicial procedures are an answer to serious crimes under all circumstances. We are balancing advantages and disadvantages of various forms of adjudication. Handbooks and literature devoted to the ICC and international criminal law are numerous. At universities, international criminal law has become a very popular subject.

At the time of the preliminary discussions of the ICC, international criminal law was still in its infancy. The first important development was the establishment of the ICTY in May 1993.[1] It was the first genuine international criminal tribunal ever es-

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1 See SC Resolution 827 (1993), UN. Doc. S/Res/ 827/1993, 25 May 1993.

tablished by an international organization. The mere existence of this tribunal was already important in helping to persuade opponents that an international criminal tribunal was no longer a fantasy. Both, the conformity of the establishment of the ICTY with the Charter and the purpose of the tribunal to contribute to the restoration and peace in the former Yugoslavia were disputed. Its establishment was soon followed by the creation of the International Tribunal for Rwanda in November 1994.[2]

A proposal to amend the Yugoslav Tribunal's mandate to extend its jurisdiction to Rwanda was rejected. Some members of the Security Council feared that the expansion of an *ad hoc* jurisdiction would lead to a single tribunal that would gradually take on the characteristics of a permanent judicial institution. Nevertheless, the Council recognized that its coexistence with the ICTY "dictated a similar legal approach" as well as "certain organizational and institutional links so as to ensure a unity of legal approach, as well as economy and efficiency of resources".[3]

The lessons learned from the establishment of these two tribunals and, subsequently, their experience and jurisprudence, have been of great help in shaping the contours of a permanent court. The establishment of these tribunals by the Security Council is no longer disputed.

2. Relationship between the Court and the United Nations

From the outset a close relationship between the Court and the United Nations was viewed as essential and a necessary link for the universality and standing of the Court. One of the reasons for the establishment of the Court was the growing understanding that the most serious crimes should not go unpunished because they threaten the peace, security and well-being of the world. This touches upon the primary responsibility of the Security Council for the maintenance of international peace and security, on the one hand, and the independence and impartiality of the Court, on the other hand, which is necessary to secure that the most serious crimes of concern to the international community as a whole will not remain unpunished. To find a solution respecting the mutual the tasks of both institutions appeared to be very complicated. This was true during the negotiations, but understandably it also turned out to be true in actual practice.

The complex character of this relationship manifested itself in different manners. Firstly, it was important to design the Statute in way which ensures that the international system of resolving disputes – and in particular the role of the Security Council – would not be undermined. Secondly, drafters had to bear in mind that the Statute should not confer any more authority on the Security Council than that already assigned to it by the Charter. Thirdly, they had to ensure that the relationship between

2 See SC Resolution 955 (1994), UN. Doc. S/Res/ 955/1994, 9 November 1994.

3 See P. Akhavan, 'The International Criminal Tribunal for Rwanda The Politics and Pragmatics of Punishment', (1996) 90 *American Journal of International Law* 501, 502.

the Court and the Council would not undermine the judicial independence and integrity of the Court or the sovereign equality of States.[4]

These factors affected the triggering mechanism, the role of the Security Council to defer cases and the problems with regard to the crime of aggression under the Statute.

According to Article 13 of the Statute, the Court may exercise jurisdiction if a situation in which one or more of the crimes of the Statute appear to have been committed is referred to the Prosecutor by a State Party, by the Security Council acting under Chapter VII of the Charter or by the Prosecutor *proprio motu*.

The prevailing assumption at that time was that cases would be submitted to the Court by the Security Council rather than by States or by the Prosecutor. This view was based on the understanding that the adoption of the Statute by States, and consequently its entry into force, would be a very time-consuming process. It was assumed that those States who decided to become Parties would not be those States where crimes are committed. Moreover, it did not seem very likely that States would be willlling to submit situations to the Court which have occurred on the territory of other states. This view was supported by the limited use of inter-state complaints under human rights conventions. One of the reasons to establish the Court was to provide the Security Council with a permanent institution (as opposed to *ad hoc* bodies) in order to facilitate and economize the international criminal jurisdiction. At the time of our preliminary discussions, the Security Council was suffering of what was called a "tribunal fatique". The costs and the energy necessary for the establishment of any new *ad hoc* tribunal were such that the establishment of any new *ad hoc* tribunal by the Council became very unlikely.

Cases submitted by the Security Council would, like in case of the ICTY and ICTR, have the binding effect of decisions based on Chapter VII of the Charter. They bind all members of the UN according to Article 25 of the Charter.

Referrals by the Security Council were therefore thought to be vital for the Court, at least in the beginning. But this assumption did not come true. On the contrary, the attitude of the United States versus the Court and the influence of this position on other members of the Security Council made it impossible for a long time to refer cases to the Court under Chapter VII. It was not until 31 March 2005 that the Council passed Resolution 1593 which referred the situation in Darfur to the ICC. Before the adoption of this resolution, some alternatives to the ICC were still suggested. The United States promoted the idea of an African hybrid court, a Sudanese tribunal based in Arusha where the seat of the ICTR is located. Nigeria, which was Chairman of the African Union, but not member of the Security Council advocated an African Panel for criminal justice and reconciliation in a letter to the EU.

In the case of the Sudan, a referral by the Security Council was the only way to bring the situation in Darfur before the Court, since the Sudan is not a Party to the Statute and not prepared to accept the jurisdiction of the Court with respect to this situation.

4 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, GA Suppl. No 22 (A/51/122), par. 129.

In the end, the resolution was adopted with 11 votes in favour, none against and four abstentions by Algeria, Brazil, China and the United States. Brazil and Algeria abstained because they were not in a position to support operative paragraph 6 of the resolution which provides that third States that have not ratified the Statute have exclusive jurisdiction over their nationals. There were also complaints about operative paragraph 7 which states that none of the expenses shall be borne by the UN.

Another very controversial question has been whether the Security Council could block ongoing or pending proceedings before the Court. This question was discussed without any result in the preparatory phase and resolved only at the very end of the Conference in Rome as part of a more general package deal.

The practical importance of the relevant Article 16 Statute came to light on 30 June 2002 when the United States vetoed the renewal of the mandate of the UN peacekeeping mission in Bosnia Herzegowina (UNMIBH) in the Security Council. This was the first example of efforts of the United States in the Council to shield UN peacekeepers from non-ICC Party States from the jurisdiction of the ICC. The United States also started a policy of concluding bilateral agreements to limit the exposure of US-nationals. This was the beginning of a period of confrontations in and outside the Security Council between States Party to the Statute and the United States. It has raised questions of interpretation of the Statute which will hopefully be settled by the Court one day.

From the outset, a clear tendency existed to limit the subject-matter jurisdiction of the Court to the most serious crimes, which are of concern to the international community as a whole, i.e. genocide, crime of aggression, serious violations of the law and customs applicable in armed conflict, and crimes against humanity. Opinions were divided with regard the inclusion of the crime of aggression although that crime was included in the Charter of Nuremberg. There was no dispute that acts of aggression belong to the most serious crimes. There was, however, a strongly held view that aggression is an act of State rather than a crime of individuals. This made it contentious up until the end of the conference at Rome whether the crime should even be included in the Statute. The Statute contains the crime aggression as a confirmation that aggression belongs to the most serious crimes. However, the Court has no jurisdiction over this crime until aggression is defined and until it is set out under what conditions the Court shall exercise its jurisdiction. Consequently, a very careful balance needs to be struck between the competences of the Security Council in determining the existence of an act of aggression and the exercise of jurisdiction by the ICC with regard to this crime, in order to make it acceptable for all interested parties, including the permanent members of the Security Council.

This again is a very delicate question which touches upon the relationship between the two institutions. Hopefully, the Assembly of the Parties will succeed at the Review Conference to fulfil this difficult task. According to the view of one of the contributors to this volume (Roger Clark), this is considered "not beyond human ingenuity".[5]

I have elaborated on this subject because it demonstrates clearly that it remains difficult to predict how the relationship between the Security Council and the Court

5 See below Ch. 35, Conclusion.

will develop. The crime of aggression still needs to be defined. The short experience with the deferrals has been discouraging. Considerable effort has been expended on the Darfur referral. Its resolution contains paragraphs that are at odds with the Statute. Nevertheless, its adoption is seen as a positive sign for the future cooperation between the Court and the Council.

One may agree with the view that the developing relationship with the Security Council will prove to be one of the most important issues for the determination of the future of the ICC.[6] One may hope that the developments in the coming five years will be more positive than events during the first five years.

3. Complementarity

Certain problems were already anticipated at an early phase of our negotiations. The rules on complementarity are an example. This principle of complementarity has been of fundamental importance for the successful conclusion of the negotiations. It managed to convince states that they would remain master over their own judicial proceedings, without allowing perpetrators of serious crimes to go unpunished. Whenever a State properly carries out its obligations to investigate and prosecute, the case will be inadmissible before the Court, even if that State decides on solid grounds not to prosecute. Complementarity can be seen as a bridge between international and national jurisdiction. The basic framework of this principle, as laid down in Articles 17-20 of the Statute, was already elaborated in the negotiations before Rome. Only minor changes were made in Rome.

With the referrals of Uganda, the Democratic Republic of the Congo and the Central African Republic, a new phenomenon is introduced, namely that of auto-referrals. In the phase of the preliminary negotiations, a suggestion was made that a State might voluntarily decide to relinquish its jurisdiction in favour of the Court. But this suggestion was not followed up in later phases. It has always been assumed that jurisdiction would either be exercised by the Court or by the State on whose territory or by whose nationals crimes are committed. The text of Article 14 of the Statute does not rule out the possibility of a referral by States on whose territory or by whose nationals crimes have been committed. It allows "a State Party" to refer a situation to the Court. In the negotiations this option was not well thought through. It is now up for the Court to decide how to deal with this new phenomenon. It raises fundamental questions. Does it involve the Court too far in internal controversies within a State at the risk of endangering the independence of the Court? To what extent is it in conformity with the obligations of the States Parties to investigate and prosecute?

6 See Sir F. Berman, The Relationship between the ICC and the Security Council, in H. von Hebel, J. G. Lammers & J. Schukking (eds), *Reflections on the International Criminal Court* (1999), 179.

4. Conclusion

I have tried to outline how immensely the scene of international criminal law has changed over the past two decades. The attitude of the United States vis-a-vis the Court has caused problems in the past five years. Their acquiescence to the Darfur referral appears to be a good omen for the coming years. Other American officials have also indicated that the United States now appears to accept that the ICC has a role to play in the overall system of international justice.[7] This may help to convince non-Parties to ratify the Statute. The Court is born out of the UN system and it has clearly a universal vocation. It is now for the Court as judicial body to show how it can meaningful contribute to the peace, security and well-being of the international community.

The collection of articles contained in this volume proves how prominent the Court has already become in the international legal community. This book offers a comprehensive overview of the emerging practice after five years. The President of the ICC, the Prosecutor, two eminent judges and a former judge provide their learned and sometimes critical views. Eminent experts take a close look at all legal aspects raised by the actions of the Court. Comparisons are drawn to the practice of other international criminal courts. Various contributions scrutinze the actions of the Pre-trial, Trial and the Appeals Chamber of the Court. Special attention is given to the role of victims, a novelty in the Statute. In short, reading of this book will inform any reader how far the Court has already advanced in its activity and what kind of problems it is likely to face in the coming years.

7 Notes from the President, Newsletter of the ASIL, Vol. 24, issue 1, January/March 2008.

Introduction: From "infancy" to emancipation? – A review of the Court's first practice

Carsten Stahn and Göran Sluiter***

1 July 2007 marked the fifth anniversary of the International Criminal Court. The Rome Statute ("the Statute") entered into force in July 2002. In 2008, the Rome Conference and the adoption of the Statute date back ten years. The first Review Conference is on the doorsteps. Can we say that these are the "infant years" of the Court?

To some extent, yes. The Court is on its feet and "in motion",[1] but is still seeking its place in the arena of international criminal justice. Certain concepts are gradually interpreted and filled with normative content (e.g. disclosure,[2] confirmation hearing,[3] participation of victims,[4] interests of justice[5]). Some institutional aspects, including the relationship and cooperation with the UN,[6] EU[7] and the host State,[8] have become clearer at age five. But many directions and choices in jurisprudence and criminal policy are still in flux, or only gradually emerging as issues.

The first years in the short life of the Statute and the Court have certainly been unusual. Hardly anyone expected the "birth" of the Court to occur quite so quickly after "conception" of the Statute. The Statute came into action even prior to the naissance of the institution. It set off a whole chain of domestic implementing legislation

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1 See Ch. 1 and 2 of this volume.

2 See Ch. 30 of this volume.

3 See below Ch. 22 and 23.

4 See Ch. 33.

5 See Ch. 11.

6 See Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, entered into force on 4 October 2004, at http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf.

7 See Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06, entered into force on 1 May 2006, at http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-01-01-06_English.pdf.

8 See Headquarter Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, entered into force on 1 March 2008, at http://www.icc-cpi.int/library/about/officialjournal/ICC-BD-04-01-08-ENG.pdf.

and shaped the substantive and procedural law of other international(ised) courts (e.g. Special Court for Sierra Leone, the UN established East Timorese panels with 'universal jurisdiction') before its actual entry into force, partly due to its contribution to the codification of international criminal law[9] and its incentive-based system of compliance ("complementarity").[10]

Where does the Court stand now? In generational terms, the Court is widely considered as the successor of the *ad hoc* tribunals. Its steps are closely watched worldwide, by domestic courts, other international tribunals, the UN, NGOs, governments and military and political leaders. But the Court is still an entity in *statu nascendi,* both in legal and in institutional terms. Certain "teething" symptoms have been diagnosed in the first practice.[11] Some of the 'grand doyens' of the discipline have raised doubts about the first steps of the ICC.[12] The practice of the Court has gained some praise, but also some criticism from the NGO community.[13] All of this rather typical of an entity of relatively young age and could hardly expected otherwise of an institution that is deemed to satisfy the hopes and expectations of so many divergent constituencies.

The institution-building process is ongoing. The Court is located at its provisional site and is waiting for its new permanent home. Unsettled issues from the Rome Conference await clarification. There are different, and sometimes divergent views about the mission and rationale of the Court. They are voiced openly or between the lines. Aspects of the Court's jurisdiction (e.g. aggression[14]) and its interplay with domestic jurisdictions and other international players (e.g. Security Council, other international(ised) courts and tribunals) are still to be defined.

The Court is a laboratory of creativity and experimentation. The legal and procedural framework of the Court is the object of lively and intense litigation. Different organs of the Court (e.g. Prosecutor, Chambers and Registry) have started to define the scope and limits of their powers, both vis-à-vis each other and external actors. This has sparked a wave of filings and jurisprudence, in which different procedural and methodological choices are advocated, tested and explored. Newly created offices (Office of Public Counsel for Victims, Office of Public Counsel for the Defence) and actors in proceedings (victims) are in the process of identifying their roles and

9 See, in particular, Articles 6 to 8 (with Elements of Crimes) and Part 3 (General Principles of Criminal Law) of the Statute.

10 See para, 6 of the preamble of the Statute as well as Articles 1, 17-20 of the Statute.

11 See A. Cassese, 'Is the ICC Still Having Teething Problems', (2006) 4 *JICJ* 434. See also below Ch. 3 of this volume.

12 See C. Bassiouni, 'The ICC – Quo Vadis?', (2006) 4 *JICJ* 421.

13 See ICC, Second public hearing of the Office of the Prosecutor (2006), Sessions 2 and 4, Transcripts at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html.

14 See below Ch. 35 and 36.

functions in proceedings.[15] Dissenting and separate opinions are flourishing, not only at the level of appeals, but also at the trial and the pre-trial stage.[16]

Some identity questions have emerged in the first practice. What is the Court? Is it a traditional criminal court or a legal subject with multiple personalities, i.e. an entity that combines "criminal" and "civil" features and "interstate litigation in one? If so, how can these features be united under one common umbrella? Where is the boundary between the virtue of state consent and prosecutorial independence? How can the Court deal with the selectivity of situations and avoid regional bias ("European Court for Africa")? Who should be prosecuted and what is the criminal policy of the Court regarding leadership accountability? To what extent can the interests of victims be reconciled with the capacity and function of the Court? What is the role of pre-trial and is it necessary? What is the appropriate role of judges in the management of proceedings and lawmaking?

All of this is quite normal and could not be expected otherwise of an institution that is founded upon on consensus and compromise among very different powers, interests groups and legal and cultural legal traditions and a negotiation process in which ambiguity was sometimes the only common denominator to be reached.[17]

Nevertheless, the first practice of the Court has brought some surprises. It has seen the emergence and/or articulation of concepts that were only at the back of the minds of the drafters at the Statute in 1998. The concept of "self-referrals" has not only become a new term of art in academic literature, but a key legal factor in the conception and assessment of the triggering of the Court and admissibility.[18] The notion of "positive complementarity" has made its way into prosecutorial practice and added another perspective to the relationship between the Court and domestic jurisdictions.[19] The term "gravity" has come to life and turned into one of the central themes for the selection of situation and cases,[20] despite its rather modest attention at the Rome Conference and the negotiation of the Rules of Procedure and Evidence.

Moreover, some differences to the *ad hoc* tribunals have become apparent. The ICC took an independent stance on the treatment of modes of liability. Instead of relying on, or developing, the doctrine of joint criminal enterprise, Judges interpreted and applied the Statute with reference to the concept of "joint control over the crime" which played only a marginal role in the jurisprudence of the *ad hoc* tribunals.[21] The

15 On the role of the Office of Public Counsel for Victims, see below Ch. 34

16 See e.g. Trial Chamber I, Decision on Victims' Participation, Separate and Dissenting Opinion of Judge Rene Blattmann, 18 January 2008, ICC-01/04-01/06; Pre-Trial Chamber I, Decision on the "Defence Application pursuant to Article 57(3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)", Partly Dissenting Opinion of Judge Anita Usacka, 25 April 2008, ICC-01/04-01/07.

17 See C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603.

18 See below Ch. 5 of this volume.

19 For discussion, see below Ch. 13.

20 See Ch. 12 and 14 of this volume.

21 See below Ch. 18 and 19.

role of victims has been addressed *in extenso.* In one of its first fundamental decisions, Pre-Trial Chamber I granted victims a role at the stage of the "case" and the stage of "situation".[22] Since the very start of proceedings, victims and their representatives have enjoyed a distinct status in proceedings, which differs from the role of parties (Prosecutor, Defence) and witnesses. The practice of "witness proofing" which forms part of established prosecutorial practice at the *ad hoc* tribunals, has been challenged in the context of ICC jurisprudence.[23] ICC case-law has provided a fresh perspective on the practice of the tribunals and triggered judicial dialogue and changes in practice.

These developments indicate that the Court is about to establish its own voice in the area of international criminal justice. Established concepts and views are challenged in ICC proceedings. New notions and approaches are emerging, probed and tested. The Court is about to leave its first footprints in the field.

However, there are some areas and causes of concern. The Statute itself is a conglomerate of complex, imperfect and sometimes contradictory provisions and approaches.[24] To make sense of this puzzle is almost a Sisyphusean task. The applicable law is not always clear; let alone its interpretation. Some of the core aspects of criminal law and procedure are widely contested, both among and within distinct legal traditions. Coherence is thus an issue. There have been disputes between the Office of the Prosecutor and Chambers concerning the applicable sources of law and their treatment by the Court.[25] Different approaches have been articulated with respect to the qualification of charges,[26] the treatment of victims and witnesses[27] or the conditions of interlocutory appeals of pre-trial and trial decisions.[28] Not all decisions may have provided the full clarity or guidance in reasoning that would be desirable for the establishment of a first jurisprudence and criminal policy of the Court.[29]

Plurality of opinion is an asset, in particular, in the emerging practice of a new institution. However, there have been some troublesome tendencies which need to be addressed. The first situations and cases have been marked by a flood of motions and submissions. Many documents required translation and needed to be redacted for purposes of confidentiality and protection of witnesses and victims, sometimes with different versions for the Defence and the public. This has resulted in an accumulation of the record, which is difficult to master by the Court and participants in proceedings. In the Lubanga case, 864 filings were made by 2007. The record of pre-trial proceedings alone comprised 17,602 pages related to the case and 217 documents (4,743 pages) related to the situation (Democratic Republic of the Congo). In

22 For a discussion, see below Ch. 33 and 34.

23 See below Ch. 31.

24 For a survey in the context of the Elements of Crime, see below Ch. 21.

25 See below Ch. 16 and 17.

26 See e.g. Ch. 26.

27 See Ch. 32.

28 On interlocutory appeals, see below Ch. 28.

29 For an analysis of the jurisprudence of the Appeals Chamber, see Ch. 27.

the Uganda situation, the picture is not much different. Here, the record contained 242 submissions by participants by 2007, amounting to a total of 7,135 pages prior to the arrest of even one single suspect. Numbers will inevitably multiply at the trial stage.

This quantity of filings and documents creates problems for the administration of justice and the capacity of the Court as a whole. If the number of situations is extended (as is to be expected), and with it the number of cases, there is a serious risk that the Court will actually become more preoccupied with itself than with its core function. Moreover, the sheer number of documents will make it ever harder for Defence teams to be became acquainted with the record and to prepare their defence effectively.

Then, there are the usual weaknesses which form part of the traditional Achilles' heel of international criminal justice: selectivity and cooperation. As could be predicted from the outset, the selection of situations and cases has become an issue.[30] Prosecutorial choices have been at the heart of attention. The geographical focus on African situations has been questioned. In the Uganda situation, the Office of the Prosecutor has been exposed to the criticism of one-sided investigation and prosecution.[31]

Cooperation has proved to be one of the major obstacles for the operation of Court.[32] The difficulties are most pronounced in the context of Darfur situation, where the two first indictees remain at large twelve months after issuance of warrants of arrest despite a Chapter VII based Security Council referral with an express duty of cooperation of the "Government of Sudan and all other parties to the conflict in Darfur".[33] Other, but not necessarily less important challenges have arisen in the practice of investigation and prosecution. The Court has operated in situations of ongoing conflict. Obtaining access to evidence has been a particular challenge in such contexts. When shared, information has often been provided under strict confidentiality restrictions (Article 54 (3) (e)) which have impaired transparency and disclosure. Moreover, managing the practicalities of arrest in accordance with Part 9 of the Statute (e.g. transfer, lifting of travel sanctions) has required intense negotiation and interaction between Court, the UN, domestic authorities and the host State. The modalities of arrest and surrender have been followed by procedural challenges at the pre-trial stage.[34]

The predominant concern, however, has been the length of proceedings. The Lubanga case has only advanced at very modest pace. The pre-trial phase took 11 months, and even 16 months if one takes into account the decision on the interlocutory appeal against the confirmation of charges. Trial was only scheduled to start almost one and a half years after the decision on the confirmation of charges, and was

30 See below Ch. 12.

31 See below Ch. 13.

32 See also Ch. 4 and 10 in this volume.

33 See para. 2 of SC Res. 1593 (2005) of 31 March 2005.

34 See below Ch. 24.

later impeded by a stay of proceedings.[35] This is hardly the timeframe that the drafters had in mind. This course of events is particularly alarming, given that the case comprised only one defendant and not more than three charges.

Part of this is due to case management. In the Lubanga case, the disclosure of Prosecution evidence to the Defence took four and a half months, starting from 15 May 2006, the date of the decision on the disclosure system. This framework might be reduced if some issues, such as protective measures and the seeking of provider's consent on the lifting of confidentiality were anticipated more effectively. A closer linkage of incriminating evidence to the counts against the defendant might have focused the process of disclosure and improved transparency. The stay of proceedings imposed by the Trial Chamber could have been avoided by a more diligent and restrictive handling of confidentiality restrictions under Article 54 (3) (e), which have become the rule rather than the exception in early proceedings.

There are also some broader procedural lessons. The pre-trial phase was partly created to increase the efficiency of proceedings, i.e. to serve as filter for trial and the record of the case. But it has become evident that there is a risk of overlap between trial and pre-trial. Evidentiary issues, disputes about the charges and questions of victim participation have been adjudicated repeatedly at both levels. There is thus a risk of duplication between trial and pre-trial.

Ten years after the adoption of the Rome Statute, there is some room for optimism. The Court is alive and running. It has come on its feet more rapidly than expected. But it has not yet managed to satisfy all hopes and expectations. Further progress will require creative and critical reflection from inside and outside the Court, and further dedication and support by those who created it.

This book is designed to assist in this process. It is targeted to accommodate a wide spectrum of voices.

The book starts with general reflections on the theme of the ICC at five years by those who have closely shaped or followed the naissance of the Court and its policies.

The subsequent chapters revisit the experiences of the emerging practice in a systematic fashion. They identify the areas in which practice is emerging or in which some first lessons may be drawn from practice. Part II examines the relationship of the ICC to domestic jurisdictions. It covers not only admissibility and complementarity, but includes analysis of the relationship between the Court and third states and issues of enforcement and cooperation. Part III discusses key aspects of prosecutorial policy and practice that have emerged in the first years, including their merits and criticism. Parts IV and V provide an account of the treatment and challenges of the Court's substantive and procedural law, and possible lessons for the future. The analysis covers the main stages of ICC proceedings and the role of participants in

35 See Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3)(e) agreements and the application to stay the prosecution of the accused', 2 July 2008.

proceedings. Part VI establishes a link to the future. It revisits some of the challenges that emerge in light of a possible review of the Statute.

This collection of essays combines expertise from inside the Court with input from external and critical observers. It is our hope that this diversity of views and analysis will shed a fresh light on some of the merits and main challenges of the Court in the transition from "infancy" to emancipation.

This book is the result of a close collaboration among various individuals and institutions. It is a follow-up of a two-day conference held in The Hague and Amsterdam on 4-5 October 2007 by the Amsterdam Center of International Law and Swansea University, in cooperation with the Grotius Centre for International Legal Studies, the Dutch Ministry of Foreign Affairs and the Netherlands Organisation for Scientific Research. We would like to thank all authors for contributing to this unique project. Special thanks are also due to the ICC Task Force of the Netherlands Ministry of Foreign Affairs for the support provided.

General Reflections on the Court at Five Years

Chapter 1 ICC marks five years since entry into force of Rome Statute

*Judge Philippe Kirsch**

Five years ago the Rome Statute of the International Criminal Court ("ICC") entered into force, ushering in a new era of accountability for international crimes. As expressed in its preamble, the aims of the Rome Statute are to put an end to impunity, to contribute to the prevention of the most serious international crimes and to guarantee lasting respect for and enforcement of international justice.

The entry into force of the Rome Statute in 2002 marked the transition of the ICC from an idea to a reality. With the election of the first judges, Prosecutor and Registrar one year later, the institution began to take shape. Since its actual establishment in 2003, the ICC has come a long way. An entire international institution has been built from scratch. The ICC has recruited a highly talented and diverse staff from around the world, put in place its administrative framework and established much of its core infrastructure in The Hague as well as several offices in the field. Today, the ICC is a fully-functioning judicial institution focused on its core activities of investigating and conducting trials of individuals accused of genocide, crimes against humanity or war crimes.

The first situations were referred to the ICC in early 2004. Within the space of eighteen months, the Prosecutor opened investigations into alleged grave crimes in three different countries – Uganda, the Democratic Republic of the Congo and Sudan (Darfur). A fourth investigation was opened this year in the Central African Republic. The judges have issued eight arrest warrants in three different cases. Following the execution of one of these warrants and the subsequent confirmation of charges by the judges of the Pre-Trial Chamber, the first trial will begin later this year. With more arrests will come more trials.

We have learned much about the prospects and promise of the ICC in its so far very brief existence. The ICC operates in circumstances unlike those faced by any previous international court or tribunal. It is active in situations of ongoing conflict where crimes continue to be committed. This presents significant challenges in terms of investigations, security, outreach and logistics, all of which underscore the importance of international cooperation to the ICC. At the same time, it is precisely

* President of the International Criminal Court, The Hague, 26 June 2007.

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because the ICC operates in situations where crimes are ongoing that it is today being credited with having a shorter term impact in preventing crimes than originally anticipated – and not just a long-term deterrent effect as was once thought.

Achieving the aims of the Rome Statute will be a collective effort. The ICC can have a truly global reach through universal ratification of the Rome Statute. 104 countries have ratified or acceded to the Rome Statute since it opened for signature in 1998.[1] This is an unusually rapid pace for a treaty setting up an international organization, especially one as complex as the ICC, and reflects both the clear need for the ICC and the confidence of states in the fairness and credibility of this new judicial institution. We nonetheless remain some distance from the objective of universality which is inherent in the Rome Statute.

In all stages of its activities, the ICC relies on the cooperation of states and, by extension, international organizations to carry out certain key functions such as the arrest and surrender of persons accused of committing crimes, the relocation of witnesses and the enforcement of sentences. The first years of the ICC have highlighted the importance of cooperation in different regards. Warrants of arrest have been outstanding since 2005. Ensuring the necessary cooperation will be a primary challenge for the ICC and for the States Parties in the years to come.

The ICC has had a significant early positive impact going beyond its investigations and prosecutions. Following the adoption and entry into force of the Rome Statute, many countries reviewed their domestic legislation governing genocide, crimes against humanity and war crimes. In several countries, this review led to amendments or upgrades to existing legislation. These countries are now in a better position to investigate and prosecute these crimes themselves. This is important because the ICC is a court of last resort. The primary responsibility to investigate serious international crimes, like all crimes, belongs to states. The ICC will only ever act when national jurisdictions are unwilling or unable genuinely to investigate crimes within its jurisdiction.

The entry into force of the Rome Statute and the initial development of the ICC occurred much faster than was expected. Our experience has clearly demonstrated that the success of the ICC depends critically on the cooperation received. The continued strong support of states, international organizations and civil society will be essential to maintaining and building on the momentum of the past five years.

1 Note that as of 22 July 2008, 108 countries have ratifiied or acceded to the Rome Statute.

Chapter 2 The International Criminal Court in motion

*Luis Moreno Ocampo**

Four years ago, I was appointed to be the first Prosecutor of the International Criminal Court ("Court"). It was an honour and an immense responsibility. I had one goal then, and I have one goal today: to build an institution to bring justice to the victims of atrocities.

I have to implement a new law: the Rome Statute ("Statute"). This law has been in the making for over a century. In Rome in 1998, 120 states committed to end impunity for genocide, crimes against the humanity and war crimes, and to contribute to the prevention of such crimes. My challenge, as Prosecutor of the International Criminal Court, was to make the body of law adopted in Rome operational, to transform ideas and concepts into a working system. We made decisions. We chose our standards. In order to facilitate interaction with all actors within and outside the Court, the Office of the Prosecutor ("Office") published its prosecutorial strategy. Policy papers have also been disseminated including on case selection and more recently, on the interests of justice. The prosecutorial strategy and supporting policy papers can inform external actors.

In the emerging practice of the Office, two areas deserve particular attention as they shape and will continue to shape the activities of the Court: firstly, the selection of situations, and secondly, the policy of focused investigations.

1. Selection of situations

Few commentators of the Statute have noted that the most distinctive feature of the Court, as compared to the other international tribunals, is the power given to the Court to independently select the situations to investigate. In other international tribunals, situations were selected by political authorities; international prosecutors could only select cases within these situations. By establishing the *proprio motu* pow-

* Prosecutor of the International Criminal Court.

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ers of the Prosecutor to open an investigation, subject to judicial review and without an additional trigger from States or the United Nations Security Council ("UNSC"), the Statute ensures that the requirements of justice can prevail over any political decision. States or the UNSC can choose to refer situations to the Court, but if they do not, we have the possibility to select situations independently through the provisions of Article 15. This is a new and entirely different approach.

For centuries, international conflicts were resolved through wars and negotiations without legal constraints. By establishing the *propio motu* powers of the Prosecutor to open an investigation, the treaty creates a new autonomous actor on the international scene. It is a new concept: the law will rule. International justice was neither a moment in time, nor an *ad hoc* post-conflict solution: it became a permanent institution to enforce the law. States established two key provisions in order to enhance the impartiality and independence of the new Court: they made it a permanent body, and they decided that the selection of situations would be a judicial decision. From the beginning, the Office defined a process to implement those defining provisions. We set up two different analysis units to assess all communications received on alleged crimes and to routinely review all open source documents describing such crimes. Assessments of jurisdiction, admissibility and gravity are systematically conducted. This is where and when situations are selected.

The process can be illustrated through the Democratic Republic of the Congo ("DRC") case. As soon as I took office on 16 July 2003, I announced that my Office was monitoring the gravest situation on the territory of States Parties: crimes allegedly committed in Ituri, in the East of the DRC. In September 2003, in my report to the Assembly of States Parties (ASP), I informed that the crimes allegedly committed in Ituri appeared to fall into the jurisdiction of the Court. The DRC government recognized its inability to control the region, there were no judicial proceedings underway and almost 5.000 persons were allegedly killed after 1 July 2002. I told the ASP that I was ready to use my *proprio motu* powers to initiate an investigation in the DRC, but I publicly invited its Government to proceed with a referral. The question was never whether we would open an investigation, but how it would be triggered. On 3 March 2004, the President of the DRC referred the situation to my Office. After analysis of the Statute requirements, the first investigation of the International Criminal Court was opened on 21 June 2004.

Concerning admissibility, in the DRC and Uganda, there was no real issue since there were no national proceedings regarding the alleged crimes we were looking into before we took the decision to initiate the investigations. In the case of the Central African Republic ("CAR"), there had been a national investigation; however, the Cour de Cassation found that the national judiciary was unable to carry out proceedings efficiently. For my Office, even in cases referred by the Security Council, the admissibility test must be performed. For two months we conducted an analysis of the judicial activities concerning Darfur and established that there were no national proceedings underway which were focused on the most serious crimes or upon those bearing the greatest responsibility. Based on this analysis, on 1 June 2005, we opened an investigation on Darfur.

The situations in the DRC and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court, and the situation in Darfur, the Sudan and

in the Central African Republic also clearly met the gravity standard. In the last years, we have analyzed a number of situations. Of those, four proceeded to investigation and two were dismissed, Venezuela and Iraq.[2] In Iraq, not a State Party, we only had jurisdiction over the nationals of States Parties present on the territory of Iraq. The alleged crimes committed by those nationals of State Parties in Iraq appeared isolated and did not meet the required gravity threshold; in addition, national proceedings had been initiated with respect to each of the relevant incidents.

These are the policies that we implemented to select the first situations of the Court. After four years, I strongly believe that the ability of the Prosecutor to independently select situation and its proper exercise is the building block of this court's legitimacy and authority. Such independence must be preserved.

2. Policy of focused investigations and prosecutions

The challenge for an international prosecutor is to carry out expeditious investigations and prosecutions of massive crimes in situations of ongoing conflicts. I had experience in my own country, Argentina, on how to conduct such activities, even without the support of police forces. In 1985, after six months of investigation, we were able to prove the criminal responsibility of 5 members of the military juntas for hundreds of cases of abductions, torture and killings. No past experience can, however, prepare a prosecutor for the challenge opened in Rome.

Given the temporal jurisdiction of the Court, we have to investigate in the middle of violence. We have to do so in accordance with Article 68 (1) of the Statute, protecting the safety and well being of victims and witnesses during the investigation. The Office had to learn how to: approach the possible witnesses without exposing them; secure discreet transportation for investigators and witnesses; provide for the contingency of moving witnesses to safe locations without attracting attention; and even check the relationships of drivers and hotel owners with the suspects.

Darfur presented an even bigger challenge: there was no possibility whatsoever that the Government of the Sudan would protect our witnesses. To uphold our duties under Article 68 (1), we decided to investigate Darfur without going to Darfur to seek statements from victims. It was the first international investigation carried out without visiting the crime scene. Let me use this case to illustrate our policy of focussing investigations on the most serious crimes and on those who bear the greatest responsibility for these crimes in accordance with the evidence.

For Darfur, we greatly benefited from the work of the UN International Commission of Inquiry. Its information allowed us to plan our investigation. We collected additional information from a range of other sources. But the policy of focused investigations and prosecutions meant that the Office selected a limited number of incidents and as few witnesses as possible were called to testify. We presented crimes allegedly committed during attacks on the villages of Kodoom, and the towns of

2 Update of Communications received by the Office of the Prosecutor of the ICC, 10 February 2006; Annexes: Iraq response and Venezuela response, <www.icc-cpi.int/organs/otp/otp_com.html>.

Bindisi, Mukjar, and Arawala in West Darfur between August 2003 and March 2004, the peak of the direct attacks against the civilian population. We screened more than 600 victims of alleged crimes committed in the Darfur located around the world and we took more than 100 statements in 17 countries. In accordance with our prosecutorial strategy, incidents were selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.

We presented 51 counts of crimes against humanity, such as persecution, murder, wilful killing, rape and other forms of sexual violence, torture, inhumane acts, cruel treatment, outrages upon personal dignity, unlawful imprisonment, pillaging and forcible transfer of civilians constitute crimes against humanity, and war crimes such as intentionally attacking civilians, pillaging, wilful killing, extra-judicial killing, and rape.

Why did we choose Ahmad Harun and Ali Kushayb? In 2003 and 2004, Ahmed Harun was the Minister of State for the Interior of the Sudan. He coordinated and implemented the use of Militia/Janjaweed to attack the civilians. Crimes in Darfur were the result of this very well organized system. There were Security Committees coordinating the activities of the militia and the Sudanese armed forces at the local level, reporting to Security Committees at the state level. They reported to one person: Ahmed Harun. He is the one who recruited, armed and funded the Militia/Janjaweed. Ali Kushayb was the Militia/Janjaweed leading the four attacks on these villages and towns. Under Harun's system of coordinating attacks against innocent civilians, more than 2 million Darfurians have been forced out of their homes and into camps. They were forced to leave their land, their house, and their cattle. Their villages were burnt down. Without daily delivery of food by aid workers, they cannot survive. If they move outside the camps, the women are raped, the men killed. They are destitute and desperate.

The arrest warrants issued by the Judges have to be executed. On 5 December 2007, I officially informed the UN Security Council that the Sudan is not cooperating with the Court.[3] I also reported on present crimes, finding that ongoing acts of violence are not chaotic occurrences but represent a pattern of attacks against 2.5 million displaced persons. In Darfur, the first phase of Ahmad Harun's plan was to force the people out of their villages and into camps. In the second phase – happening right now – he is controlling them inside the camps, controlling their access to food, humanitarian aid, and security. There are consistent reports that the land and villages the displaced left behind is being occupied by new settlers. There is a new strategy to attack the displaced who try to organize themselves in the camps such as Kalma: some are arrested, other forcibly expelled from the camps with no means of survival and relocated in hostile areas.

In Darfur today, massive crimes continue to be committed. Therefore, I also announced that the OTP will be preparing to open two new investigations in 2008, taking into account the consistent indicia showing a pattern of attacks by Sudanese offi-

3 Sixth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005), 5 December 2007, <www.icc-cpi.int/library/organs/otp/OTP-RP-20071205-UNSC-ENG.pdf>.

cials against civilians, in particular against those 2.5 million people forcibly displaced into camps. The OTP also has reports of an increasing number of attacks against humanitarian personnel and peacekeepers, as happened in Haskanita in September 2007, with rebel involvement.

3. Future challenges of the Court: Enforcing judicial decisions

All the Chambers of the Court are active. They are ruling on foundational issues like admissibility, victims' participation, the form of disclosure of exculpatory information, and the respective responsibilities of the Office the Prosecutor, the Defence, and the Chamber. The Trial Chamber is preparing the first trial. The Court is in motion. We have not taken much time to celebrate and take stock on this 5th anniversary. There has not been time, because the achievements of the recent years are constantly driving the Court to new and demanding challenges. The first trial will be a key defining moment for the Court. In the coming months and years, new detainees will arrive, I will start new investigations.

On 6 February 2008, Mr. Mathieu Ngudjolo, former senior commander of the *Front des Nationalistes et Intégrationistes* ("FNI"), an armed group active in the Ituri District, in the North East of the Democratic Republic of the Congo, was arrested in Kinshasa, surrendered to the Court by the Congolese authorities and transferred the next morning to the ICC detention center in The Hague.

Mathieu Ngudjolo is the third person surrendered by DRC authorities to the ICC, after Thomas Lubanga and Germain Katanga. He is the second militia leader to be charged in relation to the OTP's second case in the DRC, which covers crimes allegedly committed by leaders of the FNI-FRPI allied forces in the Ituri district. The Office presented its evidence to the Judges in the summer of 2007 and a sealed arrest warrant was issued on 6 July 2007. On 17 October 2007, the Congolese authorities surrendered and transferred Mr Germain Katanga, alleged commander of the *Force de résistance patriotique en Ituri* ("FRPI"), to the International Criminal Court. Mr. Katanga is alleged to have committed war crimes and crimes against humanity. He and Mr. Ngudjolo are both being prosecuted for ordering their FNI-FRPI forces to attack and "wipe out" the village of Bogoro on 24 February 2003 in the early hours. Approximately 200 civilians were murdered, and countless others were attacked. The village was pillaged by the FNI-FRPI forces.

With the arrest and transfer of Mathieu Ngudjolo to the Court, the Prosecution has completed a first phase of its DRC investigation, focusing on the horrific crimes committed by leaders of armed groups active in Ituri since July 2002. The OTP is now moving on to a third investigation in the DRC, with other applications for arrest warrants to follow in the coming months and years.

As we become operational, we need more support than ever. In particular, to perform fully its own judicial mandate, the Court needs States to ensure the arrest of the individuals sought by the Court. The difficulties are real, but they cannot lead the States Parties to change the content of the law and their commitment to implement it. The Court can contribute to galvanize international efforts, and support coalitions of the willing to proceed with such arrests. But ultimately, the decision to uphold

the law will be the decision of the States Parties. I am concerned that, for each situation in which the ICC is exercising jurisdiction, judicial decisions are challenged. The Prosecution is asked to use its discretionary powers to adjust to the situations on the ground, to threaten some with indictments and to withdraw the indictments against others. Recently, I have been advised by States to target lower level perpetrators as it would make it easier for States to comply with their obligations to cooperate with the Court and it would make our statistics better. We hear that from officials of States Parties, from our own supporters.

At the same time, the international community, as it seeks to stop violence through negotiations, excludes the justice component from the agenda; arrest warrants are at best ignored in political negotiations. They believe that ignoring the law is a wise political decision in order to secure stability. They are ignoring the law, as it was ignored when the Rwandan genocide happened in front of our eyes. They are ignoring a law built upon the lessons of decades when the international community repeatedly failed to prevent and deter massive atrocities. It is not acceptable. It is not efficient. The law established by the Rome Stature is not just for legal advisors, scholars, Judges, the Prosecutor and the Defence. The law applies also to political leaders working to seek solutions to international conflicts, military actors, diplomats, negotiators and educators.

The decisions of the Judges are to be implemented, and the arrest warrants are to be executed whether in Uganda, in Darfur, in the DRC. As the Prosecutor of the ICC, I was given a clear judicial mandate; my duty is to apply the law without political considerations and I will not adjust to political considerations. Other actors have to adjust to the law. As the Court becomes operational, we, a judicial actor, are actively putting limits to the political actors. In Rome, States committed to support a permanent International Criminal Court whenever and wherever the Court decides to intervene. We cannot be put on the agenda or off the agenda according to the evolving political negotiations in such and such a situation.

Again let me emphasize that the Rome Statute was not drafted overnight. It is a strong and consistent body of law; the drafters were well aware that rendering justice in the context of conflict or peace negotiations would present particular difficulties and they prepared our institution well to meet those challenges. Careful decisions were made: a high threshold of gravity for the jurisdiction of the Court was established; a system of complementarity was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act; finally, the UNSC was given a role in cases of threats to peace and security.

The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms. It is the law. The Rome Statute consolidates the "duty of every state to exercise its criminal jurisdiction over those responsible for international crimes"[4] and develops a novel system of international cooperation. National States remain primarily responsible for investigating and prosecuting crimes committed within their jurisdiction but in addition they have to support a permanent International Criminal Court whenever and wherever the Court decides to inter-

4 Rome Statute of the International Criminal Court, 17 July 1998, Preamble, para. 6.

vene. They have to "guarantee lasting respect for and the enforcement of international justice."[5]

The academic community can play a critical role. By putting the ICC into its text books, academia has immensely contributed to making the existence of the ICC a reality.

Allowed to remain at large, the indicted individuals can continue to threaten the victims, those who took tremendous risks to tell their stories. In the end, in the absence of arrests, the work of the Court might end up exposing the victims that we were meant to protect. In the end, in the absence of arrests of the indicted individuals, the work of the Court might end up highlighting how they can act with impunity.

It is not my opinion, it is the law.

Addendum

Since this chapter was written, the Office of the Prosecutor has presented its evidence against Mr. Jean-Pierre Bemba to the Judges of the International Criminal Court on 16 May 2008, charging him with crimes against humanity and war crimes. Mr. Bemba is the chairman of the *Mouvement de Libération du Congo*, an armed group which intervened in 2002-2003 in the Central African Republic and pursued a plan of terrorizing and brutalizing innocent civilians, in particular during a campaign of massive rapes and looting. The Pre-Trial Chamber issued a warrant of arrest on 23 May 2008. Mr. Bemba was arrested in Belgium on 24 May and transferred to the Court on 3 July 2008.

On 14 July, the OTP has also presented its application for an arrest warrant against Sudanese President, Omar Hassan Ahmad Al Bashir, to the Judges of Pre-Trial Chamber I. Three years after the Security Council requested him to investigate in Darfur, and based on the evidence collected, the Prosecutor has concluded there are reasonable grounds to believe that Mr. Al Bashir bears criminal responsibility in relation to 10 counts of genocide, crimes against humanity and war crimes. The Prosecution asserts that its evidence shows that Mr. Al Bashir masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. For over 5 years, he mobilized the state apparatus, armed forces and the Militia/Janjaweed to attack and destroy villages. They then pursued the survivors in the desert. Those who reached the camps for the displaced people, 2.5 millions, are subjected to conditions calculated to bring about their destruction.

At the moment, a number of situations covering three continents are also under analysis: Afghanistan, Colombia, Kenya, Georgia and Chad, among others.

5 Rome Statute of the International Criminal Court, 17 July 1998, Preamble, para. 11.

Chapter 3 The International Criminal Court five years on: *Andante* or *Moderato*?

*Antonio Cassese**

1. The failings of the current world community

If you pause for a moment from the hubbub of daily life and cast a glance at the legal standards and institutions of the world community as they have evolved over the last thirty or forty years, you are bound to feel dispirited. The great promises heralded in the 1960s and 1970s – the upholding of forward-looking notions such as obligations *erga omnes*, "obligations owed to the international community as a whole",[1] *jus cogens,* the aggravated responsibility of States, the common heritage of mankind, the right to development – have remained unfulfilled. Thirty or forty years later, these notions have not yet been acted upon by States or judicial organs. They still do not have the strength to guide the daily action of the primary actors on the world stage. Furthermore, the body of law designed to restrain States' resort to military force has remained replete with loopholes: neither the doctrine of anticipatory self-defence nor that of resort to force on humanitarian grounds have been clarified by states or the United Nations. The major flaws of international humanitarian law (in particular: the failure to restrain the conduct of hostilities through the enactment of detailed and precise legal standards designed better to protect civilians, and the failure to ensure impartial and steady monitoring of breaches of the law by the combatants) have not been remedied. Human rights law, the most significant hallmark of the new international community reborn in the aftermath of the Second World War, has not made much headway. The gap between standard-setting and implementation remains conspicuous. The replacement of the UN Human Rights Commission with the Human Rights Council has not involved any major change: that body still remains in the hands of sovereign States, bent on playing politics more than ensuring respect for human dignity. The law of the sea has been stripped of its most progressive concept, that of "common heritage of mankind", thus returning to traditional notions based

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1 Now proposed in Article 42 of the International Law Commission's Articles on State Responsibility.

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on reciprocity and joint interests. The law and institutions of development, of trade, in particular the WTO, as well as the law of the environment are plodding along, strained by the effort to keep up with the mushrooming of often intractable problems of poverty, underdevelopment, large-scale pollution and global warming.

In short, many lofty legal concepts have not gone beyond legal rhethoric; they have not been translated into daily living reality. There still is a marked deficit of "community sentiment" in the world community, that is, the feeling that one belongs to the same community and consequently has the duty both to work on its behalf (rather than only to promote its own interests) and to induce the other member to do likewise.

Moreover, we are still faced with a striking contradiction: the five permanent Members of the Security Council, who make up the "Board of Directors" of the international community and under the UN Charter should be responsible for ensuring peace and stability, are the biggest manufacturers and exporters of weapons, which they primarily export to developing countries. On top of this, fundamentalist ideologies are pervading the world: some in favour of violent subversion and terror, others – admittedly not dangerous albeit preoccupying – in favour of the overall exportation, if need be by force of arms, of western democracy to the whole world. These ideologies, whatever their implications, are a far cry from the ideals enshrined in the UN Charter: peace, respect for human rights (that is, tolerance and understanding), cooperation, and self-determination of peoples, that is, freedom of peoples from the oppression of foreign countries.

2. The ICC – one of the few bright spots in the world community

I have given you a quick sketch of the current landscape of the world community, for I think that it is against this general background that we should look at and appraise the ICC and more generally the current surge in international criminal justice.

The only two areas where clear progress stands in stark contrast to the general stagnation in the world community, are, I believe, that of regional protection of human rights (I am thinking in particular of what is being done in Europe by the European Court of Human Rights and more generally by the Council of Europe and in Latin America by the Inter-American Court of Human Rights) and that of international criminal justice.

The belief in, and spread of, international criminal justice, for all its indubitable failings, is indeed one of the few positive things of the world community we may observe in the last twenty years. International criminal justice has been a dream for years: the dream to put an end to atrocities not by using traditional channels, that is, via sovereign States, but by making directly answerable those individuals who, often sheltering behind the shield of state sovereignty, grossly breach human rights. Bringing to book those individuals has been held for years to be one of the most efficacious manners of ensuring respect for human rights. This dream has come true in the early 1990s with the establishment of *ad hoc* tribunals. They were, however, marred by various failings, chiefly that of dispensing selective justice. The ICC, with its drive to universality, constitutes the only true and fully-fledged realization of the ideal of jus-

tice. Hence, the contention is warranted that the mere establishment and existence of the ICC is a stupendous value *per se*.

The ICC now exists and is five years old. It is thus appropriate to try do draw up a balance sheet of the first years of its existence.

3. Six daunting tasks for the builders of a new international judicial institution, which may also serve as parameters for appraising its efficacy

When a big and important institution such as the ICC is set up, one faces six exceedingly daunting tasks, which are all closely intertwined.

First, one has to establish the necessary institutional and legal infrastructures. This ranges from finding an adequate venue with appropriate and fitting buildings, courtrooms, chambers for the judges, offices for the prosecution and the defence, a detention centre, and so on, to recruiting all the necessary staff, to crafting all the necessary rules and regulations that will govern the functioning of the institution.

Second, there is a need to drum up support in the Court's constituency. When the institution is based on a treaty, that translates into persuading as many states as possible to adhere to the treaty and thereby be bound by it.

Third, it is necessary to ensure the necessary financial wherewithal. That means that one has to make sure that all the numerous and costly needs of the nascent institution are met, and for this purpose one needs to tap states and other international institutions.

Fourth, one must see that the essential purpose of the institution, its very *raison d'être*, is fulfilled. In the case of a judicial body, this means that one needs to set in motion the judicial process: investigations, prosecutions, and trials.

Fifth, and most crucially, when a judicial institution is established, one needs to enlist the judicial cooperation of states that may help collect the evidence, allow witnesses to testify, arrest or extradite indictees, and enforce sentences.

Sixth, there arises the necessity to engage with the institution's constituency, both by stimulating a change in the legislation and in the national institutions of States, and by bringing about changes in, or at least influencing mentalities, attitudes and behaviours of courts and State officials.

For those who have pinned so much hope on the Court and so anxiously watch its gradual development, each of these six tasks may constitute a sort of benchmark by which to appraise the efficacy of the Court's first years.

4. Applying the various benchmarks to the ICC

I shall start with the first gauge, the establishment of material and legal infrastructures.

Here, nobody would deny that the ICC has been very successful. In a matter of just a few years it has been able to obtain adequate buildings housing chambers, office space for the Registry and the Office of the Prosecutor, three courtrooms as well as detention facilities. At the legal level regulations have been adopted by the Judges, the

Registrar and the Prosecutor governing matters pertaining to each of these different domains.

Similarly successful has been the Court in gaining full support from States. A previously unthinkable achievement resides in the Court's Statute being ratified or adhered to by as many as 106 states, more than half of the world community. I would not be too concerned by the fact that states such as the United States, Russia, China, Iran, Iraq, Pakistan, India and Israel continue to keep their distance. They will gradually be attracted to the Court, even though this process will of course take years.

Also by applying the third yardstick, that relating to financial support, we can conclude that the Court is on track. States have so far provided all the financial means it had requested. In December 2007 the Assembly of States Parties approved a budget for 2008 totaling €90,382,000 and a staffing level of 679. These are not peanuts!

I shall skip for a moment the fourth gauge for assessing the ICC's evolution, that relating to judicial productivity, to which I will return presently, and dwell briefly on another yardstick, that relating to the influence exercised by the institution on its constituency. Here again we may hold that the ICC has been fairly successful. The action of the Court in this respect has been aptly set out by the Court's President, Judge Philippe Kirsch, with the following words:

> "The ICC has had a significant early positive impact going beyond its investigations and prosecutions. Following the adoption and entry into force of the Rome Statute, many countries reviewed their domestic legislation governing genocide, crimes against humanity and war crimes. In several countries, this review led to amendments or upgrades to existing legislation. These countries are now in a better position to investigate and prosecute these crimes themselves. This is important because the ICC is a court of last resort. The primary responsibility to investigate serious international crimes, like all crimes, belongs to states".[2]

Although this impact on national legislation has not yet translated in a change in national mentality and in a different attitude among national prosecutors and courts, this impact by itself is a positive development. Also, one should not underestimate the importance of the "outreach programme" the Office of the Prosecutor has put in place. No doubt through this programme the Court will gradually bring the idea of justice to the local populations. It will also persuade them of the crucial role that making perpetrators of crimes accountable can play both for the restoration of law and for reconciliation in post-conflict societies.

5. The crucial parameter of judicial productivity

If we now concentrate on the fourth benchmark, that relating to the judicial productivity of the Court, and the fifth benchmark, relating to judicial cooperation of States, some perplexities seem, however, warranted. To appraise this issue, we should step back a moment.

2 See P. Kirsch, *ICC marks five years since entry into force of Rome Statute*, above Ch. 1.

We all know that the judicial action of the ICC may be set in motion by means of three mechanisms: States parties, the UN Security Council, and the Prosecutor acting under the scrutiny of a Pre-Trial Chamber. That a contracting State other than a state where crimes have been committed may trigger the Court's action is of course illusory. Sovereign states balk at accusing nationals or state agents of another state. Sovereign states are still motivated more by self-interest than by the urgency to vindicate universal or community values; as a consequence, the traditional notion of domestic jurisdiction and the connected doctrine of non-interference in domestic affairs still hold sway in the world community. As for the Security Council, it can activate the Court only in extreme circumstances, when the alleged violations, in addition to being (i) large-scale and egregious, (ii) threaten or are likely to put in jeopardy peace and, lastly, (iii) when none of the five permanent members of the Security Council strongly disagrees on the need to act judicially. Plainly, these conditions will only be satisfied in exceptional cases. Thus, the Prosecutor remains the pivotal body of the ICC. Indeed, he is the most powerful character on the scene, the person that decides (absent a referral by a State or Security Council) what "situation" to investigate, that is, what country to select (in this respect, he has of course greater powers than those accruing to the ICTY or the ICTR Prosecutors), when and against whom to begin prosecutions. In short, he is endowed with all the powers enabling him to be the driving force of the ICC.

If we consider the "situations" in which the Prosecutor has began investigations and instituted proceedings, it is striking that out of four such "situations", one was brought by the UN Security Council, the other three are so-called self-referrals, namely "situations" where a contracting State (Uganda, the Democratic Republic of Congo and the Central African Republic respectively) has referred crimes to the Court.[3] Is this a blatant disavowal of the proposition that sovereign States are loath to bring cases before the Court? Or, since these are "situations" where each of the three sovereign States referred to the Court crimes committed within its own territory, are these self-referrals meritorious actions of States that, impotent to do justice at home, go to the extreme of calling in a foreign institution to bring to book their own nationals?

I am afraid the answer must be a resounding no. In these three "situations" the state at issue referred to the court crimes allegedly committed by opponents of the referring Government, that is by rebels. This is so even though – formally speaking – in two of these instances the Government referred to the Court the general "situation" in its country, and not the crimes committed by rebels. The doubt may not be easily dispelled that the three Governments used the Court as a means of de-legitimizing and cornering their political and military opponents. It is a fact that the three indictees in The Hague prison, Mr Lubanga, Katanga and Ngudjolo Chui, are rebel leaders in their own country, the DRC. It is also a fact that reportedly the LRA (Lord Resistance Army) rebels in Uganda feel that they have been selectively indicted and claim that they will never surrender unless "the ICC indictments are lifted". Strikingly in that case the Government referred to the Court not the "situation" in Uganda, but

3 It would appear that the "situation" concerning crimes in a non-contracting State, the Ivory Coast, which has accepted the Court's jurisdiction pursuant to Article 12 (3) of the ICC Statute, is currently "under analysis" by the Prosecutor.

the "situation" concerning crimes by the rebels.[4] Also worrisome is the "Agreement on Accountability and Reconciliation" made on 29 June 2007 by the Government of Uganda with the rebels, the LRA/M. This agreement provides for "alternative justice mechanisms", invokes the principle of complementarity, thus meaning that the ICC will be replaced by resort to those national mechanisms, and adds the ambiguous formula whereby the Government undertakes to "address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M".[5]

Let me add that it would appear that in the two countries that have made self-referrals in very general terms, by pointing to the "situation" in those countries, crimes are being or have been committed by the Government. For instance, according to a recent report of Human Rights Watch, an elite presidential guard unit of the military in the Central African Republic is primarily responsible for countless atrocities committed against civilians in the northern part of the country since 2005.[6] The question therefore arises of the extent to which the ICC Prosecutor will be able also to investigate these alleged crimes. A further question also crops up: should one of the States in question assert, with regard to crimes allegedly perpetrated by Government officials, that it prefers to prosecute those crimes itself, will the Prosecutor cave in, or will he request the Court to exercise its jurisdiction over those alleged crimes as well?

Furthermore, I cannot help entertaining some perplexities with regard to the situation of Darfur. Two things in particular are mystifying.

First, to the best of my knowledge, prior to the issuance of arrest warrants to two Sudanese officials, the Prosecutor has never formally and specifically requested the Sudanese Government to cooperate with the Court by allowing interviews of suspects, witnesses or victims on Sudanese territory as well as searches or seizures of documents and other materials there. Yet, that Government is legally bound to cooperate, since the Court's action, albeit provided for in a treaty that does not bind the Sudan, ultimately rests on a mandatory Security Council resolution grounded in Chapter VII of the UN Charter. If I am not wrong, a rather unclear and indeed murky situation has materialized. On the one hand, Sudanese authorities have proclaimed in various fora or in interviews to reporters that they will never cooperate with the Court and, in particular, will never surrender any Sudanese national to the Court. On the other hand, the Prosecutor has stated that he will not go to Darfur to investigate alleged crimes because of, he asserts, "the persistent lack of security in Darfur"[7], and consequently contents himself with interviewing two senior Sudanese officials and a

4 According to an ICC press release issued in December 2003, the President of Uganda Yoweri Museveni took the decision to refer the situation concerning the Lord's Resistance Army to the Prosecutor of the ICC. See ICC, Press Release, ICC-20040129-44, 24 January 2004.

5 See UN Doc. S/2007/435, Annex.

6 Human Rights Watch, *State of Anarchy – Rebellion and Abuses against Civilians*, September 2007, 110 pp.

7 Statement of the Prosecutor to the UN Security Council, 14 December 2006, UN Doc S/PV.5589, at 4.

number of legal and judicial officers in Khartum, as well as Darfurian refugees living in Chad and other countries.

Second, perhaps queries about the Prosecutor's legal strategy may legitimately be set forth. In particular, one may wonder whether in situations like that of Darfur the doctrine of command or superior responsibility, the most advanced and embracing doctrine of international criminal law, would have not proved helpful. It is common knowledge that under that doctrine, to incriminate a military commander or a civilian leader three requirements must be met: (i) there must be widespread crimes perpetrated by troops or other organized armed men; (ii) the superiors must wield control over those perpetrators; (iii) the superiors must have known or be reasonably obliged to know that crimes were being committed and nevertheless took no action to prevent or stop them or to report their perpetration to investigating authorities. This doctrine, together with that of joint criminal enterprise, is one of the most powerful legal weapons available in the international community to make leaders accountable. It is a doctrine unknown or little practiced in domestic legal settings, but indispensable in international criminal law. Indeed, international crimes are markedly different from the ordinary criminal offences with which national courts normally deal. They have a strong contextual element (an armed conflict, or a widespread or systematic practice, or a criminal policy of a State or non-state entity); in addition they are mostly perpetrated not by single, isolated individuals, but by organized groups or bands or military units hierarchically subordinated to leaders and acting at their behest. It thus becomes crucial to strike at the leaders, on two grounds. First, they are those who bear the greatest responsibility. Even if they did not plan or order the atrocities, by failing to prevent or stop them they show that in some way they condone or acquiesce to them. Second, international courts may not bring to justice the dozens or hundreds of persons involved in the crimes both because it is normally difficult to find evidence against each single perpetrator and also because trials would be too costly. A selection must therefore be made by restricting the target of international justice to those in command who either ordered the perpetration of crimes or omitted to prevent or punish crimes committed by their troops.

The conditions in Darfur over the last five years seem to fit this pattern. It is a fact that the devastation of civilian villages, atrocities, killings, rape, looting and forced displacement of hundreds of thousands of civilians have occurred and continue to occur unabated and unpunished. It is undisputed that the military and political authorities in Khartum and in the three Darfur capitals of El-Fasher, Nyala and El-Geneina are in control of the Sudanese troops and other enforcement agencies in Darfur. It would be hard to deny that they know or should have known what is happening in Darfur, if only because of the numerous appeals of the UN, the investigations and reports of the High Commissioner for Human Rights and her monitors in the field, and the report issued by the UN Commission of Inquiry. Even assuming that leaders in Khartum ignored all these international reports, the huge media coverage of the events in Darfur should have put them on notice. What is at issue here are not crimes perpetrated by small military detachments in a remote and unknown village, as was

often the case with crimes committed in the Former Yugoslavia.[8] What is at stake here are massive destruction, atrocities and displacement occurring every day, since July 2002, under the gaze of dozens of NGOs and UN human rights monitors operating in Darfur and in the full glare of world media. It is a fact that no action has been taken at the highest level in the Sudan to stop the atrocities and other crimes.

One could object that the propositions I am setting out resemble logical syllogisms, whereas a criminal investigation needs compelling evidence. Evidence, however, can be collected by various means. Furthermore, to collect the evidence needed to build up a case based on this doctrine, one does not need to gather testimonies of the victims of each individual occurrence, of each individual crime, so long as there exist reliable and consistent first-hand reports made by authoritative bodies and these reports can be corroborated by collecting some evidence concerning this so-called "crime-base". Admittedly, evidence must be produced that the superiors at stake knew or at least should have known that crimes were being committed. However, when the crimes continue in time, and make up a consistent and protracted practice that stretches over more than five years, how could one claim that the superior authorities (say, the chiefs of staff of the military, the head of military intelligence) or the civilian superiors (say, the minister of defence, his deputy, the minister of interior and even the head of State) did not know?[9]

These are queries that trouble my mind. What also troubles my mind is that five years on, the Court has not yet conducted any trial. The Prosecutor, in his speech of 16 June 2003 at the swearing in ceremony at The Hague, stated that:

> "As a consequence of complementarity, the number of cases that reach the Court should not be a measure [of] its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."

8 I am thinking, for instance, of the crimes committed on 16 April 1993 by Bosnian Croats in the small village of Ahmici (about 2,000 inhabitants) in Bosnia-Herzegovina, and adjudicated by the ICTY in *Zoran Kupreškić and others.* See ICTY, *Prosecutor v. Kupreškić,* Trial Chamber, Judgment of 24 January 2000; Appeals Chamber, Judgment of 23 October 2001.

9 The doctrine of superior responsibility has been applied in many recent cases: ICTY, *Delalić and others*, Trial Chamber, 16 November 1998, paras. 330-401; Appeals Chamber, 20 February 2001, paras. 182-314); *Blaskić*, Trial Chamber, 3 March 2000, paras. 289-349; Appeals Chamber, 29 July 2004, paras. 53-93; *Kordić and Cerkež*, Trial Chamber, 28 February 2001, paras. 363-447; Appeals Chamber, 17 December 2004, paras. 824-952; *Halilović*, Trial Chamber, 16 November 2005, paras. 38-100 (where the Chamber found that the Prosecution had failed to prove beyond reasonable doubt was either *de jure* or *de facto* commander of the alleged operation called "Operation Neretva" or, with regard to other military operations, that he exercised effective control over the military units that had committed crimes); *Hadžihasanović and Kubura*, Trial Chamber, 15 March 2006, paras. 76-269. See also ICTR, *Kayishema and Ruzindana*, Trial Chamber, 21 May 1999, paras. 208-231; Appeals Chamber, paras. 280-304; and *Musema*, Trial Chamber, 20 January 2000, paras. 127-148.

This is true, of course. The problem however is that crimes falling under the ICC jurisdiction continue to be perpetrated unabated both in the Sudan and in some of the States Parties to the ICC Statute, and neither national courts nor the ICC take any judicial action.

One also fails to see why it took the Pre-Trial Chamber so much time to confirm the charges (10 months: from 20 March 2006, date of the initial appearance, to 29 January 2007), while it also took the Trial Chamber before which the *Lubanga Case* has been brought much time to discuss procedural matters, between September and October 2007. Nor can one fully understand why on 12 November 2007 the Trial Chamber set the date of 31 March 2007 for the opening of the trial and then on 13 March 2008 put off that opening to 23 June 2008. This all the more worrying since Lubanga has been in the ICC prison since 17 March 2006: when the trial opens he will have spent two years and three months in that jail (to this one should add the time spent in prison in the DRC prior to his transfer to The Hague: he had been confined to forced residence in Kinshasa in August 2003 and then incarcerated in May 2005[10]).

6. The question of states' judicial cooperation

Closely intertwined with the issue I have just discussed is that of judicial cooperation of States with the Court.

The Court has rightly insisted with the four States whose situations it is considering that they should cooperate. In the case of the three self-referrals, the Prosecutor has skilfully put in place a host of formal and informal contacts with the authorities and the civil society of those countries. These contacts might bear fruit. In the case of the Sudan, the Prosecutor has rightly urged the Security Council to make the Sudanese authorities execute the two arrest warrants issued by the Court.

Admittedly the whole scheme envisaged in the ICC Statute on state cooperation is rather weak, and ultimately relies on the good faith and the good will of States Parties to the ICC Statute. So long as a state withstands cooperation and rebuffs the Court's appeals, requests or orders, not much can be done, unless the Assembly of States Parties or, whenever appropriate, the Security Council go to the length of taking firm action by way of sanctions.

Nevertheless, these legal tools are available; they are there to be used. One fails to see why the Assembly of States Parties has not yet been seized with the question of the lack of cooperation by some of the states at issue. With specific regard to Darfur, the Court could make a finding on the failure of the Sudan to cooperate in executing arrest warrants and report such finding to the Security Council, pursuant to Article 87 (7) of the ICC Statute.

10 See statement of Lubanga's counsel, ICC, First Appearance Hearing, 20 March 2006, Official transcript, p. 9.

7. Concluding remarks

I assume that thousands of persons entertain, like me, great expectations for the future of the ICC. As I noted at the outset, it is currently hard to be sanguine about the outlook for the world community; the ICC remains one of the few bright spots of that community. Nevertheless, its performance so far has not been up to the expectation aroused in all of us, back in 2002, that the Court's initial pace would be *allegro con brio*. Admittedly, it took the European Court of Human Rights, one of the most vibrant institutions of the international community, almost fifty years to fully display all its potentialities thereby becoming most forceful. Arguably with these institutions destined to be lasting hallmarks of the world community, one should not be too impatient. Their gear-up time is often slow, for they require time to consolidate before springing into full action. Probably an *adagio* tempo is needed, provided of course it does not slow down to *piano* or even *pianissimo.*

Be that as it may, I trust that one day the ICC and the ideals behind its establishment will be capable of ensuring a more effective protection of human rights, by implacably and expeditiously bringing to book the perpetrators of the most serious and gruesome violations of those rights. Let me add that also State Parties have a role to play in (i) pushing the Court to exercise universal jurisdiction, (ii) putting more pressure on third States to cooperate with the Court, and (iii) ensuring that the Court fulfils its mandate. The first term of one-third of the Judges will soon expire, the first Registrar has left. The Review Conference approaches. It would seem the right time to prepare officially to take stock and try to see whether adjustments are necessary (for instance, whether procedural rules are such as to make pre-trial proceedings too lengthy).

Chapter 4 The International Criminal Court – Its relationship to domestic jurisdictions

*Judge Hans-Peter Kaul**

1. Introduction

Before I go into my own remarks, let me confess, that I am still under the impact of the inspiring presentation of Professor Cassese[1] – thank you Professor Cassese, mille grazie, thank you very much!

In these remarks, I will briefly recall some basic aspects of the relationship of the ICC with domestic jurisdictions.[2] I think that indeed here in The Hague, in the "legal capital of the world" I can be brief. After all, we are at the seat of the ICC, in the Grotius Centre for International Legal Studies – so here, with an audience like you, I can safely assume that there exists already much knowledge and expertise with regard to the ICC system.

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1 For an earlier interesting contribution of Prof. Cassese see A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4 *JICJ* 434.

2 For an overview of the basic features of the complementarity principle, see J.T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 667; see also H.-P. Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years', (2005) 99 *American Journal of International Law* 370, at 384; H.-P. Kaul, 'Preconditions to the Exercise of Jurisdiction', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 583, at 607–616; H.-P. Kaul & C. Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromises', (1999) 2 *Yearbook of International Humanitarian Law*, 143, at 153 et seq.; M. P. Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position', (2001) 64 *Law & Contemporary Problems* 67, at 110.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 31-38.

But, on the basis of my own efforts[3] to promote the ICC since 2003, let me share with you an experience that I have made time and again:

The situation can be quite different when you travel to other countries which have not yet joined the ICC, be it in Santiago de Chile, in Damascus,[4] in Beijing,[5] in Manila, in the US in general[6] or in Hanoi[7] or Sana'a, as the case may be. Needless to say, the situation there, the perception of the ICC and of the Rome Statute in these countries and capitals may vary considerably. But when you talk with relevant interlocutors and policy-makers there it is my experience that you may quite often be confronted again with one or more of the following:

Five years after the establishment of the ICC there may still be a quite limited understanding of the relationship of the Court with domestic jurisdictions.

Five years after the establishment of the ICC you may discover quite often a continuing lack of understanding of the jurisdiction and admissibility regime and of the cooperation regime of the Court.

Related to this there may also be continuing fears, critical arguments or mistrust that the ICC will present a threat to the sovereignty[8] of States or to the independence of national courts.

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3 See generally Kaul, *supra* note 2, at 370 et seq.; H.-P. Kaul, 'Breakthrough in Rome – The Statute of the International Criminal Court', (1999) 59/60 Law and St., 114; H.-P. Kaul, 'Towards a Permanent Criminal Court: Some Observations of a Negotiator', (1997) 18 *Human Rights Law Journal* 169.

4 See the consolidated version of a presentation made during the symposium "The International Criminal Court and Enlarging the Scope of International Humanitarian Law" held in Damascus on 13/14 December 2003 by H.-P. Kaul, 'Substantive Criminal Law in The Rome Statute and its Implementation in National Legislation', in International Committee of the Red Cross (ed.), *The International Criminal Court and Enlarging the Scope of International Humanitarian Law* (2004), 277.

5 See the consolidated version of a paper and statements presented at the Symposium on Comparative Study of International Criminal Law and the Rome Statute held in Beijing from 15-17 October 2003 by H.-P. Kaul, 'Germany: Methods and Techniques Used to Deal with Constitutional, Sovereignty and Criminal Law Issues', in Roy S. Lee (ed.), *States Responses to Issues arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (2005), 65.

6 See the consolidated version of the presentation given at the Judgement at Nuremberg Conference, Washington University St Louis, 28 September 2006 by H.-P. Kaul, 'The International Criminal Court – Current Challenges and Perspectives', (2007) 6 Global Studies Law Review 575; H.P. Kaul, 'The International Criminal Court: Key Features and Current Challenges', in H.R. Reginbogin, C.J.M. Safferling (eds.), *The Nuremberg Trials – International Criminal Law Since 1945* (2006), 245; Kaul, *supra* note 2, at 380 et. seq.

7 See the consolidated version of the presentation given at the Science Workshop – Hanoi, 25/26 October 2006 by H.-P. Kaul, 'The International Criminal Court – Key Features and Current Challenges', in Nguyen Ba Dien, Nguyen Xuan Son, Dong Thi Kim Thoa (eds.), *International Criminal Court and Vietnam's Accession* (2007), 27.

8 See R. Wedgwood, 'The Constitution and the ICC', in S. B. Sewall, C. Kaysen (eds.), *The United States and the International Criminal Court* (2000), 119; M. Morris, 'Comple-

Furthermore, it seems quite realistic to assume that there continue to be forces in this world with an interest to keep these questionable perceptions, these fears and criticisms of the ICC alive.

So the question arises: what needs to be done in such a situation? How can we secure more knowledge about the ICC system and a better understanding of the ICC especially in those countries which might join the Court as States parties?

Many answers are possible to this question. From my personal point of view there is very little choice other than to be patient, to explain time and again in particular the following points – and while most of these points will be familiar to you, hopefully the specific arguments and language I am using continually for this topic will be of some interest to you:

2. Jurisdiction and admissibility

The jurisdiction and admissibility regime of the ICC[9] has according to the Statute only a limited reach. The Court's jurisdiction is not universal. It is clearly limited to the most well-recognized bases of jurisdiction. The Court has jurisdiction over:

– Nationals of States Parties; or
– Offences committed on the territory of a State Party.

In addition, the Security Council can refer situations to the ICC, irrespective of the nationality of the accused or the location of the crime – and the first precedent for this is as you know Security Council Resolution 1593 on Sudan/Darfur.[10] The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.

The ICC is a Court of last resort. This is known as the principle of complementarity.[11] This principle, as provided for in particular in Article 17, is the decisive basis for the entire ICC system. It is also the key principle to determine the relationship of the ICC to national jurisdictions. As you know, this principle means: In normal circumstances, States will investigate or prosecute offences. The Court can only act where States are unwilling or unable genuinely to investigate or prosecute offences. The primary responsibility to investigate and prosecute crimes remains with the States.

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mentarity and Conflict: States, Victims, and the ICC', in S. B. Sewall, C. Kaysen (eds.), *The United States and the International Criminal Court* (2000), 195.

9 See Kaul, *supra* note 2, at 607 et. seq.; Kaul & Kress, *supra* note 2, at 152 et seq.; Scharf, *supra* note 2, at 110.

10 A. Zimmermann, 'Two steps forward, one step backwards? Security Council Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court', in P.-M. Dupuy et al (eds.), *Völkerrecht als Wertordnung – Common Values in International Law, Festschrift für/Essays in Honour of Christian Tomuschat* (2006), 681.

11 M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck Yearbook of United Nations Law* 591.

Furthermore, cases will only be admissible if they are of sufficient gravity to justify the Court's involvement.

The Rome Statute thus recognizes the primacy of national prosecutions.[12] It thus reaffirms State sovereignty and especially the sovereign and primary right of States to exercise criminal jurisdiction.

To explain this system in even more concrete and maybe more simple terms: the ICC is not a supranational court which can impose its decisions on member states. It also cannot function as an appeals court against the decision of national courts. Moreover, the ICC has no ability to demand that cases concerning genocide, crimes against humanity or war crimes, which are investigated or prosecuted by national courts, be transferred to the Court. In more technical language, the ICC thus has no parallel jurisdiction, it is not on the same level as national courts – in contrast for example to the ICTY, which has parallel jurisdiction and which therefore could request Germany to surrender Mr. Tadić to the ICTY.[13] One might say that the ICC is "subordinated" to national courts, subsidiary to the jurisdiction exercised by national courts. Whenever possible and appropriate, this must be clearly recalled and explained again to all concerned.

3. Cooperation

A further field of a crucial relationship between the Court and domestic jurisdictions is international cooperation[14] and judicial assistance pursuant to Part 9 of the Statute. When we assess the cooperation regime under the Rome Statute, we cannot fail to see that it is characterized by a decisive structural weakness: the Court does not have the competencies and means to enforce its own decisions.[15] Under the Statute, the ICC has no executive powers, no police force of its own or other executive units. It is totally dependent on full, effective, timely and predictable cooperation in particular from States Parties. This is true especially with regard to the decisive question of the

12 H.-P. Kaul, 'International Criminal Court', in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law* (forthcoming).

13 See Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Art. 8 of the Statute of the International Criminal Tribunal for Rwanda.

14 It should be noted that the following part of the contribution by the author dealing with international cooperation and judicial assistance could not be presented orally due to time constraints.

15 For a discussion of the cooperation regime in the Rome Statute, see Kaul & Kress, *supra* note 2, at 143; P. Mochochoko, 'International Cooperation and Judicial Assistance', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute- Issues, Negotiation, Results* (1999), 305; M. Perry & J. McManus, 'The Cooperation of States with the International Criminal Court', (2002) 25 Fordham International Law Journal 767; B. Swart & G. Sluiter, 'The International Criminal Court and International Criminal Cooperation', in H. von Hebel et al. (eds.), *Reflections on the International Criminal Court* (1999), 91.

effective execution of arrest warrants and surrender of suspects to The Hague.[16] One may safely assume that this structural weakness was foreseen and planned by the founders of the ICC also in the field of criminal cooperation.

Against this background, Part 9 of the Statute on international cooperation and judicial assistance seeks to ensure the functioning of the Court through the following main elements:

– States Parties have a general obligation to cooperate fully with the Court with respect to its investigations and prosecutions (Article 86).
– States Parties shall ensure that procedures are available under national law for all forms of cooperation specified in Part 9 (Article 88).
– States Parties shall consult with the Court without delay in order to resolve any problems which may impede or prevent the execution of requests (Article 97).

All in all, the system of cooperation under the Rome Statute may be regarded as a compromise and as a hybrid system. It contains a mix of elements of vertical and horizontal criminal cooperation of both the supranational and inter-state model of cooperation.

This regime as laid down in Part 9 of the Statute must be seen as a reality and a fact of life which cannot be altered easily – and also not at the Review Conference in 2010. It therefore must be accepted by all concerned, namely by the Court itself and in particular by the Office of the Prosecutor, the States Parties, international organisations and NGOs. All these actors are called upon to breathe life into the cooperation system under the Statute and to exhaust its possibilities for effective, speedy, unreserved and sustained cooperation. This is in itself an ongoing task and challenge, with many related necessities. Amongst them, let me highlight in particular three fundamental necessities:

Firstly, the joint development of a new and innovative system of best practices of international criminal cooperation: direct, point to point, flexible, without unnecessary bureaucracy, with full use of modern information technology and a fast flow of information and supportive measures.

Second, the gradual build-up and increasing strengthening of a solid and reliable network of efficient international cooperation based on trust and confidence between the Court and State Parties.

Thirdly, practical solutions for the making of arrests and the surrender of suspects to the ICC.

Let us now have a brief look at the respective roles of the main actors involved and desirable forms of cooperation and division of labour among them.

The first responsibility to make the ICC system of cooperation work lies with the Court itself, in particular with the Office of the Prosecutor. The Prosecutor and his office as the driving force of the ICC bear a special responsibility both for effective

16 See B. Swart, 'Arrest and Surrender', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 1639.

investigations as effective cooperation.[17] In this respect, let me share with you a saying which I have picked up from the young people at our Court. They say – and you can hear this quite often – : "The Office of the Prosecutor is the engine, systematic efforts for effective investigations and equally effective cooperation are the fuel for the entire Court".

What does this mean in terms of concrete criminal cooperation? The Prosecutor has a key interest in effective criminal cooperation. Part 9 of the Statute provides the legal framework for such cooperation. The Prosecutor and his office are called upon to exhaust the potential of this legal framework for firstly, the sustained build-up of an appropriate organisational capacity for cooperation issues which is large enough, which is as efficacious as possible and second, the ongoing development of efficient working methods and best practices in particular with regard to cooperation. Ideally, the Office of the Prosecutor should act as the intellectual driving force, as the creative mastermind for systematic and efficient forms of cooperation on the basis of a well-developed concept with clear goals and priorities.

Especially in the field of cooperation, it is obvious that the Court and the Prosecutor cannot be successful without active and steadfast support from States Parties, both in word and in concrete deed. The hopes and expectations at the ICC are that States Parties will support it as responsible joint owners by engaging in unreserved and systematic cooperation in all practical fields. Whether they will do so remains, as it were, a question to end all questions.

Again, what does this mean in more concrete terms? Here is a short list of concrete areas of enhanced cooperation:

- If not done already States should enact implementing legislation pursuant to Article 88 of the Statute that is sufficiently precise to allow for direct cooperation, without the need for additional arrangements.
- States should support the Court's general or situational policies publicly and also in direct contacts with other States and civil societies.
- States should provide contextual and background information and advice on interlocutors and suspects, particularly through relevant specialised government departments and agencies.
- States should provide intelligence, satellite images, analytical support and communications – and here I would like to add an example: just imagine for a moment how it would help the Prosecutor if US satellite images taken over Darfur would be made available to him…!
- States should establish fast and reliable communication channels including national focal points to ensure immediate cooperation.

In general, if States Parties are genuinely interested in further progress and lasting success of "their Court", the logical course for them is to continuously search for ways and means of strengthening cooperation with the Court.

17 Article 42 (1), Part 5 on the Investigation and Prosecution and Part 9 on International Cooperation and Judicial Assistance of the Rome Statute.

With regard to the third necessity for practical solutions for the decisive question, unresolved question of serving arrest warrants and surrendering suspect criminals to the ICC, the major responsibility belongs squarely to the States Parties.

It is obvious, that States Parties and all forces who support the Court cannot let down the Court in respect of arrest by adopting an attitude along the lines of "we have given you the money for the first budgets – now see for yourselves how you get the perpetrators before your Court…".

This will not work.

Let me recall that there are currently since 2005 four arrest warrants confirmed by Pre-Trial Chamber II with regard to suspects from Uganda[18]. Furthermore, there are since 2 May 2007 two arrest warrants concerning two high ranking Sudanese officials.[19]

As the Court does not have the authority to execute arrest warrants directly on the territory of states, arrests are primarily the responsibility of relevant territorial states. Securing arrests is a complex process that may require the commitment of significant police and military resources. Above all, it requires the necessary political will. While it is mainly for the territorial state to decide on arrest actions support by other or all States could involve:

Public and vocal support of the international community. Such support and pressure have been crucial to securing surrenders, both voluntary and coercive, to the ICTY, ICTR and the Special Court for Sierra Leone.

States should support territorial states, for example through sharing information on suspect tracking, through logistical support and specialised training for arrest operations.

States should investigate and eliminate networks of financial and logistical supply for perpetrators sought with arrest warrants.

States should create operational groups for coordinated military and diplomatic efforts to secure arrests.

The ultimate responsibility for the execution of arrest warrants on a national territory remains with the territorial state. But the territorial State has also the possibility to allow or to delegate arrest actions to third parties, such as eg. peacekeeping troops or police forces of other states. It is recognized under international law that arrest actions by such third parties are fully legitimate as long as they are consented by the territorial State. Many arrests of suspects prosecuted by the ICTY were made on the territory of Bosnia by peacekeeping troops, with the consent of Bosnia. Another example is the attack on a high-jacked Lufthansa airplane, liberation of its passengers

18 See Pre-Trial Chamber II, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, 27 September 2005; Warrant of arrest for Vincent Otti, ICC-02/04-01/05-54, 8 July 2005; Warrant of arrest for Okot Odhiambo, ICC-02/04-01/05-56, 8 July 2005; Warrant of arrest for Dominic Ongwen, ICC-02/04-01/05-57, 8 July 2005.

19 See Pre-Trial Chamber I, Warrant of arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr., 27 April 2007; Warrant of arrest for Ahmad Harun, ICC-02/05-01/07-2-Corr., 27 April 2007.

and arrests of German terrorists by German special police at the airport of Mogadishu in 1977, for which permission had been given by President Barre of Somalia.

4. Conclusion

In sum: both the jurisdiction and admissibility regime and the cooperation regime of the Rome Statute are of decisive importance for the relationship of domestic jurisdictions with the International Criminal Court. Emerging, hopefully constructive state practice by States Parties and equally responsible practice by the ICC with regard to the concrete interpretation and application of these two regimes will be crucial for the future of the Court. All concerned should also be fully aware that, as with the jurisdiction and admissibility regime of the Rome Statute, it was also with regard to the cooperation regime of the Court according to Part 9 of the Statute the wish of the Court's creators that States' sovereignty and the prerogatives of domestic jurisdictions remain prevailing. This explains the critical dependency of the Court on full, effective and reliable cooperation in particular from States Parties.

Against this background, a simple fact should also be borne in mind: already 108 States Parties – more to come! – have expressed their view through joining the Court that the Rome Statute does not violate their sovereignty, the independence of their courts or other important principles. In general, to join an international treaty or not is a sovereign right of a State, to become a State Party is a concrete exercise of this sovereignty.[20] When States join a multilateral treaty, they normally do it because they subscribe to the objectives and principles of this treaty. Thus, already 108 States from all regions of the world have joined the ICC because they share the wish to contribute to a better protection of human rights and to more international justice.

To come back to the topic of this panel session: more efforts, consistent efforts are necessary to ensure, on a worldwide level, a proper understanding of the relationship of the ICC with national jurisdictions.[21] We share the common goal to make the ICC universally understood and accepted. Let us continue to work together for this objective!

20 See the Preamble ("Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized") and Art. 6 ("Every State possesses capacity to conclude treaties.") of the Vienna Convention on the Law of Treaties of 23 May 1969.

21 See for example the campaigns of the Coalition for the International Criminal Court <www.iccnow.org> or the website of the ICC <www.icc-cpi.int>.

II The Relationship to Domestic Jurisdictions

Chapter 5 Auto-referrals and the complementary nature of the ICC

*Jann K. Kleffner**

1. Introduction

One of the striking features of the early operationalisation of the Statute is that State Parties refer situations, which occur on their own territory to the ICC. At the time of writing, three situations in relation to which the Prosecutor had opened an investigation emanated from such auto-referrals namely of the Democratic Republic of the Congo,[1] of Uganda,[2] and of the Central African Republic.[3] If one considers this practice of auto-referrals, one cannot fail to notice its tension with the formal framework of complementarity in general and the procedural setting of complementarity in particular. This formal framework encapsulates the general assumption of the drafters of the Statute that complementarity provides a mechanism for States to pre-empt the ICC from acting, centrally by requesting a deferral under Article 18 or challenging admissibility in accordance with Article 19.

Complementarity and its regulation in the Statute appears to presuppose that its primary objective is to regulate competing claims for the exercise of jurisdiction over ICC crimes, with both claimants – one or more States on the one hand, and the Prosecutor on the other hand – being eager to exercise jurisdiction. In these cases, the threat of the Prosecutor's opening an investigation into a situation can serve as an important incentive for States to exercise their jurisdiction and to investigate and prosecute those responsible for ICC crimes in accordance with the basic requirements

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1 Lettre de M. Joseph Kabila, dated 03.03.2004 – Reclassified as public pursuant to Decision ICC-01/04-01/06-46, ICC-01/04-01/06-39-AnxB1.

2 Letter of referral dated 16 December 2003 from the Attorney General of the Republic of Uganda, appended as Exhibit A to the Prosecutor's application for Warrants of Arrest under Article 58 dated the 6th day of May 2005, as amended and supplemented by the Prosecutor on the 13th day of May 2005 and on the 18th day of May 2005.

3 See ICC Press Release, '*Prosecutor receives referral concerning Central African Republic*', The Hague, 7 January 2005, ICC-OTP-20050107-86-En.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 41-53.

as they flow from the criteria of being "willing" and "able".[4] Auto-referrals, on the other hand, start from the opposite assumption, namely that the State making such a referral wants the ICC to carry out proceedings vis-à-vis matters which that State considers to be detrimental to its interests if adjudicated in its own judicial system. Instead of demonstrating that they are willing and able to investigate and prosecute core crimes, they seek to justify their auto-referral by claiming their inability,[5] and are – in the broader sense of the word – unwilling to exercise jurisdiction themselves, but this unwillingness is compatible with the intent to bring the person concerned to justice, albeit before the ICC rather than their own courts. This apparent incompatibility between complementarity and auto-referrals demonstrates the need to analyse whether, and to what extent, complementarity in general, and its procedural framework more in particular, applies in the context of auto-referrals.

Before turning to these matters, the preliminary remark is warranted that Articles 13 (a) and 14 on State Party referrals, which are invoked as the basis for auto-referrals,[6] do not stipulate that referrals may only be made by States Parties other than those on whose territory or by whose nationals ICC crimes appear to have been committed. Although the latter situation was undoubtedly at the forefront of the minds of the drafters of the ICC Statute,[7] the provisions merely provide that referrals may be made by State Parties. They do not exclude an auto-referral by a State Party, however.

2. Applicability of complementarity

The most fundamental question is whether complementarity applies at all in the context of auto-referrals or whether cases of auto-referral would render cases admissible without the need to establish that the referring State is either wholly inactive, or unwilling and unable within the meaning of Article 17 (2) or (3). It could be argued that such referrals constitute the voluntary, *a priori* and *ab initio* relinquishment of the right to exercise jurisdiction by the auto-referring State. This understanding appears

4 J.K. Kleffner, *'Complementarity as a Catalyst for Compliance,'* in J. K. Kleffner & G. Kor (eds.), *Complementary Views on Complementarity – Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam 25/26 June 2004* (2006), pp. 79-104.

5 Cf. Lettre de M. Joseph Kabila, *supra* note 1, in which it is claimed that "les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sure les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires …".

6 See for instance Lettre de M Joseph Kabila, *supra* note 1.

7 On the failed attempts to expressly regulate the related question whether complementarity could be waived during the negotiations leading to the adoption of the Rome Statute, see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (1995), UN Doc A/50/22 [47]; 'Decisions taken by the Preparatory Committee at its session held 4 to 15 August 1997', (1997) UN Doc A/AC.249/1997/L.8/Rev.1, Annex I, Report of the Working Group on Complementarity and Trigger Mechanism, footnote 17. See further M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *International Criminal Law Review* 83, 100.

to underlie the conceptualisation of auto-referrals as "waivers of complementarity".[8] However, it appears questionable whether the mere fact that a State makes an auto-referral automatically entails such a waiver. It is generally accepted that waivers or renunciations of claims or rights of States must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right.[9] However, it would appear that, in the absence of an express statement to that effect, an unequivocal implied waiver cannot be assumed by the mere fact of an auto-referral alone. This is especially so in light of the fact that the auto-referral – just as any other State referral – concerns a "situation", rather than specific cases.[10] It was indeed one of the main reasons for the introduction of the term "situation" to forestall the selective referral of identified persons with a view to avoid politicisation of the trigger mechanism of State referrals.[11] A referral, such as the one of the Central African Republic, which reportedly sought to refer five named individuals to the Court in April 2006,[12] would therefore fall outside the permissible parameters and the Prosecutor would not be limited to these individuals in his investigations.[13] It follows from this,

8 On this conceptualization, see e.g. M. Benzing 'The Complementarity Regime for the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck Yearbook of United Nations Law* 591, 629-630; El Zeidy, *supra* note 7, 100-110. See also L. N. Sadat & S. R. Carden 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381, 419-420.

9 Cf. ICJ *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) [1992] I.C.J. Reports 1992, 247-250, [12-21]; *ICJ Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep. 1999 [293]; ILC commentary on Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts, in J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (2002) 267 [5].

10 See e.g. ICC Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, public redacted version – 17.01.2006 ICC-01/04-101-Corr, para. 65 ("The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such").

11 S. Fernandez de Gurmendi, 'The Role of the International Prosecutor', in R. S. Lee (ed.), *The International Criminal Court, The making of the Rome Statute, Issues, Negotiations, Results* (1999), 175–188, 180.

12 BBC News, '*Hague referral for African pair*', 14 April 2006, <news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4908938.stm>.

13 Thus, when responding to the letter of referral of Uganda (*supra* note 2), in which the latter sought to limit the referred situation to crimes committed by the Lord's Resistance Army, the ICC Prosecutor nevertheless concluded that the scope of the referral encompassed all crimes committed in Northern Uganda in the context of the conflict involving

however, that the auto-referring State cannot be sure that the (group of) persons, which it had in mind when making the referral will indeed be the (only) ones, who will find themselves before the Court. This was amply illustrated in the context of the Ugandan auto-referral,[14] when the Ugandan President, having been informed that the Prosecutor will not necessarily limit his investigations to the organised armed group Lord's Resistance Army, reportedly expressed his readiness "to be investigated for war crimes" and that "if any of our people were involved in any crimes, we will give him up to be tried by the ICC", but then continued to state that "in any case, if such cases are brought to our attention, we will try them ourselves".[15]

This statement also illustrates that it may be somewhat over-optimistic to assume that "[w]here the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide the Office with all the co-operation within the country that it is required to give under the Statute" and that "the Prosecutor can be confident that the national authorities will assist the investigation".[16] It is exactly in scenarios of instrumentalisation by the auto-referring State where the cooperation may be limited to those aspects of the investigation and prosecution before the ICC, which advances the political goals of the auto-referring State. One can expect the DR Congo, Uganda and the Central African Republic to do everything in their power to provide the Court with the information necessary to achieve their objectives, but this will not necessarily be the case in relation to information, which may be detrimental to them, for instance when investigations target political allies or governmental officials.

Be that as it may, even an explicit statement on the part of an auto-referring State that it wishes to waive admissibility would not, and should not, preclude the application of complementarity for the following reasons.

First, excluding the applicability of complementarity by virtue of an explicit waiver is hard to reconcile with the idea encapsulated in complementarity to function as a catalyst for States to investigate and prosecute ICC crimes.[17] One of the key tasks of complementarity is to improve the performance of States in fulfilling the central role

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the LRA, thus extending to all parties to the conflict. See Letter by the Chief Prosecutor of 17 June 004 addressed to the President of the ICC, attached to the Decision of the Presidency Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04-1.

14 See *supra* note 2.

15 See Remarks by ICC Prosecutor Luis Moreno-Ocampo, 27th meeting of the Committee of Legal Advisors on Public International Law, Strasburg, 18 March 2004, available at <www.coe.int/t/e/legal_affairs/legal_cooperation/Public_international_law/Texts_&_Documents/2004/Speech%20OCAMPO%2027th%20Cahdi%20meeting.asp>, emphasis added.

16 Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, available at <www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf>.

17 M.H. Arsanjani & W.M. Reisman, 'The Law-in-action of the International Criminal Court' (2005) 99 *American Journal of International Law* 385-403, 390, 392; Kleffner, *supra* note 4.

that international law assigns to them in the suppression of ICC crimes. This fundamental objective of complementarity to strengthen domestic proceedings would be seriously undermined if one excluded its application in the context of auto-referrals. Indeed, to take such an approach could perpetuate impunity on the national level in as much as it would present States making an auto-referral with the convenient possibility not to investigate and prosecute ICC crimes, despite the fact that they are neither unwilling nor unable within the meaning of Article 17 (2) and (3).

Secondly, waivers of admissibility are incompatible with the obligation to investigate and prosecute ICC crimes, which flows from the conjunctive operation of the Preambular phrase that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and the provisions on complementarity. Admittedly, the provisions on admissibility themselves do not stipulate that States are required to be willing and, to the extent that it is within their power, able to investigate and prosecute ICC crimes genuinely. Instead, these provisions regulate the consequence for the purpose of ICC proceedings, namely admissibility, in case they are not. The mere fact that the Rome Statute attaches this consequence to not adequately investigating and prosecuting ICC crimes does not mean that States are required to do so. However, Paragraph 6 of the Preamble, which is in principle of equal normative value to other provisions of the Statute,[18] provides unmistakably that States are legally required to exercise their criminal jurisdiction over international crimes, including ICC crimes. Thus understood, the relationship between preambular paragraph 6 and the provisions on complementarity resembles the one be-

18 The view that the formal position of the duty of States to exercise their jurisdiction in the Preamble appears to be at odds with the generally accepted view that the Preamble of a treaty has to be treated as an integral part of the treaty text, which suggests its being on an equal footing with the operative provisions of a treaty, cf. Vienna Convention on the Law of Treaties, Article 31 (2), chapeau. It would be inconsistent with such a premise to categorically reject the possibility that a Preamble can contain legal obligations. Nothing in the law of treaties indicates that provisions have an inferior legal force or no legal force at all, by virtue of the fact alone that they are set forth in the Preamble rather than the *dispositif*. See for instance, G. Scelle, *Précis de droit des gens*, Vol. II (1934) 464; P. You, *Le Préambule des Traités Internationaux* (1941), 67-70; ICJ *Case concerning rights of nationals of the United States of Amertica in Morocco* [1952] ICJ Reports 176, 184; ICJ *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* [1997] 37 ILM 162, [151]; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points' (1957) *British Yearbook of International Law* 229; S. Schepers, 'The legal force of the preamble to the EEC treaty', (1981) 6 *European Law Review* 356-361, 358, 359; E. Suy, 'Le Préambule' in E. Yakpo, T. Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (1999) 253-269, 260-261. See also C. Rousseau, *Droit International Public, I (Introduction et Sources)* (Paris, 1970) 87 who notes that "[o]n a parfois considéré le préambule des traités comme doué d'une force obligatoire inférieure à celle du dispositif. Mais c'est là une opinion isolée"]. An example of such an "opinion isolée" can be found in N. Quoc Dinh, P. Daillier, A. Pellet, *Droit International Public,* 2nd ed. (1980), 126, who assert that, while the preamble constitutes an element in the interpretation of a treaty, it "ne possède pas de force obligatoire".

tween secondary and primary norms:[19] the obligation in the Preamble provides the principal basis of the system of complementarity,[20] which in turn responds to cases in which national criminal jurisdictions are not able or willing to fulfil that duty. In so doing, complementarity enhances the normativity of the obligation to investigate and prosecute enshrined in the Preamble by supplying an enforcement mechanism, which induces States to investigate and prosecute ICC crimes.

Notwithstanding assertions to the contrary,[21] it appears doubtful that territorial States can discharge their obligation to investigate and prosecute by making an auto-referral and by arguing that they are ensuring that ICC crimes are investigated and prosecuted, albeit by the ICC rather than their own courts. The sixth paragraph of the Preamble unambiguously refers to the exercise of jurisdiction of States ("its jurisdiction") and the plain terms of the provision contradict its extension to cover the exercise of the ICC's jurisdiction. Even if one rejected this construction and gave the terms a broader meaning, a State making an auto-referral can in no way guarantee that the ICC will indeed exercise its jurisdiction, for instance because it considered the referred situation not to merit its intervention for lack of sufficient gravity[22] or because an investigation or prosecution of the ICC would not be in the interests of justice.[23] It is therefore unconvincing to regard this – to some extent discretionary – exercise of jurisdiction by the ICC within the confines that the Statute provides as

19 For that distinction, see Crawford, *supra* note 9, 14-16.

20 Paper on some policy issues before the Office of the Prosecutor, available at <www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> (2003) 4 and 5; T. van Boven, 'The Principle of Complementarity – The International Criminal Court and National Laws' in J. Wouters, H Panken (eds.), *De Genocidewet in international perspectief, Jura Falconis Libri* (2002) 65-74, 68 ("It must be inferred from the Rome Statute, both from the Preamble and from the substantive provisions, in particular Article 17 dealing with issues of admissibility, that a State which has jurisdiction on the basis of the territorial or nationality principle is presumed to have an obligation to investigate and prosecute the core crimes covered by the Statute."). M. Politi, 'Le Statut de Rome de la Cour Pénale Internationale: Le Point de Vue d'un Négociateur' (1999) *103 Revue Génerale de Droit International Public* 817-850, 843 ["A la lumière des règles sur la "complémentarité" de la Cour, il s'agit en effet d'un principe qui vient souligner l'existence d'une obligation étatique non formelle (mais incluant, au contraire, celle de la mise en place de procédures judiciaries authentiques et efficaces) de poursuivre, sur le plan national, les violations du droit humanitaire."]. A. O'Shea, *Amnesty for crime in international law and practice* (2002), 257 ["principle of 'complementarity'[…] itself appears to rest on the premise that states have an obligation to prosecute those crimes covered by the subject-matter jurisdiction of the court and that are not brought before the court."].

21 See C. Kress, "Self-Referrals' and 'Waivers of Complementarity', Some Considerations in Law and Policy' (2004) 2 *JICJ* 944-948, 945-946. In a similar vein, see also Benzing, *supra* note 8, 630; Informal Expert Paper for the ICC Office of the Prosecutor: The Principle of Complementarity in Practice, available at <www.icc-cpi.int/library/organs/otp/complementarity.pdf>, 19, note 24; S. Morel, *La Mise en Oeuvre du Principe de la Complémentarité par la Cour Pénale Internationale – Le Cas Particulier des Amnisties* (2005), 141.

22 See Article 17 (1) (d) of the Statute.

23 See Article 53 (1) (c) and (2) (c) of the Statute.

a fulfilment of a State's obligation to investigate and prosecute. To understand the obligation to investigate and prosecute, which the Statute imposes on State Parties, as obliging to investigate and prosecute ICC crimes domestically finds further support in a closer analysis of Article 17, which, as indicated, needs to be understood as operating in conjunction with the Preamble when determining the content and reach of the obligation of States Parties to the Statute. The references in that provision to "a State which has jurisdiction" in subparagraphs (1) (a) and (b) make it quite clear that investigations and prosecutions are envisaged to be conducted at the national level.

Thirdly, to subject auto-referrals to an admissibility assessment diminishes the risk of politicisation of the Court. States may seek to use auto-referrals (also) as instruments of domestic politics. An illustration is the auto-referral of the DRC by the President, who, it has been suggested, has sought to employ the auto-referral as an instrument to sideline political opponents in the run-up to the 2006 elections.[24] Similarly, the Ugandan government initially sought to refer only one party to the conflict, namely the Lord's Resistance Army,[25] to the ICC, although the ICC Prosecutor commendably foiled that attempt.[26] By providing a mechanism through which cases are declared inadmissible, which can and are effectively being investigated and prosecuted on the national level, complementarity can contribute to thwarting attempts to selectively externalise the adjudication of cases, which are politically or otherwise inconvenient to be investigated and prosecuted domestically.

Fourthly, not to apply complementarity in the context of auto-referrals would entail the risk of over-burdening the Court, notwithstanding some devices, such as prosecutorial policy and the admissibility requirement of sufficient gravity, which may limit the number of cases.[27] The ICC would become the only available forum, absent action of third States and other mechanisms for bringing perpetrators to justice, such as internationalised courts. At the same time, the forum, which is envisaged to carry the main burden according to complementarity, i.e. the active, willing and able national criminal jurisdiction of the auto-referring State, would be unavailable. Not to apply complementarity in the context of an auto-referral would thus divest the Court of a tool to decline the exercise of its jurisdiction because cases can adequately be addressed on the national level.

The foregoing arguments support the view that auto-referrals are, in principle, subject to the regime of complementarity. It is therefore commendable that the Court appears to have adopted this approach in its early practice. When confronted with the question of admissibility under Article 19 in the case of Mr. Thomas Lubanga Dyilo, which emanated from the auto-referral of the DRC, one of the Court's Pre-Trial Chambers assessed the Prosecution's assertion that the DRC's national judicial

24 W. Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Governance in the DemocraticRepublic of Congo' (2005) 18 *Leiden Journal of International Law* 557-590, 563-568.

25 See Letter of referral, *supra* note 2.

26 See *supra* note 13.

27 Informal Expert Paper for the ICC Office of the Prosecutor on The Principle of Complementarity in Practice, *supra* note 21, 18-19, 60.

system was unable in the sense of Article 17 (3) and noted that this "does not wholly correspond to the reality any longer".[28] It nevertheless found the case to be admissible noting that "no State with jurisdiction over the case … is acting, or has acted", because the DRC's criminal proceedings against Mr. Lubanga related to conduct different from the policy/practice of enlisting, conscripting and using to participate actively in hostilities children under the age of fifteen,[29] which constituted the basis of the ICC Prosecutor's Application for a warrant of arrest; nor had another State become active. The Pre-Trial Chamber continued to state that "[a]ccordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability"[30] and thus did not deviate from the ordinary approach according to which the inaction of States entails that the case concerned is admissible.[31] This line of reasoning suggests *a contrario* that the Court would have assessed unwillingness and inability and thus applied complementarity if a State with jurisdiction over the case – including the DRC – had acted vis-à-vis the same person and conduct. Indeed, this scenario may arise should the ICC charges against Mr. Lubanga Dyilo be amended to include conduct in relation to which the DRC had initiated criminal proceedings in their domestic courts, most notably the killing of UN peacekeepers on 25 February 2005.[32]

3. Auto-referrals and the procedural framework of complementarity

While complementarity is applicable to auto-referrals, some questions as to the operationalisation of the procedural framework of admissibility arise. On the one hand, at the stage of deciding whether or not to initiate an investigation in accordance with Article 53 (1), an auto-referral has to be treated no differently than other State referrals. The Prosecutor's role to consider whether "the case is or would be admissible"

28 Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, Unsealed pursuant to Decision ICC-01/04-01/06-37, ICC-01/04-01/06-8-US-Corr, 36.

29 For the requirement that "a case" relates to the same conduct and the same person, see Pre-Trial Chamber I, id. 21, 31.

30 Pre-Trial Chamber I, id. 40.

31 On admissibility as consequence of inaction, see amongst many others J. T. Holmes, 'The Principle of Complementarity', in R. S Lee (ed.), *The International Criminal Court, The making of the Rome Statute, Issues, Negotiations, Results* (1999) 41-78, 77 ("It is clear that the Statute's provisions on complementarity are intended to refer to criminal investigations. Thus, where no such investigation occurred, the Court would be free to act"); Paper on some policy issues before the Office of the Prosecutor, *supra* note 20, 4 ("There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation"); Informal Expert Paper for the ICC Office of the Prosecutor, *supra* note 21, 17-18.

32 On the (conduct subject to) DRC domestic proceedings, see Prosecution's Submission of Further Information and Materials, Reclassified as public on 23.03.2006 pursuant to decision ICC-01/04-01/06-46, ICC-01/04-01/06-32-AnxC, 25 January 2006, 8-10, 22.

is mandatory rather than discretionary.[33] It needs to be borne in mind in that regard that this assessment by the Prosecutor is independent of the auto-referring State's own perception of whether a case or situation is admissible. An assertion alone that the competent authorities are incapable to investigate and prosecute ICC crimes, for instance,[34] is not determinative.[35]

Auto-referrals may have implications, on the other hand, for several elements of the procedures for preliminary rulings regarding admissibility under Article 18 and for challenging the admissibility of a case in accordance with Article 19. Assuming that the Prosecutor has determined that there is a reasonable basis to commence an investigation under Article 53 (1), an auto-referral does not absolve him from his obligation to "notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned".[36] However, the State making the auto-referral is unlikely, to say the least, to then react to the notification by requesting a deferral in accordance with Article 18 (2). It was after all that State's intention to see the ICC carrying out proceedings vis-à-vis the referred situation rather than itself. In a similar vein, that State may not be inclined to subsequently challenge the admissibility of a case under Article 19 (2) (b) or (c), although that possibility cannot be excluded, for instance when the case concerns an individual who does not belong to the group(s) of persons which the State had in mind when making the auto-referral[37] or when the situation has changed subsequent to the auto-referral, as has happened in Uganda in the course of the peace process between the Ugandan government and the Lord's Resistance Army.[38]

33 Recall the opening wording of Article 53 of the Statute: "The Prosecutor *shall* …", emphasis added.

34 Cf. Lettre de M. Joseph Kabila, *supra* note 1, in which the President of the DRC asserts that "les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes … ni d'engager des poursuites nécessaires". See also the auto-referral by the Central African Republic's *Cour de Cassation* of 13 April 2006, in which it was reportedly asserted that the persons concerned "cannot be judged by our [the CAR's] national courts; only the ICC with its reputation and resources can do that", IRIN, "ICC Reviewing Suit Against Ex-President, Official Says", 26 April 2006 <allafrica.com/stories/200604260057.html>.

35 Accordingly, the ICC Prosecutor has applied Article 53 in response to the auto-referral of the DRC, see ICC Press Release, '*Prosecutor receives referral of the situation in the Democratic Republic of Congo*', 19 April 2004, ICC-OTP-20040419-50-En.

36 Article 18 (1) of the Statute.

37 For example, the statement of the Ugandan President, *supra* note 15, and text, indicates that, if the ICC Prosecutor were to seek an arrest warrant for an Ugandan governmental official, Uganda might challenge the admissibility of the case.

38 That process has led to the Agreement on Accountability and Reconciliation signed on 29th June 2007, and an Annexure to that Agreement signed in early 2008. In these instruments the parties recalled their commitment "to preventing impunity and promoting redress in accordance with the Constitution and international obligations, and recall[ed], in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity". Paragraph 3 of the Pre-

Yet, in the absence of requests for deferral or challenges to the admissibility of a case by the auto-referring State, the question arises as to what role third States, an accused or a person for whom an arrest warrant or summons to appear has been issued, the Court and the Prosecutor (should) retain within the framework of Articles 18 and 19.

3.1. Third States

As far as the role of third States is concerned, any State can inform the Court that it is investigating or has investigated not only its nationals but also "others within its jurisdiction" and request a deferral under Article 18 (2). Furthermore, States other than those on whose territory or by whose nationals ICC crimes have allegedly been committed can challenge admissibility. This is clear from the wording of Article 19 (2) (a) and (b). At the same time, an auto-referral implies that the referring State wishes the Court to exercise jurisdiction; a wish expressed by the State, which can claim the strongest nexus to the crimes by virtue of the territoriality principle. The question therefore arises as to whether States with a weaker nexus or no nexus at all, which would have to base the exercise of jurisdiction on the principle of universality, should exercise restraint in requesting a deferral under Article 18 (2) or challenge admissibility under Article 19 (2) (b) or (c) and thereby make it more likely that the wish of the auto-referring State materialises.[39]

On the one hand, there may be good arguments for the exercise of such restraint. The ICC may be in a better position to exercise jurisdiction than the third State, for

amble to Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (LRA/M) on 29th June 2007 and Paragraph 5 of the Preamble to the Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (LRA/M) on 29th June 2007, signed in Juba on the 19th day of February 2008. The Annexure to the agreement provides for the establishment of a special division of the High Court of Uganda to try individuals who are alleged to have committed serious crimes during the conflict and a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings, cf. Sections 7-14. It further foresees the use of traditional justice mechanisms, cf. Sections 19-22. These developments clearly demonstrate that the attitude of the Ugandan government has changed from one, which had as its aim an intervention by the ICC, to a policy of domestic anti-impunity measures, including criminal proceedings. See also below the contribution by Burke-White & Kaplan, Ch. 7.

39 This question has been considered by Germany, where Ignace Murwanashyaka, a senior leader of one of the organised armed groups fighting in the DR Congo, the Democratic Forces for the Liberation of Rwanda, had been arrested in April 2006. He is believed to have committed numerous international crimes in Congo (as well as Rwanda). After his arrest, it was reported that Germany considered to transfer the case to the ICC, see Rwanda: 'FDLR Leader Could Be Tried At ICC', The New Times (Kigali), April 18, 2006, available at <allafrica.com/stories/200604190016.html>.

instance because the auto-referring State has supplied the Court with evidence.[40] On the other hand, there may be circumstances under which proceedings in a third State bear the potential of creating an incentive for the territorial State to investigate and prosecute ICC crimes with a view to foreclosing adjudication in another State.[41] After all, if a third State threatens to forestall an auto-referral by requesting a deferral or challenging the admissibility of a case, the auto-referring State might reconsider its decision not to exercise jurisdiction, because it regards prosecution in the third State as detrimental to its interests. Consider, for instance, the situation of an international armed conflict between State A and State B (both State Parties to the Statute). If State A sought to auto-refer that armed conflict as a situation to the ICC with a view to have crimes allegedly committed on its territory by members of the armed forces of State B investigated and prosecuted by the ICC, a request for deferral or a challenge to admissibility by State B may cause State A to investigate and prosecute after all. One could therefore argue that States Parties to the Rome Statute should strive to strengthen the overall objective of complementarity to serve as a catalyst for conducting domestic prosecutions by requesting deferrals or challenging admissibility.

If, on the other hand, the main objective of an auto-referral is to externalise (a) politically inconvenient case(s) (for instance because the person(s) concerned continue(s) to disrupt the domestic political process), a request for deferral or a challenge to admissibility by a third State will unlikely change the attitude of the auto-referring State, because that aim of externalisation would be achieved – albeit in a different forum than the one initially envisaged by the State making the auto-referral. The foregoing suggests that the question whether third States should exercise restraint in cases of auto-referrals has to be answered contextually rather than in the abstract. However, even if restraint appears a wise cause of (in)action, the guiding principle should be to narrow gaps of impunity rather than to categorically abstain from exercising jurisdiction vis-à-vis all cases emanating from the situation, which was the object of the auto-referral. In other words, there may be room for restraint for the limited number of cases, which fall into the reach of the ICC by virtue of the Prosecutor's policy to concentrate on those who bear the greatest responsibility[42] and their gravity under Article 17 (1) (d). Other cases, however, may still have to be prosecuted by third States in order to contribute to ending impunity.

40 See e.g. Informal Expert Paper for the ICC Office of the Prosecutor, *supra* note 21, 19, [61]. See also the auto-referral of the Central African Republic and the statement made by the *Cour de Cassation, supra* note 34, indicating that only the ICC with its reputation and resources can investigate and prosecute.

41 Recall that the proceedings against Augusto Pinochet in Spain and the UK appear to have had an impact on renewed efforts to prosecute him in Chile, see on these proceedings the concise summary in (2000) 3 *Yearbook of International Humanitarian Law* 447-451.

42 Paper on some policy issues before the Office of the Prosecutor, *supra* note 20, 7 ("The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*" Emphasis in the original).

3.2. The accused or person subject to arrest warrant or summons to sppear

A further question raised by auto-referrals is their possible effect on the procedural right of an accused or a person for whom an arrest warrant or a summons to appear has been issued to challenge admissibility, as foreseen in Article 19 (2) (a). Some have suggested that certain elements of this claim of an individual may be "waived" by the State making an auto-referral. More in particular, it has been argued that to challenge admissibility under Articles 17 (1) (a) and (b) – as opposed to a challenge based on the *ne bis in idem* principle embodied in Articles 17 (1) (c) and 20 (3) – does not amount to a *right* of an individual, but merely provides an individual with "standing to raise an issue that relates to state sovereignty".[43] This view conceptualises Articles 17 (1) (a) and (b) as protecting the right of States to exercise their jurisdiction over ICC crimes. Drawing on jurisprudence of the ICTY Appeals Chamber in *Prosecutor v. Tadić*, the view submits that in such a case, an individual "cannot claim the rights which have been specifically waived by the State … concerned".[44] However, even if one assumed that the requirements for such a "waiver" by a State were met,[45] an auto-referral of a State, which is neither unable nor unwilling in the sense of Article 17 is incompatible with the fundamental assumption underlying complementarity that territorial States are under an obligation to investigate and prosecute ICC crimes. What is at issue is thus whether the territorial State complies with that obligation, rather than whether it considers it in its interests not to invoke the right to exercise its jurisdiction. Such an obligation, however, cannot be "waived".[46] An accused or a person for whom an arrest warrant or a summons to appear has been issued could, therefore, nevertheless claim that the auto-referring State is neither inactive, nor unwilling or unable within the meaning of Article 17 (2) and (3).

An entirely different matter is, of course, whether such a person will in fact invoke admissibility. If, for instance, that person belongs to the group, which the referring State sought to eliminate or to sideline (such as the LRA in the case of Uganda or the organised armed groups opposing the government of the DRC), a challenge to admissibility may not be forthcoming, because the person entitled to do so expects his or her chances for a fair trial to be greater if tried by the ICC rather than by domestic courts of the State making the auto-referral. Another reason for an individual not to challenge admissibility under Article 19 (2)(a) may be the fact that the domestic jurisdiction concerned knows the death penalty for ICC crimes, whereas the ICC cannot impose such a sentence.[47] In short, persons entitled to challenge admissibility may not consider such a challenge to be in their best interest.

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43 See Benzing, *supra* note 8, 599. See also J. Meissner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003). 73-75.

44 ICTY Appeals Chamber, *Prosecutor v. Tadić* (Interlocutory Appeal on Jurisdiction) IT-94-I-A7R2 (2 October 1995) 56. Cf. Meissner, *supra* note 43, 75.

45 See *supra* note 9 and text.

46 See El Zeidy, *supra* note 7, 101.

47 Cf. Rome Statute, *supra* note 1, Article 77.

In the light of the foregoing, auto-referrals entail the possibility that the sole actors to assess admissibility after the Prosecutor has determined that there is a reasonable basis to commence an investigation under Article 53 (1), will be the Court in exercise of its discretionary power granted under Article 19 (1) or the Prosecutor when seeking a ruling in accordance with Article 19 (3).

4. Conclusion

Even though complementarity is, in principle, applicable to auto-referrals and (limited) procedural devices are available to apply it, the current system of admissibility does not sit easily with auto-referrals and one cannot fail to note the dilemma, which can present itself. If a State remains wholly inactive or abandons proceedings vis-à-vis persons and conduct that it seeks to refer to the Court (and provided that other States also do not act), the Court may find itself in a position as the only available forum for investigating and prosecuting a given case. In such cases, the ICC may be left with no other option than to declare cases admissible, although the auto-referring State could – in theory – conduct domestic criminal proceedings, which meet the requirements of willingness and ability within the meaning of Article 17 (2) and (3). It seems impossible to avoid the ICC effectively being taken hostage in this way within the current system. An express regulation of auto-referrals and their relation to complementarity therefore appears desirable. For the reasons explained above, it is submitted that a prudent starting point for such an express regulation is to discourage auto-referrals. At the same time, it should also take into account the possibility that auto-referrals can provide a way to accommodate the genuine wishes of States to have the ICC exercise jurisdiction.[48] If a State delays proceedings against a particular (group of) person(s) because it wishes to allow a fragile peace to consolidate,[49] for instance, an auto-referral to the ICC may be a genuine effort to bring the perpetrator(s) to justice, which merits support from the ICC. Any regulation of auto-referrals should therefore clarify under what conditions auto-referrals are permissible and provide for the necessary flexibility, which allows the Court to differentiate between auto-referrals, which seek to misuse the ICC, and those which are genuinely intended to ensure accountability.

48 Cf. Informal Expert Paper for the ICC Office of the Prosecutor, *supra* note 21, 19 [61].

49 Note that Article 17 (2) (b) would seem to provide some leeway for States to do so without being declared "unwilling", because such a delay, while perhaps 'unjustified' within the meaning of that provision, is not also considered to be "*in the circumstances [...] inconsistent with an intent to bring the person concerned to justice*".

Chapter 6 The legitimacy of withdrawing State Party referrals and *ad hoc* declarations under the Statute of the International Criminal Court

*Mohamed M. El Zeidy**

1. Introduction

In December 2003, the Government of Uganda referred to the International Criminal Court (ICC) Prosecutor the situation concerning the conflict in the northern part of the country,[1] which led to a meeting between the two parties in London to discuss future mutual cooperation.[2] Almost a year later, Ugandan officials made some statements expressing their intention to withdraw the Government's referral from the ICC. Amnesty International reported that on 14 November 2004 President Museveni stated that Lord Resistance Army Leaders (LRA), who have been engaged in an internal armed conflict with the government for more than two decades, could cease fighting and "engage in internal reconciliation mechanisms put in place by the Acholi community such as mataput or blood settlement [and if this were to happen], the state could withdraw its case [from the ICC]".[3] The threat of withdrawal was reiter-

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1 See '*President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC*', The Hague, 29 January 2004, available at, http://www.icc-cpi.int/php/index.php.

2 See Human Rights Watch, '*ICC: Investigate All Sides in Uganda*', Africa News, 4 February 2004, available at, Lexis News Library; G. Matsiko & D. Ocwich, *'Amnesty Hails ICC on Kony Probe*', New Vision (Uganda) – AAGM, 3 February 2004, available at, Lexis News Library.

3 See Amnesty International, '*Uganda: Government cannot Prevent the International Criminal Court from Investigating Crimes*', 16 November 2004, available at, < http://asia-pacific.amnesty.org/library/Index/ENGAFR590082004?open&of=ENG-UGA>.

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ated several times by the Government.[4] Attempts to avoid ICC jurisdiction for the alleged purpose of saving the peace negotiations from reaching deadlock continued, especially after the signing of the peace agreements on 29 June 2007[5] followed by an "Annexture" thereto on 19 February 2008.[6] Following these events, the LRA delegation pressured the Government of Uganda to ask the Court to drop the charges against the indicted LRA leaders.[7] Hitherto, Uganda, has not taken any serious initiative to withdraw its referral. Nor did the Democratic Republic of Congo or the Central African Republic, which also referred their own situations to the Court, attempt withdraw their referrals.

In February 2005, Ivory Coast lodged its first declaration accepting the jurisdiction of the ICC with respect to crimes committed on its territory as of 19 September 2002.[8] Thus far, nothing had been also reported about the intention of withdrawing its *ad hoc* declaration.

Although the question of withdrawal of a State party referral has never been officially brought up before the Court, the statements made by the Ugandan Government herald the possibility of facing such a question in the future. One cannot rule out the same possibility in relation to a third State's *ad hoc* declaration. The treatment of this question has gone almost unnoticed not only in practice, but also in international theory.[9] This article attempts to explore the alternative options that might be considered to solve the issue of withdrawal of a State party's referral or a third State's *ad hoc* declaration. In so doing, it will present the arguments in support of withdrawal and those against the practice in order to reflect the novelty as well as the complexity of assessing the issue. The article will examine, in particular, (i) the development of the question of withdrawing a State party's referral; (ii) the development of the question of withdrawing a third State's declaration; (iii) the legal basis for assessing the question of withdrawal; (iv) the possibility of withdrawing a State party's referral and

4 A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', (2007) 21 *Ethics and International Affairs* 179, 187 – 188.

5 Irin, 'Uganda: LRA Talks Reach Agreement on Accountability', 30 June 2007, available at http://www.irinnews.org/Report.aspx?ReportId=73010.

6 Daily Monitor, '*Details of Government, LRA Agreement*', 20 February 2008, available at, http://www.monitor.co.ug/artman/publish/news/Details_of_Government_LRA_agreement.shtml; Human Rights Watch, Analysis of the Annex to the June 29 Agreement on accountability and Reconciliation', February 2008, available at http://hrw.org/backgrounder/ij/uganda0208/index.htm#_Toc191354757.

7 The East African, '*Uganda: ICC Warrants Sticking point in Kony Deal*', 3 March 2008, available at http://allafrica.com/stories/200803031543.html.

8 ICC Press Release, '*Registrar Confirms That the Republic of Côte d'Ivoire Has Accepted the Jurisdiction of the Court*', The Hague, 15 February 2005, available at http://www.icc-cpi.int/press/pressreleases/93.html.

9 There is one notable article on the subject, see A. Maged, 'Withdrawal of Referrals – A Serious Challenge to the Function of the ICC', (2006) 6 *International Criminal Law Review* 419.

a third State's *ad hoc* declaration; and (v) the possibility of withdrawal on the basis of the legal effects of a State party's referral or a third State's *ad hoc* declaration.

2. Development of the question of withdrawing a State Party's referral under Articles 13 (a) and 14 (1) of the Rome Statute

The word "withdrawal" means the "act of taking back or away" or the "act of retreating" from a "position" or a "situation".[10] Thus, "withdrawal of a referral" literally refers to the act of taking back or retreating from a referral initially made by a State Party. This matter was addressed for the first time in 1990 during the discussions in the International Law Commission (ILC/Commission) of a draft code of crimes against the peace and security of mankind (the code). In his eighth report to the ILC, the Special Rapporteur prepared a preliminary draft statute of an international criminal court (1990 draft), which was seen at the time, as a future possibility for the implementation of the code.[11] At the time, the idea was that a State might lodge a "complaint" against a person who was the subject of another State, and the question under consideration was whether to permit that State to withdraw its complaint. The change in terminology to a State's "referral of a situation", which emerged for the first time in 1996 and found its way in the Rome Statute, had not yet been introduced.[12] But, in principle, the questions of withdrawal of a "complaint" or a "referral" are certainly analogous.

The 1990 draft included a sub-section entitled "withdrawal of complaints".[13] Two alternative versions were submitted for consideration by members of the Commission. Version A stated: "If a complaint is withdrawn, the proceedings shall be discontinued, *ipso facto*, so that criminal proceedings may be instituted before the Court, unless they are reopened by another State having the authority to do so".[14] This option had two main aspects; first, it made it possible for a State which lodged a complaint to withdraw it and, secondly, such an act would have led to the discontinuation of proceedings during the different stages, provided that any other State entitled to be heard by the court "in some capacity" as complainant or civil party had not objected.[15] By contrast, version B called for a sort of reverse approach, in the sense that a withdrawal of a complaint "does not mean, i*pso facto*, that the proceedings shall be discontinued. The proceedings must continue until such time as the case is dismissed

10 See *Black's Law Dictionary*, 7th ed. (1999), p 1595; See also *Oxford Paperback Dictionary, Thesaurus and Wordpower Guide* (2001), p. 1052.

11 Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/CN.4/430 and Add.1, 1990 *YILC,* Vol. II, Part I, p. 36 [hereinafter 1990 *YILC*, Vol. II, Part I].

12 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), paras. 145 – 146.

13 1990 *YILC*, Vol. II, Part I, p. 38.

14 Ibid., para. 98.

15 Ibid., para. 99.

or there is a conviction or acquittal".[16] Although this alternative permitted a State to withdraw its complaint, it deprived a complainant State of the power to terminate proceedings. The rationale behind the proposal was the nature and gravity of the crimes considered for the code. As the Special Rapporteur outlined in his commentary, version B was "based on the principle that prosecution for crimes against the peace and security of mankind should not be interrupted solely at the behest of the States directly concerned. Such crimes are of concern to the whole international community..., [which] transcend the subjective interests of the parties".[17]

When these proposals were tabled before the Commission for consideration during its 42nd session, there was a common understanding that a State lodging a complaint had the right to withdraw it.[18] Yet, a diversity of opinions arose in relation to the direct implications of the act of withdrawal on current proceedings. One member argued that an act of withdrawal should result in the discontinuation of proceedings, but should not prevent another interested State from initiating fresh proceedings, before either its domestic courts or the international criminal court.[19] Another member believed that the withdrawal of a complaint removed "one of the essential bases of competence", and therefore proceedings "could not continue" unless the court was given some discretion to continue on the basis of the interests of justice theory.[20] Others thought that the impact of the withdrawal of a complaint depended on the jurisdiction of the court *ratione materiae*.[21] If the competence of the court was confined to crimes against the peace and security of mankind, which concerned the international community, proceedings could not be affected.[22] However, if it was expanded to cover offences defined as crimes by the "international instruments in force", a withdrawal "might, *ipso facto*, entail the discontinuation of the proceedings".[23]

Since 1990, the title "withdrawal of complaints" has appeared neither in the subsequent reports prepared by the Special Rapporteur, nor in the discussions of the Commission or the work done by the working groups established to prepare the 1994 draft statute for an International Criminal Court. In fact, the public records seemed to lack any reference on the subject, and the 1994 draft statute was finalised without directly treating it.[24] The reason for neglecting this question after it had initially been

16 Ibid., para. 98.

17 Ibid., para. 100.

18 *Summary Records of the Meetings of the Forty-Second Session 1 May – 20 July 1990*, UN Doc. A/CN.4/SER.A/1990, 1990 *YILC*, Vol. I. (in particular, 2150 th, 2151 st, 2156 th and 2157 th meetings) [hereinafter 1990 *YILC*, Vol. I].

19 *Summary Record of the 2156 th Meeting, 1990 YILC*, para. 66.

20 *Summary Record of the 2157 th Meeting, 1990 YILC*, para. 6.

21 *Summary Record of the 2150 th Meeting, 1990 YILC*, para. 33; *Summary Record of the 2151 st Meeting, 1990 YILC*, para. 12; *Summary Record of the 2157 th Meeting, 1990 YILC*, para. 6.

22 Ibid.

23 *Summary Record of the 2157 th Meeting, 1990 YILC*, para. 6.

24 *Report of the International Law Commission on the Work of its Forty-Sixth Session* (2 May – 22 July 1994), with Annex Draft Statute for an International Criminal Court, UN Doc. A/49/10, 1994 *YILC* Vol. II, Part Two [hereinafter 1994 draft/1994 *YILC* Vol. II, Part Two].

discussed by the ILC in 1990 is not clear. It is possible that when the ILC prepared the 1994 draft it relied exclusively on the jurisdictional mechanism designed in Articles 21, 22 and 25 as an alternative avenue.

Article 21 (1) (b) of the 1994 draft stated that the court might exercise jurisdiction if a complaint was brought under Article 25 (2) and the State party concerned had accepted the jurisdiction of the court in accordance with Article 22.[25] Article 25(2) made it clear that lodging a complaint was subject to the State's prior acceptance of the jurisdiction of the court under Article 22.[26] The latter provision spoke of a State party being able to accept the jurisdiction of the court with respect to certain crimes by way of lodging a declaration with the registrar (opt-in approach).[27] The declaration might be limited to a specified period and, in the event of withdrawal, proceedings begun under the statute could not be affected.[28] Reading these provisions together indicates that it was not considered very significant at the time that the question of withdrawal of complaints should be treated separately. Logically, the withdrawal of a complaint was never to take place in practice unless a State party had first lodged a declaration accepting the jurisdiction of the court. Under Article 22 (3) of the 1994 draft, a State party was entitled to withdraw its declaration, which would have resulted in repudiating the jurisdiction of the court. Thus, the jurisdictional clauses in the 1994 draft produced similar effects to a situation where a State party was entitled to withdraw its complaint. An act of withdrawal also would not have led to the discontinuation of ongoing proceedings under any circumstances.

On 9 December 1994, the General Assembly adopted resolution 49/53[29] establishing an *ad hoc* committee to review the "major substantive and administrative issues" arising out of the 1994 draft and submit a report to the General Assembly.[30] The work of the *Ad hoc* Committee neither referred to the possibility of withdrawing a State party's complaint nor, alternatively, discussed the provision on withdrawal of a State party's declaration and its effects as provided in Article 22(3) of the 1994 draft.[31] In late 1995, the *Ad hoc* Committee was replaced by a preparatory committee to proceed with, *inter alia*, preparing the text of a convention for an international criminal court.[32] The meetings of the Preparatory Committee similarly did not explore the question of the withdrawal of complaints in the entire negotiations. Instead, the possibility of withdrawing a State party's declaration accepting the jurisdiction of the

25 1994 draft, Article 21(1) (b).

26 Ibid., Article 25 (2).

27 Ibid., Article 21(1). With the exception of genocide, where the ILC opted for a system of inherent jurisidiction. See ibid., Article 21 (1) (a).

28 Ibid., Article 22 (3).

29 G.A. Res. 49/53, 9 December 1994.

30 *Report of the Ad hoc Committee on the Establishment of an International Criminal Court,* UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995).

31 See the relevant discussions on the exercise of jurisdiction and trigger mechanism, ibid., paras. 90 – 102, 112, 134 – 136.

32 G.A. Res. 50/46, 11 December 1995;

court re-emerged in a proposal during the session held in August 1997.[33] The exact proposal appeared once more in the report of the inter-sessional meeting held in Zutphen in January 1998,[34] and in the final report of the Preparatory Committee of April 1998,[35] which was submitted to the Rome Conference for consideration.

At the Rome Conference, it was obvious that the issue of the withdrawal of a complaint was never to arise as it was entirely omitted by the Preparatory Committee. The reference to "complaint" remained as an option in the final draft submitted to the Rome Conference.[36] It was finally agreed in early July 1998 to change the term to "Referral of a situation by a State".[37] The trigger of the jurisdiction of the court was then called "referral". Although the change in terminology was a technical one, it did not mean that "referral" was not meant to be a "synonym" for "complaint".[38]

Throughout this process no single reference to the possibility of withdrawing a complaint or a referral had been made. The idea of withdrawal, as stated above, was generally attached to a declaration under the opt-in system introduced in 1994 by the ILC, which remained a considerable option by the Preparatory Committee and the Committee of the Whole in Rome. The Bureau of the Committee of the Whole of the Rome Conference retained the idea in two of its "discussion paper[s]".[39] The final choice lay between a court with "inherent" or "automatic" jurisdiction and one based on an opt-in system of consent[40] analogous to that found under Article 36 (2) of the Statute of the International Court of Justice.[41]

33 *Decisions Taken by the Preparatory Committee at Its Session Held 4 to 15 August 1997*, UN GAOR, 52nd mtg., UN Doc. A/AC.249/1997/L.8/Rev.1 (1997), Option 2, Article 22 (3) [hereinafter 1997 Preparatory Committee Decisions].

34 *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998), Option 2, Article 9 (3)[hereinafter 1998 Zutphen Inter-Sessional Meeting].

35 *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, UN Doc. A/CONF.183/2/Add.1, 1998, Option 2, Article 9 (3) [hereinafter Draft Statute & Draft Final Act].

36 Ibid., Article 11.

37 "Bureau: discussion paper regarding part 2. Jurisdiction, admissibility and applicable law", UN Doc. A/CONF.183/C.1/L.53, 6 July 1998.

38 W. A. Schabas, 'First Prosecutions at the International Criminal Court', (2006) 27 *Human Rights Law Journal* 25, 27 – 28.

39 "Bureau: discussion paper regarding part 2. Jurisdiction, admissibility and applicable law", UN Doc. A/CONF.183/C.1/L.53, 6 July 1998, art. 7 *bis* (3) [hereinafter UN Doc. A/CONF.183/C.1/L.53]; "Bureau: discussion paper regarding part 2. Jurisdiction, admissibility and applicable law", UN Doc. A/CONF.183/C.1/L.59, 10 July 1998, Option II, art. 7 *bis* (4) [hereinafter UN Doc. A/CONF.183/C.1/L.59]. .

40 Ibid., Article 5 (2); Option I, Article 7 *bis* (1), Option II, Article 7 *bis*. The proposed system of automatic jurisdiction was meant to cover genocide, crimes against humanity and war crimes. The mechanism proposed concerning the opt-in system was limited to crimes against humanity and war crimes, and automatic jurisdiction for genocide.

41 See Article 36 (2) of the Statute of the International Court of Justice.

The Rome Statute favouring the system of compulsory or automatic jurisdiction was adopted. A State which becomes a party to the Statute automatically accepts the jurisdiction of the Court with respect to the crimes set out in Article 5.[42] As a result of that act, the question of a State party withdrawing its declaration of acceptance to the jurisdiction of the Court becomes moot. If the drafters of the 1994 draft had it in mind to treat the question of withdrawal of a State party's complaint through the opt-in system, as argued above, the mechanism of compulsory jurisdiction enshrined in the current Rome Statute ruled out this alternative. The final package is that the Rome Statute includes neither a provision on the withdrawal of a State party's referral nor one on the withdrawal of a State party's declaration accepting the jurisdiction of the Court.

3. Development of the question of withdrawing a third State's *ad hoc* declaration under Article 12 (3) of the Rome Statute

A question of relevance to the discussion concerns the possibility of withdrawing a non-State Party's declaration accepting the jurisdiction of the Court with respect to the crimes set out in Article 5 of the Statute. Article 12 (3) is designed to broaden the scope of the Statute's application by providing non-State parties which have a direct link to the crimes committed with the opportunity to accept the Court's jurisdiction on an *ad hoc* basis, without pressurising any State to accede to the Statute.[43]

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42 Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, Article 12 (1) [hereinafter Rome Statute].

43 Ibid., Article 12 (3). Article 12 (3) states: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9"; See generally, H.-P. Kaul, "Preconditions to the Exercise of Jurisdiction", in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. I (2002), p. 610 et seq [hereinafter Cassese Commentary]; S. A. Williams, Preconditions to the Exercise of Jurisdiction, in O. Triffterer (ed.), *Commentary on the Rome Statute: Observers' Notes, Article by Article*, (1999), p. 329 [hereinafter Triffterer Commentary]; E. Wilmshurst, Jurisdiction of the Court, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues. Negotiations. Results* (1999), p. 127 [hereinafter Lee Commentary]; M. Inazumi, 'The Meaning of the State Consent Precondition in Article 12 (2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction', (2002) 49 *Netherlands International Law Review* 159; C. Stahn, M. M. El Zeidy & H. Olasolo, 'The International Criminal Court's Ad hoc Jurisdiction Revisited', (2005) 99 *American Journal of International Law* 421; S. Freeland, 'How Open Should the Door Be? – Declarations by non-States Parties under Article 12 (3) of the Rome Statute of the International Criminal Court', (2006) 75 *Nordic Journal of International Law* 211; C. Stahn, 'Why Some Doors may be Close Already: Second Thoughts on a "Case –by-Case" Treatment of Article 12(3) Declarations', (2006) 75 *Nordic Journal of International Law* 243.

When the question of the withdrawal of a State party's complaint was studied in 1990, the ILC's discussions fell short of any reference to the possibility of withdrawing a declaration lodged by a non-State party. The 1994 draft included a provision allowing a non-State party to accept on an *ad hoc* basis the jurisdiction of the court "with respect to the crime" concerned by lodging a declaration with the registrar of the court. Again, there was no indication as to the possibility of withdrawing it. The only reference to withdrawal, as mentioned earlier, was in relation to a declaration lodged by a State party to the statute. These alternative options appeared under the same provision. Had the drafters intended to treat the matter of withdrawing a non-State party's declaration in the 1994 draft, they might have used similar language to that used in the paragraph dealing with State party declarations. They could even have indicated that the withdrawal mentioned in Article 22 (3) also extends to Article 22 (4).

The question of the *ad hoc* acceptance of the jurisdiction of the court by non-State parties was not brought up until the Preparatory Committee met in its August session in 1997.[44] The general idea was accommodated in two different provisions, one dealing with the preconditions to the exercise of jurisdiction,[45] while the other concerned the acceptance of the jurisdiction of the court.[46] Three proposals dealing with the issue of *ad hoc* declarations appeared under these two headings (articles 21*bis* and 22). The first proposal, which appeared under Option 2 of Article 21*bis* (4) made no indication of the possibility of withdrawing a declaration lodged by a non-State party. The same holds true in relation to the remaining two proposals found under Options 1 and 2 of Article 22. Apparently, the question of the withdrawal of a declaration accepting the jurisdiction of the court was an option reserved for State parties to the statute.[47] Nonetheless, under Option 2, Article 22 (3), which addressed the possibility of withdrawing a State party's declaration, included a footnote stating that the same paragraph "may also apply to option 1". This observation suggests that the drafters may have intended to treat both types of declaration on an equal foot-

44 The Preparatory Committee decided to proceed with its work through a working group on complementarity and trigger mechanism.

45 1994 draft, Option 2, Article 21 *bis* (4). Paragraph 4 reads: "When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration".

46 Ibid., Option 1, Article 22 (3). Paragraph 3 reads: "If under article 21 bis the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 7 of the Statute]"; see also Option 2, Article 22(4): "If under article 21 bis the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 7 of the Statute]".

47 1997 *Preparatory Committee Decisions*, Option 2, Article 22(3).

ing, leaving some room for the possibility of withdrawal.[48] The exact footnote as well as the proposals concerning the lodging of declarations remained untouched in the subsequent drafts until they found their way into the draft final act submitted to the Diplomatic Conference in Rome in 1998.[49]

In Rome, the Bureau of the Committee of the Whole of the Rome Conference dealt with the issue of a declaration accepting the jurisdiction of the court by a State party and a non-State party in two separate provisions. The first provision concerned a declaration of acceptance of the jurisdiction of the court by a State party.[50] It retained the idea of withdrawal as it initially appeared in the 1994 draft.[51] This was not the case in relation to the second provision, which did not refer at all to such possibility.[52] The language of Article 7*ter* concerning the non-State party's acceptance[53] found its way into the final text of Article 12 (3) of the Rome Statute without any substantial changes.[54] Consequently, Article 12 (3) was incorporated into the Statute without any mention of the possibility of withdrawal. When it came to drafting the Rules, the French tabled a proposal, currently known as Rule 44, dealing with an entirely different legal problem.[55] Rule 44 became the only provision complementing article 12 (3), which does not tackle the question.

48 However, this does not deny the fact that there was no mention in this footnote that paragraph 3 also applies to the remaining paragraphs under Option 2, in particular Article 22 (4), which regulates a non-State party's declaration. Based on this conclusion, one may wonder whether the drafters actually intended that the footnote apply to Option 1 in its entirety or just the part concerning a State party's declaration.

49 1998 *Zutphen Inter-Sessional Meeting*, Option 2, Article 7 (4); Option 1, Article 9(3), Option 2, Article 9 (3), (4); *Draft Statute & Draft Final Act*, Option 2, Article 7 (4); Option 1, Article 9 (3), Option 2, Article 9 (3) and (4).

50 UN Doc. A/CONF.183/C.1/L.53, Article 7 *bis*; UN Doc. A/CONF.183/C.1/L.59 incorporating document A/CONF.183/C.1/L.59/Corr.1 of 11 July 1998, Article 7 *bis.*

51 UN Doc. A/CONF.183/C.1/L.53, Article 7 *bis* (3); UN Doc. A/CONF.183/C.1/L.59 incorporating document A/CONF.183/C.1/L.59/Corr.1 of 11 July 1998, Option II, Article 7 *bis* (4).

52 UN Doc. A/CONF.183/C.1/L.53, Article 7 *ter*; UN Doc. A/CONF.183/C.1/L.59 incorporating document A/CONF.183/C.1/L.59/Corr.1 of 11 July 1998, Option II, Article 7 *ter.*

53 See for e.g., the text of Article 7*ter* under option II of the Bureau proposal tabled on 10 July 1998, UN Doc. A/CONF.183/C.1/L.59 incorporating document A/CONF.183/C.1/L.59/Corr.1 of 11 July 1998. Article 7 *ter* stated: "If the acceptance of a State that is not a Party to this Statute is required under article 7, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute".

54 See Rome Statute, Article 12 (3).

55 *Report of the Preparatory Commission for the International Criminal Court*, UN Doc. PCNICC/2000/1/Add. 1 (2000), ICC Rule 44 [hereinafter ICC Rule/Rules].

4. The legal basis for assessing the question of withdrawal under the Rome Statute

The above survey shows that neither the Rome Statute nor the Rules or Regulations of the Court embody a provision which treats the question of withdrawing a State party's referral or an Article 12 (3) declaration. Solving this issue requires the Court to resort to alternative venues elaborated in a hierarchical manner under Article 21 of the Statute.

Article 21 states that the Court shall in the first place apply the Statute, the Elements of Crimes and the Rules. If these sources prove to be insufficient, the Court is required in the second place to apply, where appropriate, applicable treaties and the principles and rules of international law. Failing that, the Court shall apply the general principles of law derived by the Court from the national laws of the legal systems of the world. Article 21 (3) comes into play to ensure that any result achieved from the application or interpretation of law in accordance with paragraphs 1 (a) – (c) "must be consistent with internationally recognized human rights".[56] Indeed, in *Lubanga*, Pre-Trial Chamber I ruled that Article 21 (3) does not apply until paragraph 1 (a) – (c) has been satisfied. The Chamber considered that prior to "undertaking the analysis required by Article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under Article 21(1) (a) to (c) of the Statute, could be applicable to the issue at hand".[57] Certainly, such applicable rule or principle may be extracted from the jurisprudence of other international judicial bodies and thus may fall within the parameters of Article 21 (1) (b), despite the absence of a direct reference in Article 21 to that effect.[58] This conclusion also finds support in legal theory.[59] In its commentary

56 On the application of Article 21 (3), see Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 34-35; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paras. 36-39; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, 3 October 2006, ICC-01/04-01/06-512, pp. 5, 9.

57 Pre-Trial Chamber I, *Prosecutor v, Thomas Lubanga Dyilo*, Decision on the Practices of witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras. 10, 28.

58 This is subject to the existence of a lacuna or a "gap" in the Statute, Elements of Crimes and the Rules. See Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 39; see also the contribution by Bitti, below in this volume, Ch. 16.

59 M. Politi, "Complementary or Competition Among International Jurisdictions: The International Criminal Court Perspective", in O. Delas et al., (eds.), *Les Jurisdictions Internationales: Complémentarité Ou Concurrence?* (2005), p. 46.

on Article 33 (b) of the 1994 draft (currently Article 21 (1) (b)), the ILC made this point clear when it said:

> "The expression 'principles and rules' of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in *international practice*, whenever it needs guidance on matters not clearly regulated by the treaty".[60]

In the Uganda case, Pre-Trial Chamber II treated the jurisprudence of the *ad hoc* tribunals as being a source of guidance in determining the "principles and rules of international law", as long as they did not extend "beyond the scope of article 21".[61] Similarly, in one of its decisions on witness preparation, Trial Chamber I, acting within the framework of Article 21 (1) (b), consulted the jurisprudence of the *ad hoc* tribunals, yet with some caution. The Chamber acknowledged that despite the significance of such jurisprudence, it could not apply it in that case, since the procedural rule being compared was deemed not "appropriate".[62] Although these decisions seem to acknowledge that the jurisprudence of the *ad hoc* tribunals may be resorted to as a subsidiary remedy under Article 21 (1) (b), the Court was still careful in applying them.[63]

Yet, in its decision concerning the confirmation of charges against Thomas Lubanga, Pre-Trial Chamber I made it clear that the jurisprudence of international judicial bodies is mainly governed by Article 21 (1) (b).[64] The Chamber relied on the definition of an international armed conflict provided by the ICTY Appeals Chamber in the *Tadić* judgment[65] in order to characterise the nature of the conflict.[66] The Chamber

60 1994 *YILC* Vol. II, Part II, p. 51. One commentator recognises the confusion made by the ILC between the general principles of international law "which are of a customary nature [with] the general principles of law mentioned in Art. 38 (1) (c) of the Statute of the ICJ". See Alain Pellet, "Applicable Law" in Cassese Commentary, Vol. II, *supra* note 43, p. 1071n. 113.

61 Pre-Trial Chamber II, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, 28 October 2005, ICC-02/04-01/05-60, 28/10/2005, para. 19.

62 See Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, paras. 44 – 45.

63 See in the same vein Bitti, *supra* note 58.

64 This does not deny the fact that reference to the case law of the human rights bodies may also be based on Article 21 (3).

65 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Judgment, 15 July 1999, para. 84.

66 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 205, 208 – 211.

also referred to the jurisprudence of the ICJ in the case of *DRC v. Uganda*[67] in order to reach the same conclusion.[68] The same holds true in relation to the application of the jurisprudence of other international judicial and quasi-judicial bodies including, *inter alia*, the human rights institutions. On several occasions the Court relied to a great extent on the case-law of the human rights bodies,[69] probably acting under the umbrella of Article 21(1) (b) and (3). The practice referred to above suggests that there is a tendency to accept the transfer of certain rules and principles emanating from the jurisprudence of other international bodies to the ICC, so long as they are deemed "appropriate" to fill a particular gap arising from the interpretation and application of Article 21 (1) (a). Turning to the question under consideration, since the application of Article 21 (1) (a) does not solve the question of the withdrawal of a referral or an *ad hoc* declaration, the Court should seek solutions in applicable treaties as well as decisions of the different international judicial bodies.

4.1. The possibility of withdrawing a State Party's referral and a third State's ad hoc *declaration under the Rome Statute*

In its *Advisory Opinion on Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, the ICJ stated:

> "[I]n this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the Contracting States are prohibited from making certain reservations...The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations..."[70]

Thus, it also cannot be inferred from the absence of a particular article providing for the withdrawal of referrals or *ad hoc* declarations that these acts are prohibited under

67 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005, para. 172.

68 *Ibid*., paras. 212 – 220.

69 See for e.g., Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, 17 January 2006, ICC-01/04, 17/01/2006, (public redacted), ICC-01/04-101-etEN-Corr., 17/02/2007, paras. 51-53 (Pre-Trial Chamber I referring to the jurisprudence of the ECHR and the IACHR); Pre-Trial Chamber I, *Décision relative au système définitif de divulgation et à l'établissment d'un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation,* 15 May 2006, ICC-01/04-01/06-102, para. 97; Prosecutor's Further Submission, ICC-01/04-01/06 cited *in extenso* in Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, ICC-01/04-01/06-8-US-Corr, paras. 9, 12, unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17 March 2006.

70 ICJ, *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide,* 28 May 1951, p. 22.

the Rome Statute. The lack of a provision as such is thus insufficient for a definitive assessment. The nature or character of the Rome Statute, its purpose, provisions, mode of preparation and adoption are also essential for such a determination.

The core of the criteria established by the ICJ seems to be in line with Article 56 of the Vienna Convention on the Law of Treaties (VCLT). Article 56(1) provides that the lack of a provision concerning withdrawal from a treaty does not bar such an act if it is "established that the parties intended to admit the possibility of withdrawal, or a right of withdrawal may be implied by the nature of the treaty" (emphasis added).[71] Nonetheless, Article 56 was inserted to remedy, *inter alia*, the situation of the withdrawal from an entire treaty containing no provision to that effect, rather than withdrawal from a particular provision in that treaty.

In the *Nicaragua* case, the ICJ was faced with the question of the right to immediately terminate declarations involving indefinite duration under Article 36 (2) of its Statute. The Court agreed to apply by analogy the reasonable time requirement specified in the VCLT. The Court stated:

> "[T]he right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity."[72]

The Inter-American Court of Human Rights (IACHR) followed the same logic in the *Constitutional Court* case, when faced with a request from Peru to withdraw its declaration consenting to the optional clause accepting the contentious jurisdiction of the Court.[73] The situation should be no different in the context of interpreting the Rome Statute. The question of the possibility of withdrawing either a referral or an *ad hoc* declaration may be remedied by analogy through the rules governing withdrawal from a treaty mirrored in Article 56 (1) of the VCLT. This requires looking into the nature of the Rome Statute, its purpose, and its drafting history as the sole evidence of the intention of the parties.

The character and purpose of the Rome Statute are generally reflected in its preamble as well as Article 1. The Statute created the ICC mainly to punish the most serious crimes concerning the international community, [74]and to put an end to impunity for the perpetrators of such crimes.[75] Thus, the Rome Statute is a multilateral

71 Vienna Convention on the Law of Treaties, entered into force 27/01/1980, UNTS, vol. 1155, p. 331, Article 56 (1). See e.g., ICJ, *Interpretation of the Agreement of 25 March 1951 between the Who and Egypt*, Advisory Opinion of 20 December 1980, para. 40, p. 91.

72 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* , Judgment of 26 November 1984, para. 63, p. 420.

73 *Constitutional Court Case*, Competence, Judgment of 24 September 1999, Inter-Am Ct. H.R. (Series C), No. 55 (1999), para. 50.

74 Rome Statute, preamble. para. 4; art. 1

75 Ibid., preamble, para. 5. See also ICC-01/04-520-Anx2, para. 48.

treaty of a special type and nature that should be interpreted against the backdrop of its exceptional character, as is the case with other similar multilateral or human rights treaties. As the ICJ rightly pointed out in the *Advisory Opinion on Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States..."[76] Also, the IACHR stated:

> "[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States...In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations..."[77]

In the same vein, the European Court of Human Rights (ECHR) stated in the *Mamatkulov and Askarov* case that, "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'".[78] Applying these principles to the problem at hand suggests that allowing the withdrawal of a referral or an *ad hoc* declaration would compromise a "common interest" of the international community entrusted with punishing the most serious crimes of international concern against the private interests of a State requesting a withdrawal. This is clearly inconsistent with the main goals and purposes of the Statute, which should be interpreted in good faith.[79]

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76 See ICJ, *supra* 71, at 23.

77 *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-Am Ct. H.R. (Series A) No. 11, (1982), para. 29.

78 *Micallef v.* Malta, Application No. 17056/06, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 15 January 2008, para. 44; *Mamatkulov and Askarov*, Application No. 46827/99, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 4 February 2005, para. 100; *Shamayev and Others v. Georgia and Russia*, Application No. 36378/02, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 12 April 2005, para. 302; *Ireland v. The United Kingdom*, Application No. 5310/71, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 18 January 1978, para. 239.

79 VCLT, Articles 26, 31, 32. See on the principle of good faith, *North Atlantic Fisheries Case*, UN Reports of International Arbitral Awards, Vol. 11, p. 188; PCIJ, *Factory at Chorzów*, Judgment No. 13, PCIJ, Series A, No. 17, 1928, p. 30; ICJ, *Border and Transborder Armed Actions (Nicaragua* v. *Honduras*), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p. 105, and on Articles 31, 32 see ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 26 May 1961, p. 32; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July

The *travaux préparatoires* show that the possibility of a State party withdrawing a complaint or referral has disappeared since the initial proposals tabled by the Special Rapporteur in 1990. When the idea of withdrawal re-emerged in the 1994 draft, it was part of the jurisdictional mechanism introduced at the time on the basis of an opt-in system. A State party was given the right to withdraw its declaration of acceptance of the jurisdiction of the court. Arguably, there was no need to insert a provision on withdrawing a complaint since this was already remedied by the jurisdictional clauses. A State party was not allowed to lodge a complaint before accepting the jurisdiction of the court by means of a declaration to that effect. The fact that a declaration of acceptance was subject to withdrawal made it clear that a specific provision covering the issue was unnecessary. Yet, it remains unclear whether the drafters had this legal reasoning in mind as an alternative remedy for the situation of the withdrawal of a complaint.

The public records show no discussion of the question of withdrawal of a State party's complaint or referral since 1990. The idea of the withdrawal of a State party's declaration was generally retained and emerged even during the discussions at the Rome Conference. The final choice remained between an opt-in system based on *ad hoc* acceptance of the jurisdiction of the court in relation to crimes against humanity, and war crimes coupled with automatic jurisdiction for the crime of genocide and the possibility of withdrawing the declaration of such acceptance, or a mechanism of automatic jurisdiction whereby a State, once it had ratified the Statute, became automatically bound by its jurisdiction with respect to the three crimes. According to this scheme the idea of withdrawing a State party's declaration was no longer applicable, and withdrawal from the jurisdiction of the Court would automatically have meant withdrawal from the entire statute. Thus, the drafters were finally satisfied by a general clause (Article 127) providing for withdrawal from the Statute rather than from a selected clause.[80] This indicates that the issue of withdrawal of a State party's complaint or referral was not directly contemplated by the drafters of the Rome Statute and does not appear to be legitimate.

The drafting history concerning the withdrawal of an *ad hoc* declaration under Article 12 (3) of the Statute is not that different. The only indirect reference to the possibility of withdrawing a third State's *ad hoc* declaration appeared in a footnote attached to the proposal regarding a State party's declaration during the August session of the Preparatory Committee in 1997.[81] But again there is no clear evidence that what was intended by the drafters was to permit the withdrawal of an *ad hoc* declaration just as in the case of a State party's declaration. Apart from that, the drafting history of this provision is straightforward, and there is no single reference or proposal in the

2004, paras. 94-95; *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 17 December 2002, paras. 51-58; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 3 February 1994, paras. 52, 55; *Maritime Delimination and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, 15 February 1995, para. 40.

80 See Article 127 of the Rome Statute. Generally on Article 127, see R. S. Clark, "Article 127: Withdrawal" in Triffterer Commentary, *supra* note 43, p. 1291 – 1293.

81 See section 3 *supra.*

public records that shows that the question of withdrawing a third State's declaration was seriously discussed.

At the Rome Conference, the question of a non-State party's declaration accepting the jurisdiction of the court was dealt with in a separate provision with no reference whatsoever to the possibility of withdrawal. The footnote, which appeared during the August session in 1997, suggesting that the withdrawal of a State party's declaration was equally applicable to a third State's declaration also vanished in Rome. This suggests that the drafters intended to limit the possibility of withdrawal to the Statute as a whole, which is also consistent with the letter of Article 44 (1) of the VCLT. This provision states that the right of a party to withdraw from a treaty "may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree".[82] But this conclusion seems to be problematic if applied to a non-State party which requires *ad hoc* acceptance of the exercise of the jurisdiction of the Court. By lodging an *ad hoc* declaration of acceptance, the third State does not become a party to the Statute within the technical meaning of Article 12 (1). Thus, how can a State which lodged an *ad hoc* declaration withdraw from the entire Statute on the basis of an inapplicable provision (Article 127)? Article 44 (1) of the VCLT, together with Article 127 of the Statute, makes it clear that withdrawal from the Statute is a right reserved for States parties. Thus, based on this reasoning and in the absence of any provision which permits the withdrawal of a third State's declaration, it is difficult to accept it.

The question becomes more complex when the *ad hoc* declaration is lodged by a *State party* to the Statute. The procedural regime of the Statute leaves room for such possibility. This is, for instance, the case described in Article 11 (2), which states that where a State becomes a party to the Statute after its entry into force, the Court may exceptionally exercise jurisdiction with respect to crimes committed from the date of the Statute's entry into force[83] if that State lodged a declaration under Article 12 (3). It is not clear in a scenario such as this whether the only option for the State party would be to withdraw from the entire Statute in order to be released from the *ad hoc* clause.

Furthermore, a third State's *ad hoc* declaration accepting the jurisdiction of the Court is a unilateral act, like a referral made by a State party. Moreover, Rule 44 establishes a channel of communication between the Registrar and the non-State party authorizing the former to enquire with the State whether it "intends" to enter a declaration in accordance with Article 12 (3).[84] If such intention has been confirmed, the Registrar shall also inform the State of the legal implications for lodging a declaration.[85] The rationale for this Rule was to prevent the Court from proceeding with

82 VCLT, Article 44 (1).

83 Rome Statute, Article 11 (2). The general rule is that the Court may exercise jurisdiction only in respect of crimes committed after the Statute's entry into force in relation to that State. The invocation of Article 12 (3) is the exception in order to extend the jurisdiction of the Court to cover events from the Statute's entry into force.

84 ICC Rule 44 (1).

85 Ibid., sub-para. (2).

an examination of the situation before ensuring that the third State would accept the exercise of the jurisdiction of the Court.[86]

According to the established rules of international law, a declaration made by a State "by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations".[87] Thus, once a non-State party lodges a declaration accepting the exercise of the jurisdiction of the Court with respect to crimes relating to a situation, such an act "confers on the declaration the character of a legal undertaking".[88] Such legal undertaking, "if given publicly, and with an intent to be bound,... is binding...the intention is to be ascertained by interpretation of the act".[89] The same rule applies when a State party refers a situation to the Court, requesting the Prosecutor to proceed with an investigation. This is certainly a unilateral act which obliges the referring State "to follow a course of conduct consistent with its [act or] declaration".[90] This conclusion renders the question of withdrawal inadmissible.

But rejecting the possibility of the withdrawal of a non-State party's *ad hoc* declaration is not without its drawbacks. Prohibiting a third State from withdrawing its declaration would mean that the State was running the risk of being subjected to the Court's jurisdiction for an indefinite period in relation to a given situation, a conclusion that might be seen as unrealistic, which increases States' fears about joining the Statute or even considering submitting any future *ad hoc* declarations. It might also run counter to one of the underlying rationales for inserting a provision regarding *ad hoc* acceptance, which is based on the notions of State autonomy and consent.

Perhaps the ICC might prefer to treat the problem from this perspective. The Statute of the ICJ does not include a provision on withdrawal or termination of the optional clause in Article 36 (2). Nor do the Rules of the ICJ provide a solution to this question. Yet, the practice of the Court has accepted the idea of a State party to the Statute withdrawing a declaration of acceptance of the compulsory jurisdiction of the Court.

In *Nicaragua*, the United States attempted to withdraw with immediate effect its declaration entered into on 14 August 1946. The Court could not accept the United States' claim regarding the immediate effect of withdrawal on the basis of its com-

86 J. T. Holmes, "Jurisdiction and Admissibility, in Roy S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 325 [hereinafter Elements & Rules].

87 ICJ, *Nuclear Tests Case (Australia v. France)*, 20 December 1974, para. 43; ICJ, *Nuclear Tests Case (New Zealand v. France)*, 20 December 1974, para. 46; ICJ, *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Rwanda)*, 3 February 2006, paras. 46-50.

88 Ibid; and generally, PCIJ, *Phosphates in Morocco* (Preliminary Objection), Judgment, 14 June 1938, Series A./B. No. 74, pp. 23-24.

89 ICJ, *Nuclear Tests Case (Australia v. France)*, para. 44; *Nuclear Tests Case (New Zealand v. France)*, para. 47. The "binding character of an international obligation assumed by a unilateral declaration" is based on the principle of good faith. Ibid., para. 46.

90 *Nuclear Tests Case (Australia v. France)*, para. 46; *Nuclear Tests Case (New Zealand v. France)*, paras. 43, 49.

mitment, since the declaration explicitly stated that it would "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate [it]".[91] The Court stated:

> "Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice".[92]

When the United States invoked the 1929 Nicaraguan Declaration as being liable to immediate termination without notice as a valid basis for applying the principle of reciprocity, the Court rejected the argument on the ground that a Declaration with indefinite duration, which does not spell out the conditions for its denunciation, is not subject to "immediate termination" as a right that is "far from established".[93] This decision suggests that although a State enjoys the general right to withdraw a declaration of acceptance of the compulsory jurisdiction of the Court, such an act cannot be performed arbitrarily. In the absence of a clear indication of the duration of the declaration, a reasonable period of notice should be given in accordance with the VCLT.[94] One commentator has even gone a step further on the basis of State practice and suggested that, if the content of the declaration is "determinative" in the sense that a State explicitly reserves its right to withdraw the declaration "at any time with immediate effect", the Court must accept instant termination.[95] Such a result, as argued, coincides with the optional system which is "still largely based on unfettered sovereignty".[96]

Consequently, the ICC may choose to follow the same path as the ICJ and deal with the question, if it ever arises, in the same manner, setting aside the arguments explored earlier, which disqualify the act of withdrawal. Moreover, the manner in which the ICJ treated the question of withdrawal in the absence of a provision in its

91 See ICJ, *supra* note 72, para. 13, p. 398.

92 Ibid., para. 61, p. 419.

93 Ibid., paras. 62 – 63, pp. 419 – 420.

94 Although the decision did not expressly refer to a specific provision of the VCLT, the language used by the Court suggests that Article 56 (2) or 65 (1), (2) is the intended provision. "[Declarations with indefinite duration] should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from...treaties that contain no provision regarding the duration of their validity". See ICJ, *supra* note 73, para. 63, p. 420; See also, VCLT, Article 56 (2). Paragraph 2 specifies a minimum of 12 months' notice, while the context of Article 65 (2) speaks of a minimum of 3 months.

95 C. Tomuschat, "Article 36", in A. Zimmermann et al., (eds.), *The Statute of the International Court of Justice* (2006), p. 628 (citing the Slovak Republic's recent declaration reserving its right to withdraw a declaration at any time with immediate effect as from the date of notification addressed to the Secretary General of the United Nations).

96 Ibid.

Statutes and the Rules thereto may even support a presumption as to why the drafters of the Rome Statute omitted the issue of the withdrawal of Article 12 (3) declarations, despite its importance. One argument may be that perhaps they had in mind that the established rules extracted from ICJ jurisprudence might equally apply to *ad hoc* declarations under the Rome Statute.

In this respect, a non-State party may dictate in its declaration the duration for and the conditions upon which such declaration may be withdrawn. In the absence of any indication to that effect,[97] as with the 1929 Nicaraguan Declaration, a notice would be required. The reasonable time for such notice may be obtained by analogy from the VCLT or Article 127 of the Statute, which already follows the timeframe specified in Article 56 (2) of the VCLT. If this was the drafters' understanding, then inserting a specific provision on withdrawing an Article 12 (3) declaration was not necessary.

However, the idea of the ICC accepting a "determinative" declaration does not seem entirely plausible. In the context of the ICJ, a withdrawal "ends existing consensual bonds" and the effect "is purely and simply to deprive other States which have already accepted the jurisdiction of the Court of the right they had to bring proceedings before it against the withdrawing State".[98] The ICC regime is different. An Article 12 (3) declaration is designed for a different and specific purpose. Treating the question of withdrawal under Article 12 (3) in a manner exactly analogous to that in which it was dealt with before the ICJ would pose the question when such withdrawal or termination could take effect in practice. The ICC regime deals with situations as opposed to individual cases. The ICJ and even the human rights bodies are dealing with specific cases that have a beginning and an end. Thus, notice of a year or more in the context of the ICC might still be problematic, since a situation would most likely result in a multiplicity of cases, and final control could not be within the State's prerogative rather than mainly within the Prosecutor's discretionary powers. Although the ICJ, like the human rights bodies, considers that a withdrawal does not affect current proceedings as discussed below, those proceedings clearly come to an end by the reaching of a final decision or settlement in relation to a particular case or dispute. In the context of the ICC, it would be almost impossible to predict or determine when proceedings relating to a particular situation came to an end. Was it after the first case arising from the situation had been completed by means of a final decision to acquit or convict? Or was it after the second case etc? This would make it difficult to implement the ways or modalities of termination.

In any event, the ICJ's practice, which supports the theory of the withdrawal of State parties' declarations, has also failed to find its way into the jurisprudence of the

97 See ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, p. 32 (where the Court noted in relation to the lodgement of declarations under Article 36 (2), "there is nothing mandatory about the employment [of a certain language]. Nor is there any obligation, notwithstanding paragraphs 2 and 3 of Article 36, to mention such matters as periods of duration, conditions or reservations and there are acceptances which have in one or more, or even in all, of these respects maintained silence").

98 See ICJ, *Case Concerning The Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, 11 June 1998, para. 34, p. 295.

human rights bodies. In the *Constitutional Court* case, the IACHR rejected the comparison between the system established by Article 36 (2) of the optional clause of the ICJ Statute and that found in Article 62 (1) of the American Convention on Human Rights (ACHR). In setting out its legal reasoning, the Court said:

> "No analogy can be drawn between the State practice detailed under Article 36.2 of the Statute of the International Court of Justice and acceptance of the optional clause concerning recognition of the binding jurisdiction of this Court, given the particular nature and the object and purpose of the American Convention…In effect, international settlement of human rights cases (entrusted to tribunals like the inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation…; since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter. A unilateral juridical act carried out in the context of purely interstate relations…and independently self-consummated, can hardly be compared with a unilateral juridical act carried out within the framework of treaty law, such as acceptance of an optional clause recognizing the binding jurisdiction of an international court. That acceptance is determined and shaped by the treaty itself and, in particular, through fulfilment of its object and purpose".[99]

The same view was upheld by the IACHR in the *Ivcher Bronstein* case[100] and by the ECHR in the *Loizidou* case[101] in relation to Article 46 of the optional clause concerning the recognition of the binding jurisdiction of the Court (prior to the entry into force of Protocol 11). This finding has some merit and, as argued earlier, accepting the withdrawal of either a State party's referral or a third State's *ad hoc* declaration may conflict with the strict fulfilment of the object and purpose of the Rome Statute.

Yet, one should not overlook the fact that the ICJ permits the practice of the withdrawal of a declaration under the optional clause by a State party to the Statute of the Court, which makes it less objectionable to accept a withdrawal from a non-State party to the Rome Statute, which has no comparable obligations to those of a State party. Even within the framework of the human rights bodies, which share with the Rome Statute comparable "contexts", the possibility of the withdrawal of a declaration was ruled out in a slightly different context.

The fundamental fact on the basis of which the IACHR rejected the possibility of withdrawing a declaration was the binding nature of the Convention. As a State accepting the binding jurisdiction of the IACHR is actually a party to the Convention, "it binds itself to the whole of the Convention and is fully committed to guaranteeing the international protection of human rights that the Convention embodies". This is

99 *Constitutional Court Case*, Competence, Judgment of 24 Sepember 1999, Inter-Am Ct. H.R. (Series C), No. 55 (1999), paras. 46-48.

100 *Ivcher Bronstein Case*, Competence, Judgment of 24 September 1999, Inter-Am Ct. H.R. (Series C) No. 54 (1999), paras. 47-49.

101 *Loizidou v. Turkey*, Application No. 15318/89, Eur. Ct. H.R., Judgment (Preliminary Objections), 23 March 1995, paras. 68, 82-83.

not always the case when it comes to the application of Article 12 (3). As mentioned earlier, entering an Article 12 (3) declaration does not mean that the lodging State becomes a party to the Statute, bound to the same extent as a State party is.[102] Rather, a lodging State will remain a non-State party subject to a relatively limited set of obligations.[103] This last argument does not intend to support the *absolute* acceptance of withdrawing an Article 12 (3) declaration, as it proved to have less support as well as some disadvantages, as outlined above. Rather, the argument tends to open a little window for accepting a restricted kind of withdrawal of a third State's *ad hoc* declaration, as explored in the last section of this article. Whether the ICC will follow the approach adopted by the ICJ, the human rights bodies, or neither, remains to be determined.

4.2. The possibility of withdrawal on the basis of the legal effects of a State Party's referral or a third State's ad hoc *declaration*

A different way of looking at the question under consideration requires an understanding of the legal nature or effects of the act of withdrawal of a referral or an *ad hoc* declaration. In legal terms, the withdrawal of a referral is actually a question that goes to the jurisdiction of the Court. A State party's referral under Articles 13 (a) and 14 (1) of the Rome Statute would actually lead to the triggering of the ICC's jurisdiction.[104] Consequently, an attempt to withdraw such referral is in effect a call to deactivate or disengage the jurisdiction of the Court for the purpose of discontinuing the proceedings under consideration. In fact, this is the underlying logic of any attempted withdrawal of a State party's referral or an *ad hoc* declaration, especially within the context of the ICC.

The ICJ was often faced with a similar question regarding the effects the withdrawal or expiry of a declaration may have on the jurisdiction of the Court. The leading authority on the issue is the *Nottebohm* case delivered by the Court in 1953. In that case the ICJ faced the issue of whether the expiry of the Declaration by which Guatemala accepted the compulsory jurisdiction of the Court had the effect of de-

102 This does not ignore the fact that occasionally the declaration would be lodged by a State party to the Statute, which makes the situation more difficult to deal with.

103 Although Rule 44 (2) states that the acceptance of a declaration under Article 12 (3) has the consequence of accepting the jurisdiction of the Court "with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules there under concerning States Parties, shall apply", arguably the phrase "any rules thereunder concerning States parties" does not imply the *entire* set of obligations under the Statute applicable to State parties.

104 Rome Statute, Articles 13 (a) and 14 (1). See also Wilmshurst, "Jurisdiction of the Court", in Lee Commentary, *supra* note 43, p. 140; Williams, "Exercise of Jurisdiction", in Triffterer Commentary, *supra* note 43, p. 350; A. Marchesi, "Referral of a Situation by a State Party" in ibid., pp. 353,356; and generally, P. Kirsch & D. Robinson, "Referral by States Parties" in Cassese Commentary, *supra* note 43, p. 619 et seq.; *contra* H. Olásolo, *The Triggering Procedure of the International Criminal Court* (2005), pp. 38, 40, 42.

priving the Court of its jurisdiction to adjudicate on the claim. In this context, the ICJ responded by saying:

> "There can be no doubt that an Application filed after the expiry of this period would not have the effect of legally seising the Court. But neither in its Declaration nor in any other way did Guatemala then indicate that the time-limit provided for in its Declaration meant that the expiry of the period would deprive the Court of jurisdiction to deal with cases of which it has been previously seised…Once the Court has been regularly seised, the Court must exercise its powers…After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised…An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established…"[105]

The same rule was reiterated four years later in the *Case Concerning Right of Passage Over Indian Territory*, when the Court stated, "[i]t is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction".[106] This became the common practice of the ICJ in subsequent cases dealing with the withdrawal or termination of declarations.[107] The same rule may equally apply to the ICC, and the Court should not act differently in a purported withdrawal of a referral. As the legal effect of a referral is to engage the jurisdiction of the Court, any challenge to or request to suspend the proceedings at any stage on the basis of alleged withdrawal should be denied as having no bearing on the jurisdiction of the Court.

The question becomes trickier in the case of an Article 12 (3) declaration. The mere lodging of an *ad hoc* declaration under Article 12 (3) of the Rome Statute is not in itself sufficient to trigger the jurisdiction of the Court. A declaration is generally limited to extending the temporal, personal and territorial jurisdictional parameters of the Court. As a matter of fact, an Article 12 (3) declaration is deemed one of the preconditions to the exercise of the Court's jurisdiction, and should be clearly identified from the Court's triggering method, mirrored in Articles 13, 14 and 15. Consequently, the Prosecutor is not obliged to begin any preliminary activity as a direct consequence of the lodging of the declaration of acceptance, unless there is an explicit request to that effect,[108] or if he decides to proceed on the basis of his *proprio motu*

105 ICJ, *Nottebohm Case (Liechtenstein v, Guatemala)*, Preliminary Objection, 18 November 1953, pp. 121-123.

106 ICJ, *Case Concerning Right of Passage Over Indian Territory (Portugal v. India),* Preliminary Objection, 26 November 1957, p. 142.

107 ICJ, *supra* note 72, para. 54, p. 416; ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* Judgment, 27 June 1986, para. 36, p. 28.

108 Stahn, El Zeidy & Olasolo, *supra* note 43, pp. 423-424.

powers.[109] An explicit request may be by way of a State party's referral activating the jurisdiction of the Court in relation to the crimes relevant to the situation referred to in the declaration.[110] It may also take place in a situation where Article 11 (2) applies, as explained earlier. The declaration itself may embody language to the effect of requesting the Prosecutor to act upon it.

Once the jurisdiction of the Court has been activated or triggered it is not logical to speak of withdrawal, since, even if it were accepted as a legitimate unilateral act it would not affect current proceedings of relevance to the situation. This conclusion finds support not only in the ICJ jurisprudence cited above, but also in the case law of the IACHR. In the *Constitutional Court* case, the IACHR argued that the Court asserted jurisdiction to consider the case a week before Peru's alleged withdrawal of its recognition of the Court's contentious jurisdiction. Citing the Commission's brief, the decision stated that such "purported withdrawal have [*sic*] no effect whatever on the Court's exercise of jurisdiction…A unilateral action by a State cannot divest an international court of jurisdiction it has already asserted".[111] The Court followed an identical view in the *Ivcher Bronstein* case.[112] Yet, this may not be the case in the absence of any request to activate the jurisdiction of the Court or if the Prosecutor has remained inactive. In this respect, there may be some room for considering the possibility of accepting a State's withdrawal of *ad hoc* acceptance of the exercise of jurisdiction by the Court during this transitional phase.

5. Conclusion

One of the lacunae in the Rome Statute is the lack of a provision which governs the area of the withdrawal of State party referrals or third States' *ad hoc* declarations. Neglecting the issue may be interpreted by some simply as a clear prohibition of the practice. But the question cannot be over-simplified, and certainly a specific provision in the Rome Statute or the Rules has proved to be essential. Drawing on the practice of other international bodies will be useful in guiding the Court to reach a balanced solution to the problem. However, one should not overlook the fact that each international body has its own specific mandate and serves a different purpose. Such distinction was well recognised in the jurisprudence of the IACHR and ECHR. The latter considered that the way the ICJ treated the question of the withdrawal of a State's declaration under the optional clause of its Statute cannot be *fully* transferred into its jurisprudence due to the unique nature of the human rights treaties. The same

109 On the interpretation of Article 15, see., M. Bergsmo & J. Pejić, "Prosecutor", in Triffterer Commentary, *supra* note 43, p. 359 et seq; M. Bergsmo & P. Kruger, "Initiation of an Investigation", in ibid., p. 701 et seq; P. Kirsch & D. Robinson, "Initiation of Proceedings by the Prosecutor" in Cassese Commentary, *supra* note 43, p. 657 et seq; Holmes, Elements & Rules, *supra* note 86, p. 329- 334; H. Friman, "Investigation and Prosecution", in ibid., p. 493-502.

110 See ICC Rule 44 (2).

111 *Constitutional Court Case, supra* note 99, para. 24.

112 *Ivcher Bronstein Case*, *supra* note 100, para. 24.

holds true with respect to the Rome Statute, which is exceptional in nature when compared to the Statute of the ICJ or even the human rights treaties. This does not mean that the rules established by the jurisprudence of these Courts should not be followed by the ICC when it is faced with a similar legal issue; rather that they may be applicable to an extent that does not disturb the sensitive character of the Rome Statute. The treatment of the IACHR of the issue of the legitimacy of the withdrawal of a State's declaration is a good example. The special nature of the ACHR led the Court to reject Peru's request to withdraw its declaration in two decisions. By contrast, the practice of the ICJ generally endorsed the practice. Yet, at some point, the jurisprudence of the two bodies coincided when they had to rule on the legal effect of a unilateral act of withdrawal on proceedings that were underway. Both bodies rightly acknowledged that once the jurisdiction of an international court has been activated, a State has no control over the termination of proceedings before it. Apart from that, the difference between the jurisprudence of these bodies in treating the same question suggests that the ICC should be cautious in the selection of the approach to be embraced. It might be also useful to insert into the Rules a provision that deals with the matter or to propose its consideration at the Review Conference in 2010.

Chapter 7 Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation

William W. Burke-White & Scott Kaplan***

In December 2003, Ugandan President Yoweri Museveni referred crimes committed in Northern Uganda to the nascent International Criminal Court (ICC).[1] The Rome Statute of the ICC had entered into force one and a half years earlier,[2] and Uganda's referral was the first made under Article 14, which allows States Parties to refer a situation to the Prosecutor for investigation.[3] Although it was originally assumed that this provision would be used by non-territorial states to refer crimes within the Court's jurisdiction to the Prosecutor, Uganda made the first so-called self-referral to the ICC, seeking the Court's assistance with the apprehension and prosecution of the leadership of the Lord's Resistance Army (LRA).[4]

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1 See ICC Press Release, '*President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*', 24 January 2004, available at <www.icc-cpi.int/pressrelease_details&id=16&l=en.html http://www.icc-cpi.int/pressrelease_details&id=16.html>. Museveni's decision came after a substantial military campaign, Operation Iron Fist, failed to end – and, in fact, escalated – the conflict. Facing pressure from the international community over the humanitarian crisis that followed the campaign, Museveni's decision to refer the Northern Uganda situation was widely perceived as an effort to regain international support. See University of British Columbia, Liu Institute for Global Issues, Conflict and Development Programme, Northern Uganda – Human Security Update 2 (May 2005).

2 Ratification of the Rome Statute by the 60th member state occurred on 1 July 2002.

3 Rome Statute of the International Criminal Court art. 14 July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]

4 See generally, M. El-Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 *International Criminal Law Review* 83 (2005) (discussing legal implications of

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 79-114.

Since 1986, the LRA has been engaged in a campaign against Museveni's government[5] in northern Uganda that has included abduction and enslavement of children, murder and rape of civilians, attacks on displaced-persons camps, and other atrocities constituting crimes against humanity under the Rome Statute.[6] Despite the longevity of the conflict, its brutal nature, and multiple rounds of negotiations the Ugandan government has been unable to reach either a political or a military solution and the international community had largely neglected the situation.[7] As of early April 2008, such a settlement appears close, but may yet remain elusive.

For Museveni, referral of the situation in Uganda to the ICC was essentially a political calculation that offered several advantages.[8] Referral to the Court provided an opportunity to raise the international profile of the conflict, to pressure the LRA and its supporters – particularly Sudan[9] – and to transfer the political and financial costs of apprehension and prosecution to international actors. Through such a referral, Museveni could make a credible threat to the LRA that, should they remain at large,

Uganda's self-referral); K. P. Apuuli, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda', (2004) 15 *Criminal Law Forum* 391 (2004); H. Friman, 'The International Criminal Court: Investigations into crimes committed in the DRC and Uganda. What is next?', (2004) 13 *African Security Review* 19, 21-22 (2004); M. C. Bassiouni, 'The ICC – Quo Vadis?', (2006) 4 *JICJ* 421, 424-25 (2006); K. Southwick, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court', (2005) 1 *Yale Journal of International Affairs* 105. For a critical review of the ICC's role in the Ugandan conflict, see A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', (2007) 21 *Ethics & International Affairs* 179.

5 For a more complete discussion of the conflict between Uganda and the LRA, see F. Van Aker, 'Uganda and the Lord's Resistance Army: the new order no one ordered', (2004) 103 *African Affairs* 335 (2004). For detailed accounts of human rights violations committed in Northern Uganda, see Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, 14-36 (2005). For personal accounts of the effects of the conflict, see United Nations Office for the Coordination of Humanitarian Affairs, Regional Support Office for Central and East Africa, "*When the sun sets we start to worry": An account of Life in Northern Uganda* (2004).

6 Rome Statute, Article 7, Crimes Against Humanity

7 See P. Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', 99 *American Journal of International Law* 403, 410 (2005) (describing international reluctance to become involved in the Northern Uganda situation).

8 For analysis of a similar self-referral decision in the Democratic Republic of Congo, see W. Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo', (2005) 18 *Leiden Journal of International Law* 557 (2005).

9 See e.g., M. Schomerus, Small Arms Survey Working Paper, *The Lord's Resistance Army in Sudan: A History and Overview* 24-27 (2007); *Northern Uganda And Sudan's Support For The Lord's Resistance Army,* Testimony of Jemera Rone, Human Rights Watch, before the United States House Subcommittee on International Operations and Human Rights and the Subcommittee on Africa (July 29, 1998), available at <www.hrw.org/campaigns/sudan98/testim/house-07.htm#TopOfPage>.

they would be apprehended and face prosecution, thereby, hopefully, increasing their willingness to negotiate a settlement.[10] Simultaneously, Museveni could make it more costly for the Sudanese government to support the LRA.[11] In addition, Museveni's referral had the benefit of potentially shifting the significant domestic political costs – particularly in Northern Uganda – of prosecuting LRA members away from his government and onto the ICC.[12] Finally, such a referral to the ICC offered the prospect of international acclaim in light of strong pressure from European governments for Uganda to become the first state to refer a situation to the ICC.

Subsequent to the Ugandan referral and an investigation by the ICC, the Court returned indictments against five LRA leaders.[13] Soon thereafter, in late June 2006, the LRA expressed willingness to engage in a new round of peace talks with the Ugandan government.[14] Despite numerous past failures, this latest round of negotiations came to appear far more promising than any of the previous efforts. There are likely a variety of reasons for the relative success of the 2006 negotiations. First, it is possible that the ICC indictments had their intended effect of making the war more costly for the LRA and promoting settlement discussions. Secondly, the peace agreement in Sudan and a new willingness of the South Sudanese government to moderate talks helped

10 See W. Burke-White, 'Peace vs. Justice or Peace & Justice', draft manuscript on file with author.

11 See e.g., N. Grono & A. O'Brien, International Crisis Group, Opinion: Exorcising the Ghost of the ICC, The Monitor, Oct. 31, 2006 ("The ICC's intervention . . . complicated Khartoum's continued support of the LRA, helping sever the LRA's supply lines and uproot their secure safe havens").

12 See W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', 24 *Michigan Journal of International Law* 1, 50-52 (analyzing East Timor's decision to embrace internationalized judicial panels for prosecutions opposed by Indonesia, thereby externalizing the political costs onto the international community).

13 The warrants were issued by Pre-Trial Chamber II on 8 July of 2005, but remained sealed until 13 October 2005. See Pre-Trial Chamber II, Decision on the Prosecutor's Application for unsealing of the warrants of arrest, 13 October 2005, ICC-02/04-01/05-52. One of the indictees has since been confirmed dead. See ICC Press Release, Statement by the Chief Prosecutor Luis Moreno-Ocampo on the confirmation of the death of Raska Lukwiya, 11 October 2006. Two others, Vincent Otti and Dominic Ongwen have been widely reported to have been killed. However, DNA tests on Ongwen's supposed corpse revealed that the body found was not in fact his and the Court considers the warrants against him to remain in force. See ICC Press Release, '*ICC Unseals Results of Dominic Ongwen DNA Tests*', 7 July 2006. The Office of the Prosecutor has alerted Pre-Trial Chamber II of the reports of Otti's death, and has requested information from Uganda and the DR Congo. See ICC, Office of the Prosecutor, Submission of Information Regarding Vincent Otti 8 November 2007, ICC-02/04-01/05-258, at 2.

14 See e.g., BBC News, LRA Rebels Arrive for Sudan Talks, June 8, 2006, available at <news.bbc.co.uk/2/hi/africa/5060666.stm> (noting that Joseph Kony's call for an end to the conflict came after a promise of safety under the threat of ICC indictments).

catalyze and support the peace process.[15] Finally, newfound international pressure – perhaps also the result of ICC involvement – created incentives for both the LRA and the Ugandan government to soften their stance and consider dialogue.[16]

Whatever its ultimate cause, the relative success of the peace negotiations quickly changed the preferences and negotiating positions of the LRA and the Ugandan government. Early in the negotiations, it became clear that, notwithstanding the fact that the ICC indictments may have forced the LRA to the negotiating table, they would be a stumbling block in any potential peace agreement. The LRA leadership repeatedly stated that the withdrawal of ICC indictments was a prerequisite to ultimate settlement.[17] In late June 2007, the Ugandan government and the LRA reached an agreement laying out the principles of justice and accountability for settlement of the conflict, which contemplated domestic proceedings with alternative sentences and possibly even the use of traditional justice mechanisms. The agreement's section on sentencing highlights the delicate balance necessary for LRA approval, noting the need for a novel sentencing scheme involving "a regime of alternative penalties and sanctions, which shall . . . replace exiting penalties, with respect to serious crimes and human rights violations committed by non-state actors."[18] It defined the purpose of these alternative penalties in terms of promoting reconciliation, rehabilitation and reparations, while "reflect[ing] the gravity of the crimes."[19]

Despite the flexibility with respect to justice and accountability indicated in the agreement reached at the peace talks, almost to the day the ICC Prosecutor took an extremely firm line in a major public address in Nuremberg, Germany, essentially excluding any possibility that his office would seek to have the warrants withdrawn.[20] In the words of the Prosecutor: "for each situation in which the ICC is exercising juris-

15 See H.E. Salva Kiir Mayardit, President of Southern Sudan and First Vice President of Sudan, Remarks at The Role of Southern Sudan in Regional Peace and Security, Woodrow Wilson Center for International Scholars (July 24, 2006), available at <www.wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=195133> (discussing Southern Sudan's role in peace negotiations involving the LRA).

16 See e.g., Council of the European, Council Conclusions on Uganda, Document No. 9357/06, 15 May 2006, at 3-6 (Reaffirming the Council's positions that "The Government of Uganda has the primary responsibility for addressing the conflict [in Northern Uganda] and the grave humanitarian impact it has had" and welcoming "the increased involvement of the UN with regard to the conflict with the LRA, and in particular UN Security Council (UNSC) Resolutions 1653 and 1663 which call for UN Secretary General recommendations for tackling illegal armed groups, including the LRA.").

17 See Charles Mwanguhya Mpagi, Institute for War and Peace Reporting, ICC Looms over Peace Negotiations, 7 January 2008 ("LRA negotiators . . . contend that as long as the indictments exist, no peace deal will be signed, nor will they come out of the bush.").

18 Agreement on Accountability and Reconciliation between the Government of The Republic of Uganda and the Lord's Resistance Army/Movement, 29 June 2007, at 6.3 (on file with author).

19 Id. at 6.4.

20 See Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Address *Building a Future on Peace and Justice*, June 25, 2007.

diction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground…. These proposals are not consistent with the Rome Statute. They undermine the law that states committed to."[21]

As a result, the ICC was seen by many as a roadblock on the path to peace.[22] The withdrawal of warrants was a prerequisite to settlement for the LRA and the Prosecutor refused to use his powers under Article 53 of the Rome Statute to seek to have those warrants withdrawn.[23] A peace deal appeared elusive. The Ugandan government and various mediators began to explore other options to possibly relieve the pressure on the LRA that stemmed from the ICC warrants without entirely sacrificing the goals of accountability. The possibility of some form of domestic proceedings in Uganda rendering the case inadmissible at the ICC, pursuant to the complementarity provisions of Article 17 of the Rome Statute, emerged as the most promising alternative. According to Article 17, as long as such a domestic proceeding was a genuine effort to bring the indictees to justice, it would bar the case from being heard by the ICC and, thereby, make settlement a more promising alternative for the LRA. To that end, in late February 2008, an Annexure to the Agreement was reached between

21 Id.

22 Such sentiments have been expressed by a wide range of commentators, including NGOs, regional commentators and the international press. See e.g., J. Prendergast, Enough Project, What to do about Joseph Kony, Enough Strategy Paper 8 (October 2007) ("until there is agreement about how to deal with Kony and his top deputies -- all indicted by the International Criminal Court (ICC) for crimes against humanity -- there will be no peace deal"); *Kony Demands Peace*, 43 Africa Research Bulletin: Political, Cultural & Social Series 16659B (2006) ("[P]rospects for peace are complicated by the arrest warrants issued by the international criminal court for Kony and four of his commanders in 2005. Betty Bigombe, Uganda's negotiator with the LRA, pointed out that this left no incentive for the indicted men to lay down their arms."); BBC News, '*Uganda Rejects Key Peace Demand*', 28 February 2008, available at <news.bbc.co.uk/2/hi/africa/7268529.stm> (noting Kony's refusal to demobilize without assurances that the ICC warrants are dropped); A.-M. Essoungou, *Chantage à la paix en Ouganda*, Le Monde Diplomatique, April 2007, at 13 (recounting the hostile reaction of Ugandans in an internally-displaced persons camp towards the ICC and their view that the Court was a barrier to peace).

23 Rome Statute, Article 53 (2) (c) (Allowing the prosecutor to conclude, after investigation, that no reasonable basis for prosecution exists because "[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"). This decision can be challenged either by the referring state or the Pre-Trial Chamber. Id. at Article 53 (3) (a) and (b), but in the Uganda situation neither is likely to challenge such a conclusion. The prosecutor is able to revisit this decision "at any time" in light of "new facts or information." Id. at Article 53 (4)). This would imply that there are limited costs to such a deferral, however the language of section 2 (c) implies a balancing based on the temporal and physical proximity of the perpetrator to the crimes and the magnitude of the crimes committed. It does not articulate balancing factors based on the prospects for future peace, and, indeed, none of the factors are forward-looking.

the LRA and the Ugandan government, expressly providing for the establishment of a special division of the High Court of Uganda for the purposes of investigating and prosecuting crimes committed during the conflict.[24]

Domestic criminal proceedings, as alternatives to ICC investigation and prosecution, are clearly consistent with the goals of the ICC as a court of complementary jurisdiction.[25] Indeed, in a 2003 speech to States Parties to the Rome Statute of the ICC, Prosecutor Luis Moreno Ocampo noted that "the first task of the prosecutor's office [is to] make its best effort to help national jurisdictions fulfill their mission."[26] Moreover, the Pre-Trial Chamber's (PTC) initial determination that the case was admissible before the Court in part rested on the fact that Uganda was unable to achieve physical jurisdiction over the indictees, who had sought refuge in Congo.[27] Should those indictees reach a peace agreement with the Ugandan government and return to Ugandan territory to face criminal proceedings, the case against them could become inadmissible under the Rome Statute.

While domestic proceedings against LRA indictees in Uganda offers a possible compromise to avoid ICC prosecution without completely sacrificing accountability, it also raises a number of important questions not answered in the Rome Statute, by the Court itself, or yet subject to significant scholarly inquiry. For example, given Uganda's self-referral, can the Ugandan government still challenge the admissibility of a case? How much flexibility in terms of the procedure and sentencing in any domestic prosecution will the ICC PTC still deem to constitute a genuine investigation or prosecution? Can such a domestic prosecution be devised that would satisfy both the LRA leadership and the PTC? How should the PTC evaluate Ugandan domestic justice efforts? These questions have become all the more pressing after the June 2007 Agreement on Accountability and Reconciliation between the Ugandan government and the LRA and the February 2008 Annexure that clearly call for domestic prosecutions with alternative sentences and, perhaps, even elements of traditional justice.[28]

This essay responds to these questions raised by the prospect of a domestic prosecution of the LRA leadership in Uganda and the possibility of an admissibility challenge before the ICC. In so doing, the essay advances a framework for understanding admissibility and evaluating any admissibility challenge that might be brought. Moreover, the essay suggests that the decision of the PTC on the admissibility of the

24 Annexure to the Agreement on Accountability and Reconciliation Between the Lords Resistance Army/Movement and the Government of Uganda, 19 February 2008 [hereinafter February 2008 Agreement]

25 W. Burke-White, 'Proactive Complimentarity: The International Criminal Court and National Courts in the Rome Statute', 49 *Harvard Journal of International Law* 53 (2008).

26 Luis Moreno Ocampo, Statement to the Assembly of States Parties to the Rome Statute of the International Criminal Court, 22 April 2003, ICC-OTP-20030502-10-En.

27 Pre-Trial Chamber II, *Prosecutor v Kony, Otti, Lukwiya, Odhiambo & Ongwen*, Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, 5 July 2005, ICC-02/04-01/05.

28 Agreement on Accountability, *supra* note 18.

Uganda cases, in light of a domestic investigation or prosecution, gives the ICC an extraordinary opportunity to define the contours of acceptable national prosecutions under Article 17 of the Rome Statute and, particularly, to develop a framework for balancing the legitimate desire of national governments to achieve peace and justice after a conflict with the international legal duty of states parties to the Rome Statute to undertake genuine investigations and prosecutions of international crimes.

The article proceeds as follows. Part 1 considers the law and practice of admissibility challenges before the ICC, particularly in the case of self-referrals. Part 2 offers three distinct visions of the concept of admissibility with implications for the PTC's analysis of any challenge in the Uganda cases. Part 3 considers the negotiations between the LRA and the Ugandan government as of April 2008 and analyzes the range of potential domestic justice mechanisms that might be available to Uganda, taking into consideration both the requirements of Article 17 of the Rome Statute and the agreements between the government and the LRA. Part 4 evaluates the prospects for admissibility challenges either by the Ugandan government or by a particular indictee in light of the three visions of admissibility developed in Part II, and suggests that the PTC has a critical role both in resolving the conflict in Uganda and setting the contours of acceptable domestic justice efforts.

1. The legal basis for challenging admissibility

The Rome Statute appears to offer relatively clear rules as to the admissibility of cases and the procedures for challenging admissibility. Articles 17, 18, and 19 of the Statute provide both the circumstances in which cases will be admissible and the means through which particular states or the accused can challenge admissibility. The Uganda situation, however, raises important new questions about admissibility, largely because Uganda self-referred the situation on its territory to the ICC. Such self-referrals were not generally contemplated during the drafting of the Rome Statute and, therefore, the Statute does not clearly articulate the implications of self-referrals for complementarity and the admissibility of cases before the ICC. Yet, the admissibility of cases in circumstances of self-referrals has implications for the operation of the Court far beyond Uganda as the majority of the Court's caseload to date has come through such self-referrals.[29] Namely, the situations in the Democratic Republic of Congo (DRC), Uganda and the Central African Republic have all come through self-referrals and the Prosecutor has indicated a desire for the enhanced state cooperation that is likely to come with self-referrals.[30]

The possible legal implications for self-referral on complementarity and admissibility are numerous. First, when a case has been self-referred, do the Prosecutor

29 See e.g., C. Kress, 'Self-referrals' and Waivers of Complementarity': Some Considerations in Law and Policy, 2 *JICJ* 944, 944 (describing the move from state-referrals as a "rare exception" in any situation to the promotion of self-referrals).

30 Office of the Prosecutor, ICC, *Paper on Some Policy Issues Before the Office of the Prosecutor* (2003), at 2, available at <www.icc-cpi.int/otp/otp_policy.html> (examining the various areas where cooperation is essential to the function of the Office of the Prosecutor).

and the PTC nonetheless have to evaluate admissibility pursuant to Article 17 prior to the opening of an investigation or the issuance of arrest warrants? Second, would a change in the factual circumstances on the ground that initially precluded the territorial State from undertaking a genuine national investigation or prosecution and, hence, made the case initially admissible, preclude the Court from proceeding with the case? Third, does the act of self-referral waive either the right of the State or the right of the accused to subsequently challenge admissibility? More generally, how much flexibility should the PTC give to national governments to design their own domestic proceedings consistent with Article 17 of the Rome Statute, particularly in the context of efforts to bring an ongoing conflict, such as that in Northern Uganda, to a peaceful conclusion?

Each of these questions alone is significant. Taken collectively, they raise an even more fundamental question about the very nature of admissibility as a legal construct. Is admissibility a statutory limitation on the power of the ICC, a legal entitlement of states parties to the Rome Statute, or a right of defendants before the Court? Understanding and answering this deeper legal question provides an important framework for exploring the implications of self-referrals for the admissibility of cases before the ICC and any subsequent admissibility challenges. Moreover, the nature of admissibility provides critical perspective on the relationship of the ICC and States Parties to the Rome Statute.

1.1. The statutory basis of admissibility

Article 17 of the Rome Statute limits the admissibility of cases before the Court. In order for a case to be admissible, the Court must first satisfy itself that the domestic authorities of some state are not already meaningfully pursuing the case. Specifically, the Rome Statute provides that cases are 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…"[31]

A State is deemed unwilling to prosecute if the proceedings are "undertaken … for the purpose of shielding the person concerned from criminal responsibility;"[32] or in cases where there is either an unjustified delay in the proceedings or the proceedings are not independent and impartial in a manner "inconsistent with an intent to bring

31 Rome Statute, Article 17 (1) (a)-(c).

32 Id., at 17 (2) (a).

the person concerned to justice."[33] Inability is based on a consideration of "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."[34]

Admissibility determinations arise at a number of stages in any investigation and prosecution and involve both the Office of the Prosecutor (OTP) and the PTC. First, even before formally seeking to open an investigation, the Prosecutor must determine that any case he would likely bring would presumably be admissible. In his decision to initiate an investigation or prosecution, the Prosecutor must, under Article 53, "consider whether the case would be admissible under Article 17."[35] Even after the initiation of an investigation, the Statute further requires the Prosecutor to engage in a continuing evaluation of national judicial efforts and to inform the Pre-Trial Chamber if there are no grounds for prosecution because a genuine national proceeding has made the case inadmissible.[36]

The principle of complementarity has different legal implications for the Prosecutor at two separate phases of investigation. The first phase, the situational phase, arises when the Prosecutor makes an initial decision to investigate a particular situation. The second phase, the case phase, arises subsequently, when the Prosecutor identifies a particular suspect and develops an investigative hypothesis as to the crimes that suspect may have committed.[37] At both of these stages, the Prosecutor must scrupulously consider actions by sates that might bar admissibility.

At the situational phase, complementarity requires the OTP to undertake a general examination of whether the cases the Prosecutor might decide to undertake are already being investigated or prosecuted by national authorities.[38] Where efforts by states to investigate or to prosecute within a given situation are sufficient and genuine, the complementarity analysis at this phase would suggest that investigation by the OTP is inappropriate. In contrast, where national proceedings have not been

33 Id., at 17 (2) (b) and (c).

34 Id., at 17 (3).

35 See Article 53 (1) (b).

36 Article 53 (2).

37 For the distinction between situations and cases, see Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, 17 January 2006, para. 65. See *also* S. Fernández de Gurmendi, The Role of the International Prosecutor, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999), 175, 180-82. On the same distinction, but in the context of Security Council referrals, see L. Yee, The International Criminal Court and the Security Council: Articles 13(b) and 16, in R. S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999), 147-148.

38 Pursuant to Article 53 (1) (b), when seeking to initiate an investigation, the Prosecutor "shall consider whether … the case is or would be admissible." Such a preliminary admissibility determination requires the Prosecutor to have reasonable grounds for believing that admissibility would not be barred by reasons of complementarity. Rome Statute, Article 53 (1)(b).

initiated, have been initiated only with respect to certain groups of suspects (such as lower level perpetrators), or where there is reason to believe national proceedings are less than genuine, there would be a reasonable basis for the OTP to proceed with an investigation.[39]

At the case level, which arises when the Prosecutor develops an investigative hypothesis with respect to particular suspects and factual events, admissibility requires a more specific and detailed analysis of any prosecutions occurring at the national level involving that particular suspect. Article 17 requires that the Prosecutor determine whether the specific case he intends to bring is being or has been investigated or prosecuted by national authorities. To do so, the Prosecutor must determine whether national authorities have investigated or prosecuted the individual subject to potential prosecution by the OTP for the same underlying factual events.[40] Where no such investigation has been or is being undertaken, the case would be admissible. If an investigation or prosecution has been or is being undertaken by a state, the Prosecutor must consider whether the national investigation is genuine or not, based on the criteria set forth in Article 17 (2).[41] If the national proceedings are not genuine or the state is unable to prosecute, then the OTP may proceed with an investigation and prosecution.

At both the situational and case phases, the PTC also has a role in making admissibility determinations. When a situation has been referred to the Court by another state or by the Security Council, the Prosecutor must inform the Pre-Trial Chamber of his decision not to proceed with an investigation due to admissibility limitations.[42] Where the Prosecutor seeks to proceed with an investigation initiated under his *proprio motu* powers, the PTC must approve his decision and may take admissibility into account in deciding whether to authorize the investigation.[43] Specifically, the Rome Statute then requires that all States that "would normally exercise jurisdiction"

39 This statement assumes the other requirements of Article 53 (1) are met.

40 See Pre-Trial Chamber I, *supra* note 37, para. 65. While evaluating a domestic judiciary may be difficult, the benefit of the formulation adopted by the Office of the Prosecutor is that the test is considerably narrower than the "unable or unwilling" examination found in Article 17 of the Rome Statute and requires the Prosecutor to determine merely whether a national investigation of the same individual based on the same factual basis has been initiated. See Rome Statute, *supra* note 11, Article 17.

41 The Prosecutor is required to determine whether the investigation or prosecution was undertaken for the purpose of shielding the accused from criminal liability, whether there was an unjustified delay in the proceedings, whether the proceedings were not independent and impartial, or whether they were being undertaken in a manner inconsistent with bringing the person concerned to justice. In this second step of analysis, the Prosecutor may also consider whether the state is unable to prosecute pursuant to Article 17 (3) due, for example, to a "total or substantial collapse or unavailability of its national judicial system." See Article 17 (2) and (3) of the Rome Statute.

42 See Article 53 (1). Where the Prosecutor has initiated action based on referral by a state or the Security Council, the referring party can request the Pre-Trial Chamber to review the Prosecutor's decision. Id.

43 See Article 15 of the Rome Statute.

be notified of the impending investigation.[44] Such States have one month to inform the Court that they are or have investigated the situation and may request that the Prosecutor defer investigation.[45] The PTC can allow such a deferral based on national prosecutorial efforts[46] or can render the situation inadmissible as a general matter.[47]

At the case phase, the PTC also has to make determinations of admissibility in its decisions to issue arrest warrants. Specifically, the PTC must decide whether the particular crimes charged in the Prosecutor's indictment have already been investigated or prosecuted at the national level. Likewise, the PTC must make such a determination when either an accused or a State Party challenges admissibility before the opening of an actual trial.[48] Where the PTC grants a deferral, the Prosecutor can request a review of the decision after six-months or in the event of a "significant change of circumstances" of the states ability or willingness to "genuinely" investigate and prosecute.[49] If at either the situational or case phase of an investigation or prosecution the PTC finds the case to be inadmissible, the Prosecutor must cease the investigation of that case and indictments will not be confirmed against those accused whose crimes have already been investigated or prosecuted.

As noted above, admissibility can be considered by the PTC both on its own accord[50] and in response to particular challenges to admissibility by States that might have jurisdiction over the case or by the accused himself. Article 19 allows a challenge to the admissibility of a case by the accused or by a State with jurisdiction "on the ground that it is investigating or prosecuting the case or has investigated or prosecuted."[51] While the Statute grants the accused and the State the right to challenge admissibility, they may only do so once and the challenge must come prior to or at the commencement of the trial.[52] After a challenge has been mounted or the trial has begun, the Court's leave is required for any subsequent challenge to be brought, and any such challenge after the commencement of trial must be based on a double jeopardy claim.[53]

44 Id, at Article 18(1).

45 Id. at 18(2).

46 Id.

47 Id., at Article 19 (1).

48 For Pre-Trial Chamber jurisprudence on the admissibility determination at the arrest warrant stage and reference to further consideration of the issue at the trial phase, see Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest Under Article 58, 10 February 2006, ICC-01/04-01/06, 7–18.

49 Id., at Article 18 (3).

50 See Article 19 (1)

51 See Article 19 (2) (a) and (b).

52 See Article 19 (4).

53 Ibid.

1.2. The problem of admissibility challenges in the case of self-referrals

Though the Rome Statute provides a relatively clear and detailed set of guidelines for the admissibility of cases, the Statute does not specifically address questions of admissibility in the case of self-referrals, which were not generally contemplated at the time of drafting. However, the text of the Rome Statute and general principles of international law suggest that there may be potential difficulties with admissibility in the case of self-referrals for three reasons: first, an earliest opportunity requirement; second, a prohibition on shielding, and third, the general principles of estoppel and good faith.

The statutory problem arises first from Article 19 (4) of the Rome Statute, according to which a State must "make a challenge [to admissibility] at the earliest opportunity."[54] Where a State self-refers a case and then subsequently seeks to challenge admissibility, a compelling argument can be made that the state has failed to act at the "earliest opportunity." Where the challenge to admissibility arises because of a subsequent factual development – such as a new ability to secure the custody of the accused – the earliest opportunity requirement might present less of a problem as long as the state challenging admissibility acted at the earliest opportunity after that change of circumstances. If the earliest possible opportunity requirement were not satisfied, the state's admissibility challenge would, presumably, fail.

The second statutory problem with a subsequent challenge to admissibility after a self-referral arises from the requirement in Article 17 of the Rome Statute that for any domestic accountability efforts to bar admissibility, they cannot be intended to shield the accused from criminal liability.[55] It may well be that where a State initially self-refers to the Court and then seeks to challenge admissibility, the State is in fact attempting to avoid complete accountability for the accused due, for example, to political developments since the self-referral. In this case of possible shielding through an admissibility challenge, the State would remain able to challenge admissibility, but the PTC might give careful scrutiny of the reasons for that challenge and possibly even start with a presumption that the admissibility challenge was intended to shield the accused from complete criminal responsibility.

A third potential problem with a subsequent admissibility challenge in the case of a self-referral arises not from the Statute itself, but from the general principle of estoppel and the international legal duty to act in good faith.[56] While the principle of estoppel has its historic origins in territorial disputes,[57] the basic elements are applicable in

54 See Article 19 (5).

55 See Article 17 (2) (a) and Article 20 (3) (a).

56 See C. MacGibbon, 'Estoppel in International Law', 7 *International & Comparative Law Quarterly* 468, 468 ("Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.")

57 See eg PCIJ, *Legal Status of Eastern Greenland* (Denmark v. Norway), 5 April 1933, P.C.I.J., Ser. A/B) No. 53; ICJ, *Concerning the Temple of Preah Vihear* (Cambodia. v. Thailand), 1962 ICJ Rep. 6.

any reliance-creating international situation. Estoppel attaches when a State makes a clear and voluntary commitment and the other party relies in good faith on that representation to their detriment.[58] A self-referring State certainly meets the clear and voluntary requirements, and a case could be made that, at least in the Ugandan situation, the ICC had relied on Uganda's self-referral and would be harmed if Uganda were allowed to reassert jurisdiction. The ICC's investment of significant financial, personnel, and political efforts in Uganda could well be detrimentally undermined by a reassertion of Ugandan territorial jurisdiction, thereby raising the possibility that Uganda could be estopped from a subsequent admissibility challenge.

Further, the requirement of good faith, articulated in Article 26 of the Vienna Convention on the Law of Treaties[59] and the General Assembly's Draft Declaration on the Rights and Duties of States[60] requires at the very least that States perform their treaty obligations to the best of their abilities and that what "has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise."[61] To the degree that a State seeks to use the admissibility requirements of the Statute to manipulate the Court or subvert the object and purpose of the Rome Statute and its accountability requirements, such actions would breach the State's duty of good faith. As a result, even if the admissibility challenge were otherwise justified, the PTC could deem it to fail as a result of the state's breach of good faith.

Given the potential legal problems with an admissibility challenge after a self-referral, a deeper inquiry into the nature of admissibility as a legal principle is needed. Such an understanding of the functions of admissibility in the Rome Statute and its impact on the operation of the Court provides a critical framework for evaluating the legality of admissibility challenges in cases of self-referral.

2. Three visions of admissibility

Both the text and *travaux prepairatoires* of the Rome Statute are suggestive of three very different visions of admissibility and corresponding purposes of the complementarity regime found in Article 17. More specifically, the admissibility requirements of the Statute can be understood as a fundamental right of the accused, a means to protect State sovereignty, or a basic limitation on the power of the Court. Each of these visions of the purposes of admissibility provide insight into the appropriateness

58 D.W. Bowett, 'Estoppel Before International Tribunals and Its Relation to Acquiescence', (1957) 33 *British Yearbook of International Law* 176, 176.

59 "Every treaty in force is binding upon the parties to it *and must be performed by them in good faith*." See Vienna Convention on the Law of Treaties, 1115 U.N.T.S 331, Article 26 (emphasis added).

60 See Draft Declaration on Rights and Duties of States, G.A. Res. 375 (IV), U.N. GAOR 4th Sess. 6 December 1949, Annex, Article 13.

61 See 'Codification of International Law', (1935) 29 *American Journal of International Law* (Supp.) 1, 981.

of an admissibility challenge after a self-referral and may suggest different answers to whether the PTC should allow such challenges in the Uganda situation and beyond.

Complementarity and challenges to admissibility were considered in great detail at the Rome Conference, with States presenting a range of opinions on both the purpose and legal structure of complementarity.[62] The language contained in the Statute represents a series of compromises about the general nature of complementarity and how it fits in the schema of the Rome Statute. While there was near universal agreement that complementarity was an important and necessary component of the Statute,[63] States differed on its purposes, the appropriate requirements for rendering a case inadmissible,[64] and the procedure for establishing and challenging admissibility. While each of the three visions of admissibility discussed below highlights different elements of admissibility, the approach likely to be taken by the Pre-Trial Chamber will presumably represent a combination of and compromise amongst these competing visions of admissibility.

2.1. Admissibility as a personal right of the accused

A first vision of admissibility is as a personal right of the accused. This vision of admissibility is derived from the idea that an accused has a right both to be free of multiple, overlapping proceedings and to be tried by his natural or home court where such a court is able and willing to act.[65] First, multiple trials in differing fora are clear-

62 See J. T. Holmes, The Principle of Complementarity 41, 45-56, in R. S. Lee, *The International Criminal Court: The Making of the Rome Statute* (1999) (recounting the key issues in admissibility prior to the adoption of the Rome State) [hereinafter *Principle of Complementarity*]. For a background on the development of the principle of complementarity, see M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Michigan Journal of International Law* 869.

63 In his introduction of the admissibility issue at the 1998 Diplomatic Conference, Coordinator John Holmes stated "virtually all States had indicated [in Preparatory Committee discussions] the importance which they attached to the inclusion of the principle of complementarity in the Statute." M. Cherif Bassiouni, (2005) 3 *Legislative History of the International Criminal Court: Summary of the 1998 Diplomatic Conference* 188 [hereinafter Diplomatic Conference].

64 While most States expressed a desire to adhere to the compromise reached on the Admissibility article (see eg. Diplomatic Conference 193 (noting the Polish delegations view that "the compromise text of [the Admissibility] article had been achieved through long negotiations and should remain in tact"), several states voiced concern that the Admissibility article relied too heavily on subjective evaluations of national courts, favoring more deference to such courts (see eg. Diplomatic Conference 195, Comments of Ms. Li Yanduan (noting that the Chinese delegation considered that "the judicial systems of most countries were capable of functioning properly" and proposing limiting a determination of unwillingness to cases in which national law and procedure were not followed)).

65 A basic formulation of this right appears as early as the Magna Carta, which guaranteed that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land." R. Thompson (trsl.), An Histori-

ly inappropriate and would violate the accused's fundamental rights such as the right to a free and fair trial found in, among other sources, the International Covenant on Civil and Political Rights.[66] In addition, this construction of the complementarity regime suggests that the accused has a right to be judged by the court which has the best ties to him and the acts for which he is accused, presumably the territorial or national State. Removal of the accused from his home court is only justified as a last resort when the home court is unavailable.

In the drafting of the Rome Statute, there was general agreement that at least an accused person should have a right to challenge the admissibility of a case. Most disagreement at Rome on this point focused on whether a "suspect" under investigation but not yet indicted should be able to challenge admissibility.[67] The ultimate choice of allowing the right to challenge admissibility to an accused or one "for whom a warrant or arrest or summons to appear has been issued"[68] emphasizes that the accused's right to challenge admissibility attaches at the point where the Court's position relative to the accused interferes with that person's liberty through, for example, summoning them to a foreign locale.

The text of the Rome Statute suggests that such a right of the accused to challenge admissibility is not unlimited. An accused only has an automatic right to challenge admissibility once and such a challenge must be mounted prior to the initiation of trial, unless leave of the Court is granted and the challenge is based on a double jeopardy claim.[69] This limitation reflects a balancing between the right of the accused to a trial in his home forum and the need to prevent the waste of judicial time and resources that would accompany removal of a case after trial had started.[70] Thus while

cal Essay on the Magna Carta of King John (1829). While the exact meaning of this is subject to widespread debate, a common understanding is that a person has a right to be tried by members of his/her community, implying physical proximity. See, e.g., R. Wacheter, *Law Reform Committee, Parliament of Victoria, Jurisprudential and Historical Aspects of Jury Service*, 3 Jury Service in Victoria, at Chapter 1, §1.8 (the phrase 'trial by one's peers' requires that the jury be representative of the community). Similarly, one of the grievances noted in the United States Declaration of Independence was "transporting us beyond Seas to be tried for ... offenses" (at para. 20). More recently, the Princeton Principles for Universal Jurisdiction lay out nine factors for determining the appropriate resolution for competing jurisdictional claims, five of those factors are locational. See Stephen Macedo (ed.), *Princeton Principles of Universal Jurisdiction* (2001), at Principle 8.

66 Article 14 (7).

67 Suspect remained in brackets (indicating its potential to be used in lieu of "accused") in the 1997 reports from the Preparatory Commission sessions, the 1998 "Zutphen Draft" submitted at the Preparatory Committee's final session, and the draft considered at the 1998 Diplomatic Conference. See M. Cherif Bassiouni, 2 *Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* 155-160 (2005) [hereinafter Evolution of the Statute].

68 Rome Statute, Article 19 (2) (a).

69 See *supra* 1.1.

70 See *Principle of Complementarity* 62 (the balance of preventing procedural misconduct and allowing some form of redress applied also to States).

the concept of admissibility as a right of the accused is clearly an important element of the complementarity regime, this right of the accused can be subordinated to the need for proper functioning of the Court.

While a vision of admissibility as a right of the accused is compelling, there are reasons to doubt that it fully justifies the principle. To the degree that the Rome Statute is viewed as transferring territorial or national jurisdiction of States Parties to the Court, there is no reason for the accused to expect to be tried by his home court. States have in a variety of circumstances transferred their jurisdictional entitlements to other states or entities through, for example, status of forces agreements, without jeopardizing the rights of the accused.[71] In addition, the principle of universal jurisdiction expressly embraces the idea that certain crimes such as those contained in the Rome Statute are so heinous that any state has a right to try the perpetrators, regardless of any connection to the State itself.[72] Hence, to the degree that the right of the accused to trial in his natural court is the justification for complementarity, the Rome Statute must be viewed as conferring new rights or supplementing existing rights of the accused with respect to the appropriate forum for prosecution. At the very least, the vision of admissibility as a right of the accused suggests that irrespective of the method through which the case was referred to the Court, the accused maintains an actionable interest in preventing the Court from hearing his case where a domestic court is able and willing to undertake a genuine investigation as long as such a challenge does not undermine the operation of the Court itself.

2.2. Admissibility as the protection of the rights of States

A second vision of admissibility is as a means to protect the rights of states embodied in the principle of State sovereignty.[73] This view was perhaps the dominant frame

71 See M. Morris, 'The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States', (2001) 64 *Law & Contemporary Problems* 13, 44-45 (2001). For examples of status of forces agreements that include a transfer of jurisdictional entitlements, see Facilities and Areas and the Status of United States Armed Forces in Korea, 9 July 1966, Article xv, paras. 1, 8 (allowing Republic of Korea to exercise jurisdiction over United States citizens and corporations in Korea pursuant to military contracts, and reserving the right to try such persons by United States military authority if Korean courts declined to exercise jurisdiction). But see D. Marie Amann, The International Criminal Court and the Sovereign State, in W. G. Werner & Ige F. Dekker (eds.), *Governance and International Legal Theory* (2004), 187-98 (arguing that the transfer of jurisdiction is illegitimate). Some States have limited their own exercise of universal jurisdiction to be a subsidiary principle which can only be invoked when the territorial and national states have failed to prosecute themselves. That approach would seem to reflect the right of the accused to trial by the courts of the home state where they are available.

72 K. Randall, 'Universal Jurisdiction Under International Law', (1988) 66 *Texas Law Review* 785; Princeton Principles of Universal Jurisdiction (2001).

73 See Article 2 (7) of the UN Charter ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the

of complementarity and admissibility voiced at Rome and would be fully consistent with the Statute itself being viewed as a transfer of jurisdictional entitlements from the national and territorial states to the ICC.[74] According to this view, States Parties transferred jurisdiction through the Rome Statute, but did so in a limited way, only transferring a jurisdictional entitlement to the Court where the territorial or national state was unable or unwilling to prosecute itself. In contrast, States retain any and all rights not transferred to the Court and the exercise of jurisdiction by the Court beyond those transferred powers would be a breach of the state's sovereign rights and exceed the Court's power under the Statute.[75]

Once again, the text of the Statute reflects a compromise as evidenced by the *travaux*. In the initial stages of the discussions at Rome, several States were skeptical of any intrusion on State sovereignty, seeking to retain for themselves the right to prosecute domestically except where the national or territorial State was truly unable to act.[76] In contrast, other states favored a larger scope of admissible cases, encompassing ineffective state action in addition to inaction.[77]

The divergent views of the delegations expressed in the 1995 Report of the Ad Hoc Committee on the Establishment of the International Criminal Court, underscore this vision of the complementarity in the Rome Statute as a protection of State sovereignty. On one end, some States preferred a "strong presumption in favour of national jurisdiction," citing advantages of established procedure, law and punishment, as well as administrative efficiencies and the interest in maintaining State responsibility and accountability for prosecuting crimes.[78] At the other end of the spectrum was a call for the ICC to serve as the only venue for prosecuting extremely grave crimes. This approach was based on the idea of universal jurisdiction and that with respect to "a few 'hard-core' crimes" states no longer retained an exclusive right to prosecute.[79]

Eventually, the Preparatory Committee settled on language based on the initial ILC proposal, but with a more nuanced delineation of when a case would be inadmissible. This validated the intrusion of the Court into a domestic prosecution even when national proceedings had been undertaken or were taking place, but only if the proceedings were not genuine.[80] After this proposal with respect to admissibility, an "alternative approach" was offered with a notation of the need for "further discussion." The alternate admissibility language read simply: "The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been

domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter").

74 See Morris, *supra* note 71, at 44.

75 The Case of the S.S. "Lotus", (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10.

76 See *Principle of Complementarity,* 41-42.

77 Id.

78 Evolution of the Statute 150-51.

79 Id. at 152.

80 See *Principle of Complementarity,* 44.

prosecuted, by a State which has jurisdiction over it."[81] However, the vast majority of delegations rejected this approach.[82]

A further proposal by the United States, first introduced at the 1998 Preparatory Committee sessions demonstrated the strength of the state sovereignty frame in the course of the Rome Statute negotiations. The United States proposal, eventually incorporated in Article 18, shifted the admissibility evaluation to the beginning stages of the investigative work of the Prosecutor.[83] The US delegation framed the need for this adjustment as a protection, at the outset of a referral, of a State's right to fully investigate the crimes concerned itself.[84] The US proposal touched off a debate between delegations that considered this proposal to add unnecessary obstacles to the Court's exercise of jurisdiction[85] and those, which argued that the proposal strengthened the protection of State sovereignty.[86] Reflecting the US efforts in consultations with other delegations and resultant adjustments of the original proposal, the US proposal became, for many delegations, "key to their acceptance of the complementarity regime and the *proprio motu* role of the Prosecutor."[87]

Several other compromises addressed the concerns of those states that viewed the complementarity provisions as tipping the scales too heavily in favor of State's rights. For example, a state challenge to admissibility under what would eventually become Article 18 subsequently limits future challenges under Article 19 to instances of significant change in situation.[88] Rather than allow a recalcitrant state to use the article as a means to obstruct the work of the Prosecutor, the balance struck by the final version of admissibility in the statute gives states opportunities and incentives to address crimes through national jurisdictions but retains for the Court the authority to proceed when the clear intention of the state was to shield perpetrators from justice or the circumstances of the State made it impossible to investigate or prosecute.

A compromise was also reached between the polar extremes of those delegations that preferred any state – including non-Party States which had only been asked to cooperate in a particular investigation or arrest – to challenge admissibility and delegations that wanted admissibility challenges limited to States Parties to the Statute.[89] Agreement was reached on a more moderate States' rights position, allowing for any

81 See Evolution of the Statute 145.

82 See *Principle of Complementarity,* 52-53.

83 For a detailed discussion of the United States proposal, see id at 68-72.

84 See Diplomatic Conference 189.

85 *Id* at 190, 193 (noting the stance in favor of deleting the proposed article by Belgium and Poland).

86 Id. at 194 (reporting that Japan's delegation "considered that [the proposed article] should be retained, since the principle of complementarity applied even in the early stages of an investigation.")

87 *Principle of Complementarity*, 71.

88 Rome Statute, Article 18(7).

89 *Principle of Complementarity*, 62.

state with jurisdiction to challenge admissibility.[90] Allowing even non-Party States to challenge admissibility demonstrates a commitment to protecting the rights of a state with jurisdiction and suggests that negotiators were uncomfortable with granting the Court authority unchecked by State action. So long as a State acted in good faith, the delegations at Rome allowed that state to challenge admissibility and handle proceedings domestically, trusting the bar on prosecutions aimed at shielding the accused was sufficient protection to warrant deference to national prosecutions.

The language eventually adopted in the Statute thus appears to reflect both the desire of at least some States Parties to retain sovereign prerogative over the investigation and prosecution of international crimes and the need to create a court with the authority and capacity to effectively "put an end to impunity."[91] The vision of the admissibility as a protection of States' rights stresses the first element of this balancing and suggests that states retain all rights not expressly transferred to the ICC in the Rome Statute. Such a reading of admissibility results in a narrow interpretation of the powers transferred to the Court and would perhaps preference state challenges to admissibility notwithstanding self-referrals.[92]

2.3. Admissibility as a limitation on the power of the ICC

A third potential vision of admissibility is as a fundamental limitation on the power of the ICC. This vision is closely linked to the protection of State sovereignty discussed above, but emphasizes the limitations on the Court's power rather than the protection of State's rights. This vision of admissibility also rests on the idea that through the Rome Statute, States Parties transferred strictly limited jurisdictional entitlements to the ICC. The Court, as a creation of the States Parties themselves, has no powers beyond those expressly transferred to it and lacks any capacity to act beyond the narrow confines of the powers granted to it in the Rome Statute. This perspective provides perhaps the narrowest vision of complementarity and would presumably be most favorable to a state challenging admissibility because, should the case be deemed inadmissible, the Court would have no statutory power to act.

While not the dominant frame as expressed by the drafters, the notion of a court of limited powers reappears repeatedly in the drafting of the Statute. Admissibility as a limitation on the powers of the ICC is most apparent with respect to statutory language addressing when and how often the Court should investigate admissibility on its own accord. Notably, the Preparatory Committee draft of the eventual Article 19 required that the Court "[a]t all stages of the proceedings... satisfy itself as to ju-

90 Id., at 66. The eventually adopted language allows challenges to be made by "A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted." See Article 19 (2) (b) of the Rome Statute.

91 See para. 5 of the preamble of the Rome Statute.

92 If a State's rights vision is adopted as an object of the Rome Statute, the plain language of the admissibility rules would favor a State retaining its right to an admissibility challenge even in the case of self-referral. Vienna Convention, *supra* note 59, at Article 31 (1969).

risdiction over a case."[93] Such a continuing obligation to scrutinize admissibility suggests that the Court has no power to act when a case is inadmissible, even if the admissibility requirements might have been initially satisfied. However, the continuing scrutiny language was eventually abandoned in favor of a statutory requirement that that the Court satisfy itself as to jurisdiction and admissibility up to the point where a trial actually begins.[94] This revision might be seen as undermining the view of complementarity as a limitation on the Court's power because, should a case become inadmissible after the start of the trial, it would appear that the ICC would retain the power to prosecute, notwithstanding the subsequent change of circumstances on the ground that would have otherwise rendered the case inadmissible. At the very least, this language suggests a balancing between the fundamental limitations on the Court's power and the need for an institution that can operate effectively within its sphere of authority.

A further reason to question the view of admissibility as a fundamental limitation on the Court is the restriction on challenges to admissibility found in the Rome Statute. In the drafting of the Statute, the Committee as a Whole accepted without great controversy the limitation of one challenge to admissibility each for States and the accused prior to commencement of the trial, and the requirement, though perhaps underspecified, that States challenge admissibility at the "earliest opportunity."[95] Indeed, the largest source of controversy was over whether non-Party States would be able to avail themselves of the right to challenge. The Italian delegation's position, for example, was summarized as being "reluctant to allow States not parties, which did not share the burden of obligations under the Statute, to share the privilege of challenging the jurisdiction of the Court."[96] While negotiations eventually gave non-Party States the ability to challenge, that right was limited to states with jurisdiction, protecting the Court from bad-faith efforts to delay action on a case.[97] If admissibility were in fact a fundamental limitation on the power of the Court, it would seem to have been appropriate to allow numerous challenges to admissibility – at least those based on new developments – and to allow such challenges to be made even by States without jurisdiction over the crime.

The evolution of the Rome Statute's provisions for challenging admissibility demonstrate a desire on the part of the negotiators to ensure that the Court would have enough authority that its prosecutorial efforts would not easily be derailed once commenced. Thus while admissibility was a limitation on the Court's authority, it was a limitation that established clear boundaries for the Court's exercise of jurisdiction and retained for the Court the powers necessary to effectively carry out its func-

93 Evolution of the Statute, 157.

94 Article 19 (1) of the Rome Statute.

95 Id., at 1995.

96 United Nations, 2 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 220, A/CONF.183/13 (Vol.11) (1998).

97 *Principle of Complementarity,* 62.

tions.[98] Once admissibility had been determined and sustained on challenge, the Court would retain the authority to prosecute notwithstanding new developments on the ground. After the commencement of trial, admissibility could only be challenged if the accused were actually convicted in another jurisdiction and the continuation of proceedings before the ICC would breach the accused's rights to avoid double jeopardy.[99] In other words, the Court appears to have functional authority after the commencement of trial with respect to cases that might otherwise have become inadmissible. It is difficult to square that residual admissibility with a vision of complementarity solely as a fundamental limitation on the power of the Court, although some notion of a court of limited powers is clearly evidenced in the complementarity regime.

2.4. Visions of admissibility in the practice of the ICC

While the case law on admissibility is still in its earliest stages, the decisions of the PTC in its first cases provide some insight into how the ICC Chambers understand admissibility and balance the three visions of admissibility identified in the Rome Statute. The primary decisions on admissibility to date arise in the case of Thomas Lubanga in the situation concerning the Democratic Republic of Congo (DRC), but arise only at the earliest stages of the proceedings against him.[100] The Union of Congolese Patriots (*Union des patriotes Congolais* (UPC), under Lubanga's leadership[101] was implicated in widespread violence and human rights abuses in the DRC, including abducting children and forcing them to participate as "fighters, cooks, carriers and sex slaves."[102] The Ituri situation was self-referred by the DRC in 2004. Prior to the issuance of an ICC warrant, Lubanga was arrested and imprisoned in Kinshasa on domestic charges of murdering nine MONUC peacekeepers in March 2005.[103] He was subsequently charged by the ICC with genocide, crimes against humanity,

98 This is similar to the extension of international legal personality to the United Nations. While such an extension fell beyond the scope of the United Nations Charter, it was deemed necessary in order for the UN to carry out its essential functions. See ICJ, Reparation for Injury Sustained in the Service of the United Nations, 1949 ICJ 174.

99 See Article 20 of the Rome Statute.

100 See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

101 For a history of the origins of the Ituri conflict, see Human Rights Watch, Ituri: "Covered in Blood": Ethnically Targeted Violence in Northeastern Democratic Republic of Congo (2003).

102 M. Simons, '*Congo Warlord's Case Is First for International Criminal Court*', N.Y. Times, 10 November 2006.

103 UN, Press Release, '*Security Council Condemns Murder of Nine UN Peacekeepers*', 2 March 2005, SC/8327/Rev.1.

murder, illegal detention and torture[104] in a warrant issued on February 10, 2006,[105] and was transferred to The Hague a month later.[106]

In its initial decision as to whether to issue an arrest warrant, the PTC had to decide whether the case against Lubanga remained admissible, notwithstanding the fact that he was in domestic custody facing prosecution in Kinshasa. While the DRC did not challenge admissibility, the PTC noted that it had to consider admissibility on its own accord before issuing arrest warrants: "an initial determination on whether the case against Mr. Thomas Lubanga Dyilo... is admissible is a prerequisite to the issuance of a warrant of arrest for him."[107]

The PTC found the case against Lubanga admissible because he was being charged by the ICC, based on separate facts, with crimes distinct from those alleged in the domestic Congolese warrant against him. Specifically, the Congolese warrant addressed Lubanga's role in the MONUC killings, whereas the ICC warrant focused on his conscription of children into his militia group.[108] The PTC noted that while inability under Article 17 (1) and (3) no longer appeared to be a barrier to the DRC asserting national jurisdiction,[109] because the proceedings in the DRC did not specifically reference the conscription of children into hostilities, the case remained admissible.[110] In order for a case to be inadmissible "national proceedings must encompass both the person and the conduct which is the subject of the case before the Court."[111] Having affirmed that no domestic case against Lubanga for the same charges had been initiated, the Chamber declined to make a formal analysis of "unwillingness or inability" beyond its earlier reference.[112]

While it remains possible that admissibility will be challenged or further examined as the case against Lubanga proceeds to trial, thus far the PTC has balanced two of the distinct visions of admissibility presented above – admissibility as a protection of states' rights and admissibility as a limitation on the powers of the Court – with the functional needs of the Court to maintain the power to fulfill its mandate. On the one hand, the PTC scrupulously examined the admissibility of the case against Lubanga on its own accord before issuing arrest warrants and thereby ensured that the Court was not stepping beyond the limited powers provided for in the Statute or

104 ICC, Prosecutor's Application, ICC-01/04-01/06, paras. 184, 187.

105 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, 10 February 2006, ICC-01/04-01/06.

106 ICC, Press Release,*'First Arrest for International Criminal Court'*, 17 March 2006.

107 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, 24 February 2006, ICC-01/04-01/06-06-37, para. 19.

108 See ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Warrant of Arrest, 4. For an interesting account of the issues facing the Court in its first prosecution, see J. Anderson, Institute for War and Peace Reporting, '*ICC Enters Uncharted Territory*', 24 March 2006, (available at: <globalpolicy.igc.org/intljustice/icc/2006/0324uncharted.htm>.

109 Id., at 36.

110 Id., at 38-39.

111 Id., at 37.

112 Id., at 40.

encroaching on the rights of States. On the other hand, the Chamber imposed the requirement, not necessarily evident from the statute, for a case to be inadmissible, domestic proceedings must include the same conduct charged by the ICC. That element of the PTC's decision ensured the Court sufficient leeway to carryout its functions. While, as yet, the Chamber has not adopted the vision of complementarity as a right of the accused, should an accused himself challenge admissibility, that element of complementarity might well become more apparent in the Court's jurisprudence. As the jurisprudence of the PTC stands to date, the ICC appears to view admissibility primarily as a means to protect states' rights, however the limitations imposed by such a vision are not absolute and may be circumscribed by the functional needs of the institution.

3. The potential Ugandan admissibility challenge

Throughout late 2007 and early 2008, events on the ground at the peace negotiations between the LRA and the Ugandan government in Juba, South Sudan, have been unfolding rapidly. At the time of writing in mid April 2008, it is difficult, if not impossible, to predict the ultimate outcome of those negotiations, though a final peace agreement is supposed to be signed and may lead to a complete demobilization of the LRA.[113] For the purposes of argument, the sections that follow assume that such a peace deal is ultimately signed and that Uganda and the LRA proceed to implement the June 2007 and February 2008 agreements on accountability and reconciliation. This part of the chapter first considers the terms of the two agreements reached between the LRA and the Ugandan government and then turns to the range of possible domestic accountability options available to Uganda in light of those agreements.

3.1. Domestic justice: The June 2007 and February 2008 accountability agreements

As part of ongoing efforts to bring about a peaceful settlement to the conflict in northern Uganda, the LRA and the Ugandan government reached an initial agreement on justice and accountability in June 2007. The agreement seeks to promote "lasting peace with justice" through a balancing of the need for peace with the obligation to "prevent… impunity" and the "requirements of the Rome Statute."[114] The agreement anticipates the establishment of a domestic criminal justice mechanism to provide accountability for the most serious crimes committed during the conflict in the north. Specifically, the agreement calls for "formal criminal and civil justice mechanisms" to "be applied" to those responsible for "serious crimes or human rights

113 At the time of writing, it remains far from clear whether Kony will in fact sign such an agreement. See BBC News, *'Ugandan Rebel too for Peace,'* 1 April 2008, available at <news.bbc.co.uk/2/hi/africa/7324045.stm>.

114 Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and The Lords Resistance Army/Movement, 29 June 2007 [hereinafter June 2007 Agreement].

obligations" through a "legal framework in Uganda."[115] Such language appears fully consistent with the exercise of Uganda's primary jurisdiction over Kony and other LRA indictees. In fact, the language of the agreement appears to anticipate an admissibility challenge, noting "Uganda has institutions and mechanisms … provided for and recognized under national laws capable of addressing the crimes and human rights violations committed" in the conflict.[116]

This first agreement however offers two key concessions to the LRA leadership that may have troubling implications for a Ugandan challenge to admissibility. First, the agreement suggests that, notwithstanding the use of "formal courts," "alternative penalties and sanctions…shall apply and replace existing penalties with respect to serious crimes."[117] While such penalties are supposed to "reflect the gravity of the crimes," they remain unspecified in the initial agreement. Depending on how such penalties are ultimately crafted, they might or might not meet the admissibility tests specified in Article 17 of the Rome Statute, namely that the proceedings were not intended to shield the accused and that they were consistent with "an intent to bring the person concerned to justice."[118] Second, the June 2007 agreement calls for the use of "traditional justice mechanisms" such as *mato oput* "as a central part of the framework for accountability."[119] Such traditional justice mechanisms generally are based around forgiveness ceremonies rather than criminal sanction and, as such, would presumably not meet the intent to bring to justice standard of Article 17.[120] Again, the June 2007 Agreement does not specify the scope of applicability of such traditional justice mechanisms, but they are clearly intended to be a significant component of accountability.

After months of negotiation and consultations within the LRA and the Ugandan government, a second and more detailed Annexure to the Agreement on Accountability and Reconciliation was concluded in February 2008. This agreement seeks to provide the specific frameworks for the implementation of the principles articulated in the June 2007 agreement. More specifically, the Annexure calls for the establishment of a "special division of the High Court of Uganda" to "try individuals who are alleged to have committed serious crimes during the conflict."[121] The anticipated special division is supposed to undertake investigations under the authority of the Director of Public Prosecutions for war crimes and crimes against humanity. While the Annexure does not specifically mention alternative sentences, that language as contained in the June 2007 Agreement would appear to remain applicable. In addi-

115 Id.

116 Id.

117 Id.

118 Rome Statute, Article 17.

119 June 2007 Agreement.

120 Ugandan Coalition for the International Criminal Court, *Approaching National Reconciliation in Uganda: Perspectives on Applicable Justice Systems* (2007).

121 February 2008 Agreement.

tion, the Annexure again notes that the special division may recognize "traditional and community justice processes in proceedings."[122]

In light of these developments, the PTC submitted a request to the Government of Uganda on 29 February 2008, seeking further information on the steps Uganda was taking to implement the agreements, the proposed competence of the special division of the High Court, the categories of offences subject to traditional or alternative justice, and the impact of the agreements on the ICC arrest warrants.[123] In a response dated 27 March 2008, Uganda clarifies that "formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations."[124] The letter further specifies that the government will appoint a task force for determining the necessary implementing legislation and will proceed with the establishment of the special division after a final peace agreement is signed. With respect to issues of admissibility, the Government's response provides insight into the potential interactions between the ICC and the Ugandan High Court. The Solicitor General's letter notes: "The special division of the High Court is not meant to supplant the work of the International Criminal Court and accordingly those individuals who were indicted by the International Criminal Court will have to be brought before the special division…"[125] The letter further provides the basis for a future Ugandan challenge to admissibility, noting that "Uganda's inability to have the LRA leadership tried" was due to the fact that the LRA leaders were "beyond the borders of Uganda." The letter continues: "It is expected that once the agreement is signed and the Lord's Resistance Army submits to Ugandan jurisdiction as required, the perpetrators of atrocities in northern [sic] [Uganda], the indictees inclusive, shall be subject to the full force of the law."[126]

3.2. Mechanisms of domestic justice

The agreements reached to date between the LRA and the Ugandan government as well as the exchange between the Ugandan Government and the ICC suggest that Uganda will pursue a dual track strategy with respect to accountability. Those most responsible for international crimes committed in the conflict who have not yet received amnesty will face formal justice with special procedures and, possibly, alternative sentences. Given that Uganda has already granted amnesty to members of the LRA who have been demobilized, such formal justice would likely apply only to those LRA members who remain at-large, including the ICC indictees.[127] Those who

122 Id.

123 ICC, *The Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, 29 February 2008, ICC-02/04-01/05.

124 Letter from Jane F. Kiggundu, Acting Solicitor General, to the Registrar of the International Criminal Court, 27 March 2008.

125 Id.

126 Id.

127 See Amnesty Act (2000) [Uganda].

committed lesser offences will, presumably, face limited accountability through an alternative form of justice based around traditional justice ceremonies. Any Ugandan challenge to admissibility will relate only to the justice mechanisms utilized for LRA officials indicted by the ICC, presumably the formal justice provided by the yet-to-be-developed special division of the High Court. The key question, then, is whether the domestic justice utilized for ICC indictees will meet the complementarity requirements of the Rome Statute. A number of options are available to Uganda in this process with considerably different implications for such an admissibility challenge.

3.2.1. Amnesty

The present legal framework in Uganda provides for what is essentially a blanket amnesty for demobilizing rebels who apply for amnesty through a simple process with the Amnesty Commission.[128] The Amnesty Act of 2000 was extended by the Government of Uganda in May 2006 for an additional two-year period and remains applicable. Under existing law, even ICC indictees who submit to Ugandan domestic jurisdiction could apply for amnesty and would, thereby, be immune from Ugandan domestic jurisdiction.[129] While there are many deficiencies in the existing amnesty process in Uganda, as long as such amnesty applies only to non-ICC indictees, the Amnesty Act would not present a problem for an admissibility challenge. It would, nonetheless, limit the use of formal justice mechanism to those members of the LRA who have yet to apply for amnesty. If, however, amnesty is offered to or, perhaps even if it is statutorily available to ICC indictees, it would presumably deprive Ugandan courts of domestic jurisdiction and thereby render any Ugandan admissibility challenge moot. Hence, should Uganda seek to implement the February 2008 Annexure plan for a special division of the High Court, it must reform the Amnesty Act so as, at the very least, to exclude ICC indictees from amnesty.

3.2.2. Courts martial

Perhaps the most effective means to provide domestic accountability for ICC indictees would be to conduct a trial through Uganda's military tribunals, which are already well established and clearly have the competence to undertake such investigations. This has been the preferred method of trying sensitive, politically implicated crimes in the past. There are, however, two problems with such an approach. First, the February 2008 Annexure specifies that military courts will not be used as a mechanism for accountability for serious crimes.[130] Second, the constitutionality of using military tribunals to prosecute individuals not in the military is questionable. In 2005, the trial of the opposition leader Dr. Kizza Besigye provoked a constitutional conflict when he was detained by the military to face a Court Martial on charges of terror-

128 Amnesty Act (2000) [Uganda].

129 At least some readings of an amended version of the Amnesty Act of 2000 would appear to give the Minister of Justice authority to limit a grant of amnesty so as not to preclude the exercise of domestic jurisdiction over ICC indictees. Personal Interview, El Hajii Miro, Amnesty Commissioner, Kampala, Uganda, 8 January 2008.

130 February 2008 Agreement.

ism and illegal-weapon possession.[131] Uganda's High Court ruled that the exercise of military jurisdiction over civilians was unconstitutional[132] under Article 126 (1) of the Ugandan Constitution.[133] Hence, despite the potential effectiveness of military courts martial as a means of accountability for the LRA, it appears highly unlikely they will play a role in the process.

3.2.3. A special division of the High Court

By far the most likely means of formal accountability for the LRA will be through the use of a special division of the High Court. Considerable implementing legislation will be needed in Ugandan domestic law to provide for the operation of such a special division in conformity with the June 2007 and February 2008 Agreements, though a potentially effective framework for such trials does exist in Ugandan law. Three key issues must be addressed to ensure the effective functioning of a special division of the High Court and to provide a reasonable likelihood that such domestic trials would bar admissibility before the ICC: (i) potential charges under Ugandan law; (ii) the operating procedures of the special division; and (iii) the range of possible sentences. How the Ugandan government deals with these three issues is likely to have significant bearing on the ultimate success of an admissibility challenge.

The ICC indictment against Joseph Kony contained 33 separate charges involving nine international criminal acts: enslavement, sexual enslavement, rape, inducing rape, attack against civilians, cruel treatment, inhumane acts, pillaging, and murder.[134] Under Uganda's Penal Code, these ICC charges could be translated into the following domestic charges: kidnapping or abducting in order to subject person to grievous harm; slavery;[135] detention with sexual intent;[136] rape;[137] doing grievous harm;[138] theft;[139] and murder.[140] The Penal Code also establishes that any person who "does or omits to do any act for the purpose of enabling or aiding another person to commit the offense" is a principal offender, deemed guilty of performing the act, as is any person who procures another to commit the act.[141] If Uganda charged Kony

131 He was charged under Ugandan People's Defence Forces Act No. 7 of 2005, Section 119(1).

132 See Constitutional Court of Uganda, *Uganda Law Society v. Att'y Gen.,* Constitutional Petition 18 (2005).

133 Id. at 38.

134 ICC, Warrant for the Arrest of Joesph Kony, 12-19.

135 Uganda Penal Code Act, Chapter 24 Section 245 (punishable by up to 15 years of imprisonment).

136 Id., at Chapter 14 Section 134 (punishable by up to 7 years of imprisonment).

137 Id., at Chapter 14 Section 219 (punishable by death).

138 Id., at Chapter 21 Section 219 (punishable by up to 7 years of imprisonment).

139 Id., at Chapter 25 (Section 261 prescribes general punishment of theft as not more than 10 years imprisonment).

140 Id., at Chapter 18 Section 188-89 (persons convicted of murder "shall be sentenced to death").

141 Id., at Chapter 4 Section 19(1)(b)&(2).

with all of the above crimes, it could likely meet the requirement cited by PTC I in the *Lubanga Case* that each person and count charged in the ICC warrant be charged in the domestic proceedings. Thus the question would simply be whether or not the Chamber is willing to allow Uganda to retake ownership of the LRA trials if it intends to genuinely pursue domestic justice.

Second, Uganda will have to develop an appropriate procedural framework for the trial of the LRA leadership in the proposed special division. Such a procedural framework is indicated, at least in broad terms, in the February 2008 Annexure and would have to comply both with the Ugandan constitution and key procedural guarantees of international human rights instruments. More specifically, that procedural framework would have to guarantee that certain key elements of Article 17 of the Rome Statute are met, namely that the proceedings are conducted "independently and impartially" and that there is not "an unjustified delay" in the proceedings.[142] As soon as practical after the signing of a final peace agreement, Uganda will need to pass appropriate implementing legislation for the operation of the special division of the high court.

Perhaps the most challenging element of the legal framework for domestic prosecutions relates to the sentences to be imposed by the special division. The June 2007 Agreement clearly references the establishment of a "regime of alternative penalties and sanctions."[143] The nature of the negotiations between the LRA and the Ugandan government during late 2007 and 2008 suggests that this regime of alternative sentences is a *sine qua non* of any peace deal and a strong incentive for Kony and his followers to submit to Ugandan domestic jurisdiction.[144]

Under existing Ugandan law, the likely charges Kony and others would face could carry sanctions up to and including death,[145] whereas the ICC could apply a maximum sentence of life in prison.[146] Hence, under existing law, it appears likely that the range of sentences Kony and others might face would be fully consistent with the intent to bring to justice requirement of Article 17 of the Rome Statute. However, should the Ugandan government revise the applicable penalties available to the special division, as suggested by the June 2007 Agreement and demanded by the LRA, to provide far lighter sentences or even house arrest, it is possible such a sentencing regime could be seen by the PTC as a means of shielding the accused from the ICC or as inconsistent with an intent to bring the accused to justice. As a result, the Ugandan admissibility challenge might fail.

The key for implementation of meaningful domestic justice that would render the cases inadmissible before the ICC is to find a sanction regime that encourages the LRA to surrender but that still meets the tests of Article 17. Article 17 requires domestic proceedings are based on an intent to bring the accused to justice. As it is

142 Rome Statute, Article 17 (2) (b) and (c).

143 June 2007 Agreement.

144 Personal Interview, LRA Representatives, January 7, 2008, Kampala, Uganda.

145 See Ugandan Penal Code, Article 189.

146 See Rome Statute, Article 77.

extremely difficult to parse the intent of a State in such regard, the PTC may have reference to the penalties available under a domestic proceeding as a proxy for the state's genuine intent to bring the accused to justice. At present, however, such a regime of penalties must be designed with little guidance from the PTC as to what kinds of sanctions would meet the Article 17 threshold. It is further unclear the extent to which the Chamber's decision on the genuineness of the domestic process would be based on the outcome of the trial. The language of the Rome Statute seems to indicate that a *result* that shields the accused from justice would be impermissible, yet it makes reference only to the "proceedings" to determine willingness to prosecute.[147] It is therefore difficult to tell if the Court's decision would be based on the process undertaken or the final verdict reached or sentence given.[148]

A purely process-focused inquiry might be problematic due to the inherent difficulty of assessing the genuineness of the process without reference to the results. It would appear inconsistent with Article 17 for the accused to nominally face severe penalties but to be discretionally sentenced to terms that do not match the severity of the crimes. Therefore, if the PTC makes its determination after a trial, it may look at the difference between the verdict reached and typical sentences within a jurisdiction to determine if a "national decision was made for the purpose of shielding the person concerned from criminal responsibility,"[149] and may look at any pre-trial agreements reached between the government and the accused. In the Uganda case, this may be particularly relevant as a national decision has been made on accountability and it will be incumbent upon the Government to demonstrate that the agreement was *not* reached to shield the indictees from responsibility. In order to do so, it may be necessary to demonstrate that any gap between a typical sentence for the crimes charged and an actual sentence given is consistent with normal variations in sentencing, or, at least, that the gap does not reflect an unwillingness to hold the accused accountable for their crimes. If, in contrast, the PTC rules on admissibility before the domestic trial is completed, the ultimate result of the domestic process will still be undetermined. In such a circumstance, the PTC will have no choice but to focus its inquiry on the domestic process, rather than result. In that circumstance, the PTC may look at the sentences available to the domestic court as a proxy for the intent to bring the accused to justice and consider whether the range of available domestic sentences in the particular proceeding diverges from those available in typical domestic cases.

147 Id., at Article 17 (2)

148 In theory a full and fair trial leading to an acquittal would satisfy complementarity. However, this may set up a bizarre scenario where, in absence of any evidence that an acquittal was the result of a concerted effort to shield the accused from justice, an acquittal provides a stronger challenge to admissibility than a conviction with an inexplicably light sentence. The latter would present a *prima facie* evidence of an agreement on the criminal responsibility between the jurisdictional state and the accused, whereas the former is only an indication that the process was carried out to a decision and does not necessarily point to collusion.

149 Id., at 17 (2) (a).

3.2.4. Traditional justice

A third option available to Uganda is the use of traditional justice, as called for in both the June 2007 Agreement and February 2008 Annexure. Such traditional justice mechanisms are clearly the strong preference of the LRA indictees and might include modified versions of various local processes such as *Mato Oput*, *Cuol Kwor*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka*.[150] These mechanisms generally seek community healing and reintegration through confession, repentance and token restitution, aimed at demonstrating remorse and signaling a new start for all involved.[151] They do not, however, generally provide for criminal sanction.

The March 2007 Letter from the Ugandan Solicitor General to the ICC Registrar suggests that these traditional justice mechanisms will only apply to lower level offenders and would not constitute a part of the formal justice mechanisms applicable to ICC indictees. While there are serious concerns about the appropriateness of traditional justice mechanisms for serious offences committed in a conflict and with respect to the frequent exclusion of women from these ceremonies, as long as traditional justice is only utilized for offenders who have not been indicted by the ICC, the use of traditional justice would be irrelevant to any admissibility considerations.

Should, however, traditional justice be used as part of the formal justice mechanism applicable to ICC indictees, it could present significant problems for a Ugandan challenge to admissibility. Specifically, should the participation in a traditional justice ceremony constitute a part of the sentences handed down by the special division of the High Court, such a sentence could be viewed as inconsistent with an intent to bring the accused to justice. Similarly, should the procedures adopted by the special division incorporate elements of traditional justice, it is possible the ultimate proceedings might not be deemed independent and impartial. Hence, the separation of traditional justice mechanisms from the formal court proceedings envisioned by the February 2008 Annexure might be critical to the success of any admissibility challenge.

4. Conclusion: Evaluating admissibility, shaping domestic justice

Assuming a final peace deal is reached and the LRA disarms to face domestic accountability, an admissibility challenge will, presumably, be brought before the PTC, on the grounds that the crimes committed by ICC indictees are being investigated and prosecuted in a domestic forum and that Uganda is both able and willing to provide accountability domestically. The approach taken by PTC II to such a challenge will have considerable implications both for the pursuit of peace and justice in Uganda and for the broader contours of acceptable domestic processes under Article 17. Given the circumstances of Uganda's referral and the on-going peace negotiations, the results of such a challenge may significantly impact the Court's legitimacy and future effectiveness. On one hand, rejecting a challenge to admissibility, par-

150 For an analysis of the different mechanisms of traditional justice in Northern Uganda, see Ugandan Coalition for the International Criminal Court, *supra* note 120.

151 Id.

ticularly if a peace agreement has been reached that is conditional on removal of the ICC warrants, may result in a perceived lack of respect for state sovereignty and may undercut state support for the Court. On the other hand, if the Court is seen as compromising justice by allowing the LRA leaders to escape meaningful justice, it may seriously weaken both the moral authority of the ICC and its deterrent effect. Such a ruling might also create incentives for States and suspects to use the ICC as a negotiation tool, rather than an institution of justice.

This final section of the chapter first considers two potential admissibility challenges that could be brought in the Uganda situation – one by the Ugandan Government and one by an indictee such as Joseph Kony. The section then turns to the broader implications of any potential PTC ruling on admissibility and the ways in which the PTC may be able to help shape domestic justice processes in the future.

4.1. An admissibility challenge by the Government of Uganda

Uganda has jurisdiction over any crimes committed by ICC indictees and, pursuant to Article 19 (2) (b) of the Rome Statute, is therefore empowered to challenge admissibility on the grounds that "it is investigating or prosecuting the case."[152] Such a challenge brought by the Ugandan government would likely raise three key questions for consideration by the PTC: (i) is Ugandan estopped from challenging admissibility or has it somehow waived the right to challenge admissibility through its self-referral?; (ii) has Uganda raised the admissibility challenge at the earliest possible opportunity?; and (iii) do the proposed domestic proceedings in Uganda meet the tests laid out in Article 17 of the Rome Statute?

Framed in terms of the visions of admissibility noted above, a Ugandan admissibility challenge would assert that, given Uganda's newfound ability and willingness to prosecute, any enforcement action by the ICC would interfere with Uganda's sovereignty and would exceed the jurisdictional entitlements transferred to the ICC through the Rome Statute. Such an argument would adopt the visions of admissibility as a protection of state sovereignty and as a limit on the powers of the Court discussed in Part 2, above.

Should the PTC approach the question from the perspective of admissibility as a fundamental limitation on the power of the Court, the estoppel argument carries little weight. If the Court lacks the power to proceed where a domestic court is able and willing to undertake its own investigation and prosecution, then the Ugandan self-referral should have little or no bearing on the ultimate powers of the Court or its determination of admissibility. In contrast, if the PTC views admissibility as a protection of state sovereignty, then the estoppel argument may be more convincing. By self-referring the case, it may be that Uganda has waived the rights it would have otherwise had to challenge admissibility.

As noted above, however, the vision of admissibility as a protection of State sovereignty appears to be balanced against the need for the proper functioning of the Court. Assuming that any Ugandan challenge to admissibility is appropriately made

152 Article 19 (2) (b) of the Rome Statute.

before the commencement of trial, it is unlikely that a PTC finding of inadmissibility would in any way interfere with the effective operation of the Court or undermine the goals articulated in the preamble to the Rome Statute of ending impunity. Thus, even from the perspective of admissibility as a protection of State sovereignty, the estoppel claim should not stand in the way of the PTC rendering the case inadmissible based on genuine domestic proceedings.

Perhaps a more difficult consideration with respect to a Ugandan challenge to admissibility relates to the timing of such a challenge. Statutorily, Uganda is only entitled to one admissibility challenge.[153] Such a challenge must be based on clear evidence that Uganda is both able and willing to prosecute in its own courts in satisfaction of the requirements of Article 17. Yet, such a challenge must also be made at the "earliest opportunity."[154] This suggests a potential contradiction, or at least an inconsistency, in the operation of Article 19. For example, should Uganda challenge admissibility prior to conducting a trial, it might not be able to satisfy the Court that it in fact was "willing," in the Article 17 sense, to genuinely prosecute the accused. However, if Uganda waits to challenge admissibility after starting a domestic trial, the PTC could surely find that the challenge was not made at the earliest possible opportunity.

The purpose of the earliest possible opportunity requirement in Article 19 (5) is presumably to both maximize the efficiency of proceedings, such that the ICC does not waste resources on an investigation or prosecution only to have the case subsequently deemed inadmissible when such an admissibility challenge could have been brought at an earlier time, and to incentive States with jurisdiction to promptly assume responsibility for prosecuting indictees or potential indictees. While these are both valid goals, the object and purpose of the Rome Statute is to create a court of complementary jurisdiction that preferences national prosecutions where they are possible. Reading the earliest possible opportunity requirement consistently with that intent and purpose of the Statute suggests allowing some leeway in terms of the timing of a challenge and not using the timing requirement to block otherwise genuine assertions of national jurisdiction. As long as the Ugandan challenge is brought before the ICC expends further resources in apprehending or prosecuting the accused, the purpose of Article 19 (5) would likely be satisfied and the ICC would not be harmed by an unnecessary delay by the Ugandan government.

However, this does not resolve the problem of when such a challenge would be resolved. It is unclear how the Chamber would decide an Article 19 challenge without reference to the proceedings as a whole, including the result/verdict. As a result, the "earliest opportunity" to challenge may not correspond with the earliest opportunity for the Court to decide such a challenge. It may be that the only practical way to proceed is for the Court to require that the challenge be made as soon as a threshold showing can be made that a genuine process is underway, but to defer deciding on the challenge until more evidence, in the form of actual progress towards justice is shown. This possibility of a delayed decision on admissibility would have the added benefit of involving the territorial State and the PTC in a potential dialogue as to

153 See Article 19 of the Rome Statute.

154 Article 19 (5) of the Rome Statute.

the nature of domestic proceedings and creating on-going pressure on the territorial state to provide meaningful justice.

If this is the case, in order to meet the standards of Article 17, Uganda will have to provide compelling evidence that it is in fact undertaking genuine domestic proceedings. That, in turn, will require far more than just an illusive signature on a peace deal. Specifically, it is likely that the PTC would demand evidence that the accused are in fact in Ugandan custody and that the Ugandan judiciary has taken action against them, presumably in the form of a domestic investigation or even domestic indictment. Ideally, then, before initiating an admissibility challenge, the Ugandan government would wait until it had the necessary legal framework in place to prosecute, had a signed final peace deal, had secured custody over the accused, and had initiated domestic proceedings. Although such a challenge could, theoretically be made at an earlier time, waiting until a compelling case can be made that the government is in fact able and willing to prosecute will probably be the most effective strategy to convince the PTC to render the case inadmissible.

Finally, the PTC will have to consider whether the proposed Ugandan domestic proceedings meet the tests of admissibility in Article 17 of the Statute. Given the limited information presently available about the actual structure of such proceedings and the scant jurisprudence on admissibility from the ICC to date, detailed speculation as to how the PTC will rule is inappropriate. On one end of the spectrum, however, it would appear that accountability based solely on traditional justice would be insufficient to meet the requirements of Article 17. On the other end of the spectrum, a standard domestic trial with the full range of potential sanctions ordinarily available for equivalent charges would likely satisfy Article 17. The difficulties, of course, arise with respect to the far more likely result, namely a special domestic trial before the High Court with alternative sanctions.

In that likely middle ground, the critical questions for PTC analysis will likely be whether the sentences available to the special division of the High Court are indicative of an intent to bring the accused to justice and whether the special division's procedures can result in an independent and impartial proceeding. Should either the ultimate sentences rendered or the range of sentences available to the special division appear too limited, the PTC could well determine that the case remains admissible. Should the sentences appear too severe, the LRA may fail to submit to Ugandan jurisdiction at all. In order to sustain an admissibility challenge, then, the legislation implementing the proposed special division must ensure that, even if a regime of alternative sentences is adopted, those sentences retain the potential severity to indicate a clear intent to bring the accused to justice. To that end, the Ugandan government would be well advised to ensure that the low end of penal sanctions available to the special division is not out of proportion with the low end of sentences regularly available for such crimes and that the special division maintain the flexibility to impose severe punishments (though not necessarily the death penalty) should it so choose.

4.2. An admissibility challenge by an indictee

Article 19 of the Rome Statute also allows an indictee of the Court to bring an admissibility challenge to the PTC. Such a challenge by an indictee raises many of the same questions as would a challenge by the Ugandan Government. However, in the case of a challenge by an indictee, the PTC may well adopt a vision of admissibility based around the rights of the accused himself, rather than on the protection of State sovereignty. This alternate vision of admissibility could well have important consequences for the ultimate outcome of the challenge. The estoppel argument, which might limit the success of an admissibility challenge by the government would be inapplicable in the case of a challenge by an accused, precisely because the accused was not involved in the self-referral and could not be said to have waived his rights to trial in the natural or home forum. Similarly, the earliest opportunity requirement may be less problematic for the accused since the accused would only know that he would be prosecuted in a domestic forum once he was indicted by domestic authorities. As long as the indictee's challenge was timely brought after the filing of domestic charges against him, he should be able to satisfy the earliest opportunity requirement.

With respect to the evaluation of the proposed domestic proceedings in an admissibility challenge brought by an indictee, the basic tests of Article 17 would remain the same as they were in the case of an admissibility challenge by the government. However, the vision of admissibility as a protection of the rights of the accused might change the perspective of the PTC. Specifically, the PTC might look somewhat more forgivingly on procedural deficiencies in the domestic forum. After all, the accused's challenge to admissibility would be a clear reflection of his preference for prosecution in the domestic forum despite any eminencies that such a forum might have. That said, in the case of a challenge by an accused, the PTC might well examine more strictly whether the domestic forum was indicative of a genuine intent to bring the accused to justice. The PTC might, for example, want to fully satisfy itself that the accused was not challenging admissibility simply out of a desire for a perhaps lighter sentence available in a domestic forum. Such stricter scrutiny of the intent to bring the accused to justice could lead the PTC to find that a regime of alternative sentences under domestic law would leave the case admissible before the ICC.

In the case of a challenge by the accused, one further issue arises: must the accused already be in custody before bringing an admissibility challenge. This is a particularly important consideration in Uganda, where Kony might well prefer to challenge admissibility before submitting to Ugandan jurisdiction such that he could not be transferred to the ICC upon surrender. The accused's right to challenge admissibility would appear to attach at the time that the ICC's activities interferes with the accused's personal liberty, namely at the time an arrest warrant is circulated against him.[155] From that perspective, the accused would be entitled to challenge admissibility from the time the arrest warrant is issued. However, the success of any challenge

155 This was the approach taken by the International Court of Justice in the Arrest Warrant Case, in which the very circulation of an arrest warrant against a Congolese government official was deemed to interfere with Congo's rights and the rights of the accused. See

by the accused ought to require that the accused be in custody of either the state seeking to prosecute or the ICC. Unless the accused is in custody, the state seeking to prosecute can not effectively do so and, hence, the admissibility challenge should fail.

4.3. Admissibility as an opportunity to shape domestic justice processes

The Preamble to the Rome Statute makes clear that the ultimate goal of the ICC is to "put an end to impunity."[156] As one of the authors has argued extensively elsewhere, to the degree that the goal of ending impunity can be achieved through domestic institutions, the ultimate purpose of the ICC is still served and, perhaps can even be achieved far more effectively and efficiently than it could be by the Court operating alone.[157] In fact, the Preamble to the Rome Statute recognizes the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[158] Given the limited resources available to the ICC and the fact that such an international tribunal can, at best, prosecute a few individuals each year,[159] the ultimate goal of ending impunity may be best served through a policy of positive or proactive complementarity, whereby the ICC seeks to encourage and perhaps even assist national jurisdictions in undertaking their own investigations and prosecutions as an alternative to international prosecution.[160]

While the implementation of a policy of proactive complementarity might ordinarily be seen as falling within the remit of the Prosecutor who could, for example, use the threat of ICC investigation to encourage national jurisdictions to investigate and prosecute international crimes themselves, in the case of an early admissibility challenge, such as that which may be brought in the Uganda situation, the PTC may have a key role to play in promoting the shape and structure of domestic justice efforts. More specifically, national governments will look to the jurisprudence of the PTC to determine the acceptable range of domestic proceedings that can satisfy Article 17 of the Rome Statute. Particularly where States in on-going conflicts seek to design judicial mechanisms that balance the need to secure the peace with the obligation to provide justice, they will look to decisions from the PTC to determine the flexibility they retain to satisfy those two potentially conflicting goals. The Ugandan case will likely provide that critical precedent.

From this perspective of balancing peace and justice in conflict and post-conflict environments, an admissibility challenge from Uganda gives the PTC an extraordinary opportunity to begin to map out the contours of acceptable domestic proceed-

ICJ, *Arrest Warrant of April 11th* 2000 (Democratic Republic of the Congo v. Belgium), Judgment, Merits, para. 78, D.2, 41 ILM 536 (2002).

156 Rome Statute, at Prmbl.

157 For a full discussion of proactive complementarity, see Burke-White, *supra* note 25.

158 Rome Statute, at Prmbl.

159 See Burke-White, *supra* note 25.

160 See Burke-White, *supra* note 25.

ings. In setting those contours, however, the PTC must tread carefully. If its reading of the Statute is too restrictive as to the design of domestic proceedings, the PTC runs the risk of destabilizing a much needed peace process and perhaps exposing the Court to accusations of prolonging conflict and standing in the way of international peace and security. In contrast, should the PTC grant Uganda too much leeway, for example by allowing the government to undertake domestic prosecutions with maximum sentences of, for example, limited house arrest, it could undermine the goals of justice and accountability at the heart of the Rome Statute and irreparably damage the Court's reputation.

Should the Uganda situation result in an admissibility challenge, the PTC will face perhaps its greatest test to date. But, it also has an exceptional opportunity. The PTC will have to strike the right balance between granting States freedom to design domestic judicial responses to help end a conflict and the legitimate demands for justice and accountability. In the Uganda case, that balance may well lie in finding the right regime of alternative sanctions. Uganda will have to present a far more detailed proposal for domestic accountability to the PTC and the Court will have to respond. Ideally, both sides will recognize the goal of a mutually acceptable solution, constrained on one hand by the requirements of justice in the Rome Statute and on the other by the need for peace and stability. That recognition will hopefully lead the Ugandan government to aim higher than it otherwise would with respect to justice and sentencing and lead the PTC to accept something less than perfect accountability.

The difficulty for both sides in this process is that they are operating largely in the dark with little guidance as to either the PTC's interpretation of Article 17 or the ultimate outcome of a domestic process in Uganda. If the Ugandan government's proposed domestic process presented in an admissibility challenge is inadequate, the PTC will be fully justified in deeming the case still admissible before the ICC. The PTC should, however, take that opportunity to provide guidance as to what would constitute a sufficient domestic proceeding to satisfy Article 17, grant the Government the opportunity to revise the domestic proceedings if need be, and allow a second admissibility challenge as appropriate. In the process, however, the PTC will send a powerful signal to states and the international community as to the flexibility states retain to resolve internal conflicts despite being party to the Rome Statute, the acceptability of compromises between peace and justice, and the Court's perception of its own role at the intersection of law and politics, peace and justice.

Chapter 8 The International Criminal Court and its relationship to Non-Party States

*Robert Cryer**

1. Introduction

This essay is intended to discuss the relationship between the International Criminal Court and third States (i.e. non-parties to the Rome Statute).[1] To provide a little context, however, it is worth going back in time, to 1998. Then, when the Rome Statute was being drafted, there was considerable discussion about the number of ratifications necessary to bring the statute into force. Some wanted there to be a low number, to get the Statute into force as fast as possible. Others thought that to ensure the Court was representative a high number of states ought to be required.[2] Some saw this as a way of ensuring the ICC deserved its definite article, others saw it as "an American plot to ensure that the Court would never be created".[3] Contrary to the best hopes of the hopeful, and the worst fears of the fearful, 108 States have ratified the Statute,[4] thus there are now more members than non-members in the world. As such, non-parties to the Statute are in the (State-based) numerical minority.

But, as is well-known, this is the positively-spun side of the story; there are many large and powerful States outside the Rome Statute regime, many of whom are happy to let the US pay the diplomatic price for leading the early opposition to the Court.[5]

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1 2187 UNTS 90.

2 See T. N. Slade & R. S. Clark, 'Preamble and Final Clauses', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 422, 444-5.

3 W. Schabas, *An Introduction to the International Criminal Court* (3rd ed., 2007), xi.

4 And not just, as was feared initially, States who would not have considered themselves possible candidates for the exercise of the Court's jurisdiction.

5 On the US position see e.g. B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) Chapter IX; D. P. Forsythe, 'The United States and International Criminal Justice', (2002) 24 *Human Rights Quarterly* 974; The criticisms are not legally convincing though, see e.g. D. Akande, 'The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *JICJ* 618.

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The ICC has to operate in an international environment that is not entirely conducive to its actions.[6] This is not just because some States are, at best, ambivalent towards the Court,[7] but also because of structural features of the international legal order. Irrespective of possible developments towards a more cosmopolitan international order,[8] the current international legal system remains, to a large extent State-based, decentralised and consensual in nature.[9] Although there are collective problems that require collective solutions,[10] that does not, in itself, mean that the international legal system has fundamentally restructured itself.[11] As yet, general international law has not developed to a position in which States are obliged to become members of any particular international organisations, or to assist international organisations of which they are not members.[12]

This latter point is no more than a recapitulation of one of the fundamental tenets of treaty law, the *pacta tertiis* rule.[13] Whether it is liked or not, third States, absent Security Council action, have no obligations toward the Court other than to accept it as

6 For a short discussion see O. Bekou & R. Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 *International & Comparative Law Quarterly* 49, 54-5.

7 For pieces on other State's at best ambivalence to the ICC see, Hirad Abtahi, 'The Islamic Republic of Iran and the ICC, (2005) 3 *JICJ* 635; L. Jianping & W. Zhixiang, 'China's Attitude towards the ICC', (2005) 3 *JICJ* 608; U. Ramanathan, 'India and the ICC' (2005) 3 *JICJ* 627; B. Tuzmukhamedov, 'The ICC and Russian Constitutional Problems', (2005) 3 *JICJ* 621.

8 See, for example, R. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (1998), or, at a more avowedly idealistic level, P. Allott, *Eunomia* (1990).

9 See e.g. A. Cassese, *International Law* (2nd ed., 2005) Chapter 1.

10 The urgent necessity of averting environmental degradation, and perhaps, collapse, immediately springs to mind.

11 Although some assert that the creation of the International Criminal Court has caused or reflected a fundamental change in the way in which international law is made (see e.g. L. N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002)) there is no reason to assume that the Rome Statute was seen, in particular by its drafters, as being based on such a change, nor is it is advisable to see it as such. See R. Cryer, 'International Criminal Law vs State Sovereignty: Another Round?', (2005) 15 *European Journal of International Law* 979, 982-5.

12 As was accepted though in the *Reparation for Injuries Suffered in the Service of the United Nations* opinion (1949) ICJ Reports 151, 185, International organisations may have objective personality. The ICC has such personality, as is evidenced with the relationship agreement between the UN and the ICC, (Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, October 2004, ASP/3/Rev.1). Since the UN is not a party to the Rome Statute, the agreement must be based on the understanding that the UN (and probably its membership) accepts that the ICC is an international legal person in spite of the fact that not all UN members are parties to the Rome Statute.

13 See e.g. Vienna Convention on the Law of Treaties, Article 34, see A. Aust, *Modern Treaty Law and Practice* (2nd ed., 2007), 256-61.

an international legal person,[14] and (for those who are still signatories) the somewhat vague obligation in Article 18 of the Vienna Convention of the Law of Treaties not to defeat the object and purpose of the ICC Statute unless and until the signatory informs the depository that it does not intend to become a party to the relevant Treaty or it becomes clear that the treaty will not enter into force).[15] This is not to say that there can be no effect on third Party states, as Danilenko put it

> "The *pacta tartiis* principle does not mean that treaties may not have certain indirect effects on non-States Parties. Practice suggests that multilateral treaty arrangements often create legal and political realities that could in one way or another affect political and legal interests of third States and impose certain constraints on the behaviour of non-parties. This constraints may not result not from imposition of legal obligations on Third States, but from the fact that a large portion of the international community adopts, in conformity with international law, a decision to deal with contemporary problems of community concern by creating appropriate institutions and procedures."[16]

It is against this background that we need to understand the role of the ICC in the international legal order. And it is from this understanding that we must move on to discuss the nature of the Court itself.

2. The law on point[17]

The drafters of the ICC were not unaware of the possible problems facing the Court, and the fact that there were likely to be States that were not parties to the Court. As a result, the drafters structured aspects of the Statute to take it into account. For example, the drafters decided that absent Security Council authorisation, the ICC ought not to have universal jurisdiction, limiting it instead to situations (in relation to States parties) that occur on their territories or are committed by their nationals.[18] The drafters of the Statute thus sought to ensure that the Court was on the safest of jurisdictional grounds.

This does not, as noted above, mean that there are no possible effects for third States. The ICC may exercise jurisdiction over crimes committed by nationals of non-parties when they commit crimes on the territories of States party to the Statute and (although this seems to have raised less ire) crimes committed on the territories of

14 Such an obligation flowing from the objective nature of its international legal personality.

15 Two States, the United States and Israel, have so notified the Secretary-General of the UN of their intention not to become parties.

16 G. Danilenko, "The Statute of the International Criminal Court and Third States" (1999-2000) 21 *Michigan Journal of International Law* 445, 448.

17 For an early piece on this see Danilenko, ibid.

18 Rome Statute, Article 12. Article 12 (c) also permits non-parties to consent to the jurisdiction of the court on an *ad hoc* basis. Only Cote D'Ivoire has done so to date, and little progress has been made in relation to that situation.

non-State parties by nationals of States parties. Neither of these third party effects are unlawful,[19] and indeed this limitation has been critiqued by a number of commentators, from the other side, that in failing to grant universal jurisdiction to the ICC, the drafters left scope for impunity.[20] Owing to the structure of the court, and the fact that non-parties have no duties to co-operate with the Court, the limitation of the jurisdiction in this manner is quite sensible.[21] The best way for the ICC to obtain an effective form of universal jurisdiction is for the Rome Statute to achieve universal ratification, something which the Assembly of States Parties expressly accepted in 2006.[22]

Still, it might be speculated that some parties to the Rome negotiations were perfectly aware of the fact that they were not likely to become Parties to the Rome Statute and therefore sought to maximise their (third party) rights under the Statute even if they did not ratify it. Hence, for example, Article 18 (1) of the Rome Statute provides that, unless the Security Council has referred the matter to the Court, where the Prosecutor has decided to initiate an investigation "…the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned." The structure of the duty, which refers to both States parties and "those States" makes it clear that the latter are non-State parties.

Those non-State parties are, pursuant to Articles 18 and 19, also allowed to challenge the jurisdiction of the ICC on the grounds of complementarity. Article 18 (2) provides that

> "[w]ithin one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation".

As can be seen, this is a mandatory provision, and the Prosecutor must stop investigating, unless the Pre-Trial Chamber expressly authorises him to do so (which it can only do on complementarity grounds). To assist the Prosecutor in undertaking an

19 See Akande, *supra* note 5.

20 H.-P. Kaul, "Preconditions to the Exercise of Jurisdiction" in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2003) 583, 613.

21 See Bekou and Cryer, *supra* note 6. The Special Tribunal for Lebanon is likely to suffer from the problem of having jurisdiction over events where there is no duty to cooperate on some of the most important States, see B. Swart, 'Cooperation Challenges for the Special Tribunal for Lebanon', (2007) 5 *JICJ* 1153.

22 "Universality of the Rome Statute…is imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice". ICC-ASP/5/Res 3 Annex 1.

oversight role in relation to those investigations, Article 18 (3) permits to the Prosecutor to return to the matter: "The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation." This right of the Prosecutor is backed up by an obligation on States Parties to provide information on the investigations or prosecutions:

> "When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay [emphasis added]."[23]

As can be seen, however, this is one area where the Statute lets the Court down. It gives the Prosecutor the positive things to bring to non-Party states, but it does not give a stick to go with the carrot. Although they can invoke complementarity, third States can do so without becoming subject to obligations to co-operate with the Court in relation to overseeing the prosecutions form the point of view of complementarity or co-operating thereafter.[24] There is, in short, no *quid pro quo* for the ICC with regard to what the Statute gives to third States. This is unfortunate, as although Article 36 of the Vienna Convention on the Law of Treaties makes it perfectly possible to grant rights to third States, as Simon Young has noted, it requires non parties seeking to enforce rights to "do so in the prescribed manner, with the attendant duties and obligations".[25] There would seem to be nothing objectionable about requiring a State seeking to prevent the ICC acting coming under an obligation to cooperate with the oversight mechanisms as a result of it having taken advantage of the provisions of the Statute designed for its benefit. This, however, was not the route taken by the drafters.

In the context of Article 18 the Prosecutor has tried to find a way to make a virtue of the necessity of (in practice) inviting complementarity challenges, by stating that

> "[t]he exercise of the Prosecutor's functions under Article 18 of notifying states of future investigations will alert States with jurisdiction to the possibility of taking action themselves. In a case where multiple States have jurisdiction over the crime in question the Prosecutor should consult with those States best able to exercise jurisdiction (e.g. primarily the State where the alleged crime was committed, the State of nationality of the suspects, the State which has custody of the accused, and the State which has evidence of the alleged crime) with a view to ensuring that jurisdiction is taken by the State best able to do so."[26]

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23 Rome Statute, Article 18 (5).

24 When it comes to duties to assist the Court, these can only come into being by express consent of the Parties, Rome Statute, Article 87 (5).

25 S. N. M. Young, 'Surrendering the Accused to the International Criminal Court', (2000) 71 *British Yearbook of International Law* 317, 338.

26 Paper on some policy issues before the Office of the Prosecutor, available at <www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> at 5.

Still, as this implies, complementarity therefore does at least provide the Prosecutor with an argument about the importance of States, including third States, prosecuting international crimes themselves, which is, of course, one of the roles of the Court. Interestingly, pursuant to Article 93 (10) (c), the right to provide assistance to national jurisdictions in prosecuting, *inter alia* crimes subject to the jurisdiction of the Court is expressly extended to assistance to non-State Parties.

Another area of importance where the Rome Statute shows considerable respect for the interests of non-parties is immunities. Although Article 27 of the Rome Statute provides that procedural immunities are inapplicable before the ICC, Article 98 of the Statute protects immunities owed to non-party States by providing that states parties to the Statute are not obliged to "act inconsistently with its obligations under international law with respect to the 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". As has been said elsewhere,

> "[t]he interplay of Articles 27 and 98 (1)…creates a regime wherein States Parties agree to relinquish all immunities in relation to ICC requests concerning their own nationals, representatives or officials, while still respecting the existing …[personal]…immunities of States which have not joined the ICC Statute system."[27]

Hence, the Statute is in fact, contrary to the arguments of many critics,[28] quite solicitous of the rights of non-Party states. The Rome Statute is certainly not in advance of current international law.[29] This, however, is far from the end of the story when it comes to the relationship between the ICC and non-parties.

3. The Court's Janus-faced nature

Having discussed (briefly) the legal regime surrounding the Court's relationship with third parties, it is time to move into a somewhat more contextual realm. When doing so, it is fundamentally important to draw a distinction between two aspects of the Court and its work. This is the distinction between what might be described as the "juridical" and the "diplomatic" roles that the Court has. On one hand, the Court is a judicial body, and it is beyond doubt that the decisions it makes must, as a criminal court, be based on the law. That is not a negotiable issue. But within decisions there are degrees. Whilst they must be based on the law, there is also a careful balance to be made between what is necessary for a decision and attempts to clarify more general aspects of the law, especially when it is not necessary to do so. Against this background, it is key to understanding the Court to remember that the ICC is, as well

27 R. Cryer, H. Friman, D. Robinson & E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2007) 440.

28 David Scheffer, 'The United States and the International Criminal Court', (1999) 93 *American Journal of International Law* 12; Ruth Wedgwood, 'The International Criminal Court: An American View', (1999) 10 *European Journal of International Law* 93.

29 See *supra* note 5.

as a judicial body, an international organisation, and one which, if it wants anything (including ratifications or accessions) from non-State parties, it has to persuade them to give it those things. Therefore, of necessity, it has to have, at some level, a diplomatic role. It has to convince States to grant it assistance, and there are some people who are better at this than others. Nonetheless, of course, a careful balance has to be drawn in this circumstance between personnel in the Court with experience of such affairs, and with the requirements of judicial propriety. There are various different ways in which this issue manifests itself.

3.1. Interpreting the Statute

The first of these is the simple fact that, the Court's early practice is being scrutinised closely by non-State parties, some of whom are adopting a "wait-and-see" approach to ratification of the Statute, and are therefore looking closely at the early jurisprudence of the Court to determine its approach, and fidelity, to the Statute. Others are looking for sticks with which to beat the Court, accusing it of judicial activism, or overbroad interpretations of the Statute. This is not a new fear, it manifested itself in the drafting of the Rome Statute,[30] and the Elements of Crimes.[31] But it has not gone away, and if the Court is to gain the confidence of non-Party States (or, more optimistically, putative parties) then it needs to take certain precautions. In other words, the Court must be careful in its interpretations of the Statute. States are watching closely, and over-expansive readings, as have been suggested at times, have to be very carefully avoided when interpreting the Statute. The Court scares third parties, as well as States parties, at its peril. Especially if it needs anything from them, be it co-operation or possible ratification.

The balance that has to be drawn here is a complex one, and it would be folly to pretend to have precise answers to these very difficult problems, but it is worth bearing in mind

> "international judges are keenly aware that while their rulings can be sweeping and influential, they work in *fragile institutions*. Judges cannot afford to ignore the larger circumstances in which their courts are situated, which subject them to pressures from competing loyalties, inadequate funding, public expectations, and the currents of politics".[32]

As Terris, Romano and Swigart have said, "International judges…face somewhat different problems from their national peers. Unlike national judges, international

30 See, e.g. R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) Chapters 5-6.

31 See, e.g.. W. Schabas, 'Interpreting the Statutes of the ad hoc Tribunals', in L. C. Vohrah *et al* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (2003) 847, 887; J. K. Cogan, 'Competition and Control in International Adjudication', (2008) 48 *Virginia Journal of International Law* 411, 421-2.

32 D. Terris, C. P.R. Romano & L. Stewart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (2008) at xx.

judges do not inherit courts of law; they need to build them. The credibility and legitimacy of their courts cannot be relied upon, but must be established."[33]

This traces the distinction made by Sir Hersch Lauterpacht between courts that have mandatory jurisdiction and those that have voluntary jurisdiction.[34] He, rightly, said that the principles of interpretation in the latter instance are necessarily less free than in the former. As he said, in the context of the ICJ

> "If governments are not prepared to entrust with legislative functions bodies composed of their authorised representatives, they will not be prepared to allow or tolerate the exercise of such activity by a Tribunal enjoined by its Statute to apply the existing law…With this is connected a further reason for restraint and caution in the international sphere, namely, the fact that of the voluntary nature of the jurisdiction of international tribunals. An international court which yields conspicuously to the urge to modify the existing law-even if such action can be brought within the four corners of a major legal principle-may bring about a drastic curtailment of its activity. Governments may refuse to submit disputes to it or to renew obligations of compulsory judicial settlement already in existence".[35]

As the above implies, Lauterpacht was particularly of this view when it came to questions of jurisdiction.[36] Still, perhaps here goes a little too far, and indeed, elsewhere in his *magnum opus* on point provides his own counterpoint:

> "At the same time, the necessity for bold judicial action is particularly great in the international sphere, *i.e.* in a system of law in which legislative opportunities for modifying rigid, unjust and obsolete rules are somewhat nominal. The result of the clash is not without interest, It shows itself in both the in the tendency to caution and the apparent desire to create the appearance of caution."[37]

It is no secret that the ICJ's jurisprudence, at least since the *South West Africa* Affair bears out the difficult relationship between innovation and keeping the parties convinced of the sensitivity of the Court.[38] Indeed, even an ex-President of the ICJ has explained in a piece that defends a pragmatic, "expedient" approach to aspects of that Court's jurisdiction:

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33 Ibid., 103-4.

34 Hersch Lauterpact, *The Development of International Law by the International Court of Justice* (1958) Chapter 6. M. Bedjaoui, 'Expediency in the Decisions of the International Court of Justice', (2000) 71 *British Yearbook of International Law* 1, at 17-8.

35 Lauterpacht, *supra* note 34, at 76.

36 Ibid., 91.

37 Ibid., 77.

38 See E. McWhinney, *The World Court and the Contemporary International Law Making Process* (1979), Chapter II. For an enlightening view on the drafting of ICJ Judgments, see H. Thirlway, 'The Drafting of ICJ Judgments: Some Personal Recollections and Observations', (2006) 5 *Chinese Journal of International Law* 15, 16.

> "A decision dictated by expediency is therefore one which, while remaining legal, is inspired by feelings of appropriateness, wisdom or prudence. These are suggested to the International Court by its desire to promote justice and peace between States."[39]

This is not to say that the ICC ought to be politicised in its decision-making. Far from it. The ICC, in the inspirational terms of David Bederman's, like all international organisations, has a soul,[40] and it is not the purpose of this chapter to suggest even an implicit Faustian bargain. It is a criminal court, and the criminal law aspects of its decisions ought to be based solely on legal concerns. Nonetheless, the ICC is, as mentioned above, a multifaceted body. There are various stages of its activities, most notably jurisdictional (including admissibility) and trial, and it would be naïve to deny that for the former (but emphatically not the latter) the ICC ought to have regard to the weight the (euphemistic) bridge will bear. To fail to do so will not only scare non-State parties, but also cause consternation with states parties, whom, lest it be forgotten, rightly or wrongly, control the budget, one of the most effective mechanisms of control that exist over the court.[41]

In aspects of the Court work that relate to its institutional aspects, rather than substantive criminal law, the fairly open nature of the language of the Rome Statute on matters such as complementarity means that there is room for the ICC to have regard to the acceptability of its jurisprudence to states.[42] It is worth noting that some early ICC jurisprudence has been criticized on the basis that it is over-adventurous with respect to complementarity.[43] In particular, William Schabas has described the approach of the Prosecutor and the Pre-Trial Chamber in the *Lubanga Case* as "impetuous",[44] as the Prosecutor argued, and the Chamber accepted, that the Court need not defer to the prosecution of Lubanga for crimes against humanity and genocide ongoing in the Democratic Republic of Congo, as they were prosecuting recruitment of child soldiers.[45] As Schabas says:

> "they took jurisdiction on the basis of an interpretation of the Statute which may be more intrusive with respect to the criminal justice of States than was ever intended. This could well have an impact on future ratifications of the Rome Statute. Many States are care-

39 Bedjaoui, *supra* note 34, at 3-4

40 D. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Lake Spartel', (1995-1996) 36 *Virginia Journal of International Law* 275.

41 See Bekou & Cryer, *supra* note 6, at 58, fn51.

42 The ICTY at least arguably done this with respect to the question of issuing subpoenae to State officials, see *Prosecutor* v *Blaškić*, Decision on the Requires of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-94-14/1-AR108, A.Ch., 29 October 1997.

43 See Schabas, *supra* note 3, at 182-4.

44 Ibid., 183; Matthew Happold (2007), 'Prosecutor v Thomas Lubanga', (2007) 56 *International & Comparative Law Quarterly* 713.

45 Pre-Trial Chamber I, *Prosecutor* v *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, ICC-01-04-01/06, paras 37-9.

> fully studying the first cases as the Court, to see whether its promise to defer to national prosecutions will be respected".[46]

Furthermore, it must be said, that some of the Court's decisions are not in-depth, and do not deal with all the arguments in great detail.[47] This is unfortunate, as the ICJ has found, it is important to show the "working-out" of the Court, to ensure that States who are looking at the jurisprudence of the Court are confident in its reasoning, and that their arguments will be taken seriously.[48]

Where matters come to trial, of course, the situation is different. A person is entitled, both by general international law,[49] and, more specifically, the Rome Statute, to be afforded a detailed list of fair trial rights, and it would be scarcely reconcilable with such rights for the ICC to determine the criminal law aspects of a case with regard to extraneous factors such as the extent to which States will accept that jurisprudence. The possibility of influence from States on matters relating to trial could only undermine the ICC, as some fear (or hope) has been the effect of the early practice of the Court in relation to Uganda (although admittedly, in this instance, not relating to ongoing trials),[50] and the *Barayagwiza* affair before the ICTR showed.[51]

3.2. Not just judges: Other practice

Of course, the judges are not the only interpreters of the Statute, the Prosecutor also has a role here, and a very important one. This is with respect to whether to initiate an investigation when he has either had a matter referred to him by States or the Security Council under Article 12, or by virtue of the *proprio motu* powers provided for in Article 15 of the Statute.[52] The former two sets of powers have caused considerable controversy, in particular with respect to self-referrals,[53] and the Darfur

46 See Schabas, *supra* note 3, at 184.

47 Ibid., 182.

48 Lauterpacht, *supra* note 34, Chapter 3.

49 See generally S. Trechsel, *Human Rights in Criminal Proceedings* (2005); G. McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY', in G. Boas & W. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2005) 193.

50 For a discussion of this practice see M. Happold, 'The International Criminal Court and the Lord's Resistance Army', (2007) 8 *Melbourne Journal of International Law* 159.

51 ICTR, Appeals Chamber, *Prosecutor v Barayagwiza*, Decision, ICTR-97-19-AR72, 19 November 1999; ICTR, Appeals Chamber, *Prosecutor v Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) ICTR-97-19-AR72, 31 March 2000. See also W. Schabas, 'Prosecutor v Barayagwiza', (2000) 94 *American Journal of International Law* 563.

52 See generally Part III of this volume.

53 On which see J. Kleffner's contribution to this volume, Ch. 5.

referral.[54] Most diplomatically difficult, with respect to the initial decision to initiate an investigation, however, are those suggestions that the Prosecutor use his *proprio motu* powers, especially in relation to those which urged him to look into the situation in Iraq. In his initial response, the Prosecutor the Prosecutor took an approach grounded firmly in the Statute, noting that

> "38 Communications express the view that a crime of aggression took place in the context of the war in Iraq. The Court cannot proceed with respect to aggression until the crime is defined and the conditions for the exercise of jurisdiction set out. The Assembly of States Parties of the International Criminal Court may adopt such a definition to a review conference to be convened in 2009. Thus the alleged crime to which these communications refer does not fall within the jurisdiction of the Court."[55]

The emotions of the Prosecutor can only be speculated over, but the language of the response gives some reason to believe that he breathed a sigh of relief over this. The communications on Iraq, nonetheless kept on coming, necessitating a further response, which came in February 2006. It is worth setting out the manner in which he responded in detail. The Prosecutor began by emphasising the limited nature of his role:

> "While sharing regret over the loss of life caused by the war and its aftermath, as the Prosecutor of the International Criminal Court, I have a very specific role and mandate specified in the Statute. …The Rome Statute defines the jurisdiction of the Court and a limited set of international crimes…Unlike a national prosecutor, who may initiate an investigation on the basis of very limited information, the Prosecutor of the International Criminal Court is governed by the relevant regime under the Rome Statute. Under this regime, my responsibility is to carry out a preliminary phase of gathering and analyzing information, after which I may seek to initiate an investigation only if the relevant criteria of the Statute are satisfied.[56]

The Prosecutor clearly here is attempting to set out his own understanding of the importance of avoiding expansive claims of jurisdiction, thus ensuring that he adopted a position that is not overly threatening to states, whilst not appearing insensitive to applicants and victims. This approach though, also sets up the substantive aspect of the response, which reiterates, and expands upon his earlier comments:

> "The events in question occurred on the territory of Iraq, which is not a State party to the Rome Statute and which has not lodged a declaration of acceptance under Article 12

54 R. Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', (2006) 19 *Leiden Journal of International Law* 195.

55 ICC Press Release, Office of the Prosecutor, "Communications Received by the Prosecutor of the ICC", available at <www.icc-cpi.int/organs/otp/otp_com.html>, at 2.

56 ICC, Office of the Prosecutor, Iraq Response, 9 February 2006, available at <www.icc-cpi.int/organs/otp/otp_com.html> at 1.

> (3), thereby accepting the jurisdiction of the Court. Therefore in accordance with Article 12, acts on the territory of a non-State party fall within the jurisdiction of the Court only when the person accused of the crime s a national of a State that has accepted jurisdiction (Article 12 (2) (b)). As I noted in my first public announcement on communications, we do not have jurisdiction with respect to actions of non-State party nationals on the territory of Iraq.[57]…Some communications submitted legal arguments that nationals of States Parties may have been accessories to crimes committed by nationals of non-State parties. The analysis of the Office applied the reasonable basis standard for any form of individual criminal responsibility under Article 25."[58]

On this basis, the Prosecutor stated that there was not sufficient evidence that there were such instances of complicity. This is interesting, however, given that the ICC proceeded to an evidential evaluation. It might be thought that it was odd that the Prosecutor felt it necessary to make this further response. The reason seems to be that the Prosecutor was responding at least in part to a report submitted by the NGO Peacerights to the Court in 2004. The report, prepared after an enquiry by eight eminent international lawyers,[59] asserted that there was sufficient evidence to establish that in addition to using cluster weapons itself, the UK had also allowed its platforms to be used by US forces to fly sorties in which such weapons were used, including in built-up areas.

This was not quite the gravamen of the request to the Prosecutor, however. The report sought to use allegations of war crimes committed by the US to issue a collateral attack on the lawfulness of the War against Iraq. The report argued that British nationals could be held responsible for war crimes said to be committed by US nationals, owing to a joint criminal enterprise,[60] that joint enterprise being the crime of aggression against Iraq.[61] By doing so the report argued that the Court would not be acting *ultra vires* in declaring that the war in Iraq was unlawful, as in doing so the

57 Original footnote, "The Office examined arguments submitted subsequently that were based on alleged connections to the territory of States Parties, but in light of the applicable law under Article 21, the peripheral connections indicated by the available information did not appear to satisfy the requirements for territorial jurisdiction."

58 Ibid., at 3.

59 Bill Bowring chaired the Commission, the other members were Upendra Baxi, Christine Chinkin, Guy Goodwin-Gill, Nick Grief, René Provost, William Schabas and Paul Tavernier. B. Bowring, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (2008) at 64. The report (*Report of the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War During 2003*) is available at <www.peacerights.org/ documents/A%20IRAQ%20REPORT%20Final.doc>.

60 On which see, e.g. E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) pp. 94-110; M. Osiel, "The Banality of Good: Aligning Incentives Against Mass Atrocity" (2005) 105 Columbia LR 1751; S. Powles, "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?" (2004) 2 *JICJ* 606.

61 Peacerights Report, *supra* note 59, para 3.23.

court would not be exercising jurisdiction over aggression because it was not, in fact, trying someone for it:

> "In concluding that aggression had been committed, the ICC would not be exercising jurisdiction over aggression, as it would not be attempting to actually hold any person accountable for the crime. It would merely be reaching the view that the criminal enterprise of waging aggressive war had been committed as a preliminary circumstance to the prosecution of criminal acts over which it may exercise jurisdiction-namely crimes against humanity and war crimes."[62]

As the Chair of the Commission said, this interpretation "broke new ground".[63] Given that it dealt, in practical terms, with making a declaration of the criminal nature of the attack on Iraq against a third State, when the crime is not, as the report itself noted, within the jurisdiction of the Court, it might be expected that the Prosecutor would be sceptical. He was. The response took what was unquestionably the diplomatically most careful route:

> "Many of the communications received related to concerns about the legality of the armed conflict. While the Rome Statute includes the crime of aggression, it indicates that the Court may not exercise jurisdiction with respect to it (Article 5(2). This arrangement was established because there was strong support for including the crime of aggression but a lack of agreement as to its definition or the conditions under which the Court could act…In other words, the International Criminal Court has a mandate to examine conduct during the conflict, but not whether the decision to engage in armed conflict was legal. As the Prosecutor of the International Criminal Court, I do not have the mandate to address the arguments on the legality of the use of force or the crime of aggression."[64]

Whether or not it might have been at one level satisfying for him to attempt to adopt such an innovative approach to the jurisdiction of the Court, the Prosecutor here was clearly aware of the risks that accepting the Report's analysis would have for the relationship of the ICC with States. This was with respect not only with States Party to the Statute, (who would probably have been unhappy about it) but, more importantly, with non-Parties to the Statute, who would be brought within the jurisdiction over aggression of the Court for their actions outside of the territories of State parties. It would have involved declaring that the actions of the US to be aggressive. The response of the US to what it would (not without some justification) have considered an exorbitant exercise of jurisdiction are quite predictable.

The US would be unlikely to be the only non-State party who would cry foul at such a decision, as other States would be concerned that their actions could be "declared" upon by the Court by virtue of an allegation that there was a joint criminal enterprise involving some actions that could be considered to be aggression, war crimes

62 Peacerights Report, ibid., para 3.24.

63 Bowring, *supra* note 59, at 66.

64 Iraq Response, *supra* note 56, at 4.

or crimes against humanity. It must be said, the interpretation would certainly not have been in accordance with the understanding of the drafters of the provisions of the Rome Statute, and thus the Prosecutor's actions must therefore be seen as legally, as well as diplomatically, sound.

There is another side to the Prosecutor, however, when he is dealing with one non-party State: Sudan. Sudan is in a special position with respect to the Court owing to the Security Council referral of the situation in Darfur to the Court in Resolution 1593. This in addition to the requirement in that Resolution that Sudan cooperate with the Court does create a *sui generic* position for Sudan, as a non-Party that is nonetheless obliged, by virtue of its membership of the UN to cooperate with the Court. Perhaps as a result of this status, and the truculent attitude of the Sudanese government towards the court, the Prosecutor has made some less than diplomatic comments about Sudan. Hence in 2007, the Prosecutor reported to the Security Council that Sudan

> "[i]s not co-operating. The GoS [Government of Sudan] has taken no steps to arrest and surrender Ahmad Harun…Ahmad Harun is still allowed to play a role in this situation. As Minister of State for Humanitarian Affairs, he has been put in a position to control the livelihood and security of those people he displaced. The GoS has maintained him in this position with full knowledge of his past and present activities. GoS officials, far from taking steps to stop the crimes, publicly deny their assistance. These are clear indication of the support Ahmad Harun is receiving. Such active support to a person charged by the Court and to his activities warrants further investigations by the Office [of the Prosecutor]."[65]

In these circumstances, the Prosecutor has therefore taken a very strong view. That view being that not only is the Sudanese government in violation of its obligations towards the Security Council, but that the assistance granted to Harun may amount to crimes in the Rome Statute. Given that none of the offences against the Court provided for in Article 70 of the Rome Statute seem to be appropriate, it appears that he means complicity in one (or more) of the offences in Article 5. This is a bold (although not unjustified) approach, and it seems only explainable on the basis that the Prosecutor does not feel inhibited when dealing with a situation referred by the Security Council,[66] as it is the Council who ought to bear the brunt of any criticism.

4. Judges and diplomats

The necessity of understanding the context in which the court operates leads on to one of the criticisms that has been made of the early practice of the Court, (or to be

65 Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 December 2007, paras 3, 6.

66 Some go as far as to consider the ICC as best viewed as almost being two courts, one when it acts on the basis of State referrals or the Prosecutor's *proprio motu* powers and another when the Security Council has referred a matter, G. Fletcher & J. D. Ohlin, 'The ICC: Two Courts in One?', (2005) 4 *JICJ* 428.

more exact, the State parties' practice) which has been to elect, amongst the judges those with diplomatic experience.[67] There are those who have been critical of those appointments, on the basis that the judges should solely be drawn from the judiciary (or, where the critiques come from academics, from the judiciary and the academy). Although it is true that there are a number of judges on the Court who have come from backgrounds in government service, there are reasons to avoid undue critique of the court, and there are at least two reasons why there is more to this than a bipolar split between "pure" lawyers and those "tainted" with government service.

The first of these is that the primary ground upon which a person ought to be judged in this area is if they are a good lawyer or not. It would be invidious to discuss those at the Court, but two examples from elsewhere will suffice to show that those with governmental experience need not be anything other than first-rate judges. Both Sir Gerald Fitzmaurice and Philip Jessup had careers in government before moving to the bench. Whether or not all of their judgments are agreed with, their abilities as judges are beyond debate.[68] Therefore, the fact that there are those with diplomatic experience should not, in itself, be a matter of concern. Where there are possible reasons to doubt impartiality, Judges are required to recuse themselves from sitting,[69] and International Criminal Courts have, in the modern era, taken a sterner view of the grounds that require this than other international courts.[70]

There is, of course, the question of whether judges from government service will have been socialised into a certain form of thinking about international law, which favours the State.[71] There is the possibility of this, however, there are reasons to believe that this ought not be overstated. First amongst these is that there are sufficient other members of the court to balance this interest. As Terris, Romano and Swigart's explain:

> "Each person working for an international court carries a sense of how best to accomplish the job of justice, a sense created through long experiences in his home country

67 This is an in issue which is by no means unique to the ICC, see for example S. Rosenne, *The Law and Practice of the International Court of Justice* (4th ed., 2005) at 359.

68 See, e.g. J.G. Merrills, 'Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the International Court of Justice', (1977-8) 48 *British Yearbook of International Law* 183 J.G. Merrills, 'Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the European Court of Human Rights', (1982) 53 *British Yearbook of International Law* 115; O. Schachter, 'Philip Jessup's Life and Ideas', (1986) 80 *American Journal of International Law* 878.

69 Rome Statute, Article 41 (2), Rule 34, see C. Steans, 'Situations that May Affect the Functioning of the Court' in Roy S. Lee *et al* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 284, at 300-9.

70 See Y. Shany & S. Horowitz, 'Judicial Independence in the Hague and Freetown: A Tale of Two Cities', (2008) 21 *Leiden Journal of International Law* 113. Earlier international criminal courts were not as fastidious, see N. Boister & R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), 83-4

71 See, generally e.g. L. V. Prott, *The Latent Power of Culture and the International Judge* (1979).

> surrounded by others with a similar understanding of the world or, alternatively, in the expatriate or diplomatic circles in which he grew up or served professionally before joining the court. In…judicial institutions…tensions related to different worldviews may arise, not only inside the courts themselves, which are characterized by alliances and hierarchies like other large institutions, but also in relation to the work they perform and the constitutencies they serve. Within these tensions, however, there exists an enormous potential for forging new and powerful collective approaches to justice that can still honor the multiplicity of cultural understandings found both inside the courts and around the world at large".[72]

Second, even accepting that such socialisation necessarily affects the approach of lawyers at a conscious or other level,[73] the contrasting argument might be made, that they act as a counterbalance to any unreasonably expansionist tendencies on the part of other members of the court. This relates to one of the major arguments in favour of having some members on the court with diplomatic (legal) experience. Their reading of the runes on what will prove beyond the tolerance of states is likely to prove useful for the court as a whole. In other words,

> "because international courts tackle very different sets of international and transnational problems in various legal and political context, a bench made of a blend of people with different backgrounds is a crucial asset. Indeed, each of the three basic pools from which candidates are drawn contributes uniquely to the blend. Diplomats can provide an understanding of the larger political framework within which the case is embedded, as well as potential ramifications of judgments. Academics are able to connect the judgment to the larger construction of international law, providing the formal correctness and consistency necessary to buttress the legitimacy of the ruling. National judges know, obviously, how to judge…Each group naturally has weaknesses as well. Diplomats tend to be too deferential to governmental and systemic interests and often argue for the status quo. Academics are often accused of being incapable of participating in a consensus, of being too abstract, and of being "maximalists" who are disinclined to make the necessary compromises of judicial work. National judges might have too little understanding and appreciation of international law and may not be as worldly as those in the other groups."[74]

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72 Terris, Romano and Swigart, *supra* note 32, at 62-3. They also note, ibid., at 36-7, that the collective nature of much judicial work helps with quality.

73 And there is certainly evidence to the contrary. Philip Allott, for example, began his career as a government lawyer, and used his experiences to come up with a radical critique of the current international legal order and international lawyers, see. e.g. *Eunomia, supra* note 8. His views on courts are similarly radical, see P. Allott, 'The International Court and the Voice of Justice', in V. Lowe & M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1995). For his views on government lawyers see P. Allott, 'The International Lawyer in Government Service: Ontology and Deontology', (2005) 23 *Wisconsin International Law Journal* 13.

74 Terris, Romano and Swigart, *supra* note 32, at 64.

A balance, naturally, has to be struck here, and much must be left to judgement, but courts must be careful, whilst respecting the reasonable expectations of states, to ensure their institutional integrity, and have to remain independent of states.[75] Finally, it may also be pointed out that socialisation is more than a one-way process, and being in the ICC itself is a part of a socialising process that operates on such people.[76]

4.1. Judicial diplomacy

The next thing on point which needs discussion is that the ICC needs to engage in diplomatic work. Hence it is necessary to accept that when the ICC takes time (and spends money) on outreach work with States not parties, this is a useful thing. The Assembly of States Parties, as was seen at the outset of this chapter, has made clear that it views universal ratification as a goal, and this will not happen without outreach work with non-parties. Therefore, as the ICC itself has said:

> "The primary responsibility for promoting ratification of the Rome Statute belongs to the States Parties and other supporters of the Court and not to the Court itself. Nevertheless, the Court contributes to others' efforts to achieve universality by providing information about its functions and role to interested audiences."[77]

Further to this, President Kirsch (an ex-Canadian diplomat) visited Japan a number of times to provide information about the Court, which helped contribute to Japan's accession to the Rome Statute, a major boost for the Court. He has also visited, *inter alia*, Turkey, Guatemala, Ukraine and Chile, and received visits from many other governmental delegations at the Court, and representatives from Inter-Governmental organisations such as the Arab League.[78]

There has also been considerable outreach activity in the non-governmental sector, particularly in the US, where ICC President Kirsch has undertaken considerable work to increase knowledge of, and support of the ICC amongst those outside the government. The reason for this, is, in his words,

> "I have found for a very long time that one of the best ways to ensure that the International Criminal Court ...has the support it needs to succeed in its mission is through providing accurate and as complete as possible about the Court."[79]

75 Ibid., 160.

76 Prott, *supra* note 71, at 35-8.

77 Report of the International Criminal Court 31 August 2007, A/62/314, para 42.

78 Ibid. See also ICC, Press Release, ICC-CPI-20080307-PR292-ENG.

79 P. Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law', (2006-7) 22 *American University International Law Review* 539; see, similarly, P. Kirsch, 'The International Criminal Court and the Enforcement of International Justice', (2005) 17 *Pace International Law Review* 47.

This is important work if a long term view is taken, and it might, admittedly a little optimistically, be noted that there has been, quietly, been something of a thaw towards the ICC in the Bush administration in the past few years, and both the Republican nominee (John McCain) and most of the Democratic candidates have expressed some degree of support for the ICC,[80] a large change from the Bush-Kerry competition of 2004, in which the ICC was a topic in which the candidates appeared to involve themselves in a competition to cast greater aspersions on the utility and advisability of the Court. The thaw that can be seen in US relations towards the Court (which includes quietly providing some assistance in relation to the Darfur investrigations) seems unlikely to have occurred in the absence of some (private) contact.

The difficult question is how these activities need to be balanced against the judicial work of the court. This is again a difficult issue, but we do have some guidance, primarily from the code of judicial ethics which the ICC has promulgated. According to the Code, Judges are not to engage in any activities that are "likely to interfere with their judicial functions or to affect confidence in their independence."[81] This is not intended, however, to prevent them from doing or saying anything, Article 9 provides, though, that Judges "shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality…While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and avoid expressing views which may undermine the standing and integrity of the Court". Their extra-judicial activities are limited to those that are not "incompatible with their judicial function…or that may affect or may reasonably appear to affect their independence or impartiality." These guidelines, although at something of a level of generality, do provide the basic framework for the judges to understand the appropriate boundaries, such that making any promises about possible cases or situations that may arise for a state would be inappropriate, but that there is nothing wrong in explaining the Court and its activities to states. Again, the watchwords here must be care, prudence and sensitivity to how things will appear to others.

5. Conclusion

The ICC, is, despite its prominence, still a young institution, that it only just starting to find its proverbial feet. This is not an easy thing to do, in particular because the international environment it operates in is an intensely political one, and the issues it deals with are often related to matters of high State policy and interest. To take an example from a situation relating to a state party, the politics of engagement of the ICC in Uganda are difficult, and highly contested.[82] The ICC has not been pitch-per-

80 The American Society of International Law have a very useful collection of the candidates' views available at <www.asil.org/ilo8/il2008.html>.

81 ICC Code of Judicial Ethics, ICC-BD/02-01-05, Article 2.

82 See, e.g. T. Brook, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2007).

fect in all of its approaches and actions;[83] however, this is only to be expected as the institution goes through its early years. Learning processes take time. For the most part, though, the ICC has, with respect to non-Party states, adopted a largely sensible approach, mixing diplomacy and care in its approaches to those States. Where it has not, it risks scaring states, both parties and non-parties alike. Indeed, much of what has been suggested here, prudence, sensitivity to context and careful reasoning is at least as important for the ICC to bear in mind with respect to State parties, who, after all will only support, cooperate with, and fund, the Court to the extent to which they trust it.

83 See, e.g. M. Cherif Bassiouni, "The ICC-*Quo Vadis*" (2006) 4 *JICJ* 421 A. Cassese, "Is the ICC Still Having Teething Problems" (2006) 4 *JICJ* 434.

Chapter 9 The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC

David Tolbert and Aleksandar Kontic***

1. Introduction

As the first international tribunal of its kind,[1] the International Criminal Tribunal for the former Yugoslavia (ICTY) has been a groundbreaking institution in many respects. While the Tribunal's work has principally focused on carrying out investigations, issuing indictments, and conducting trials and appeals, there has been, somewhat understandably, less attention given to its impact on the former Yugoslavia itself and particularly on the ICTY as an instrument of transitional justice. Nonetheless, in creating the ICTY, the UN Security Council clearly linked the Tribunal's judicial activity to establishing the basis for peace and reconciliation in that region.[2] Indeed, the Security Council specifically expressed its conviction that the establishment of the ICTY would not only bring about justice but would also 'contribute to the restoration and maintenance of peace'[3] in the region. Thus, the question of how the ICTY has contributed as an institution to these goals is important in terms of evaluating

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1 While the Nuremburg Military Tribunal (NMT) is clearly a predecessor to the ICTY and other international courts and tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), the ICTY was the first such tribunal established by the United Nations and thus in a number of important respects is the first of its kind.

2 S.C. Res. 808, UN Doc. S/RES/808, 22 February 1993; S.C. Res. 827, UN Doc. S/RES/827, 25 May 1993.

3 Ibid., at para. 9.

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its overall performance as well as learning lessons for future international courts and tribunals.

The ICTY's mandate gives it 'the power to prosecute persons' who committed war crimes, crimes against humanity, and genocide in the territory of the former Yugoslavia since 1991.[4] While the ICTY's jurisdiction is concurrent with national jurisdictions, it is nonetheless clear that the Tribunal, which was given primacy over national authorities, was intended as the principal purveyor of justice over these crimes.[5] Over time, that mandate has been altered to apply to the prosecution of only the most senior leaders accused of committing the most serious crimes during the relevant time period in the region.[6] This shift in responsibility foreshadowed the approach taken by the UN in establishing other international and hybrid courts and tribunals, such as the Special Court for Sierra Leone (SCSL),[7] which explicitly limits the role of that court to the prosecution of those individuals 'bearing the greatest responsibility' for the relevant crimes. Moreover, the International Criminal Court (ICC) Statute adopted a system of 'complementarity',[8] which essentially limits that court to prosecuting those persons which national authorities are 'unwilling or unable' to bring to justice, thus leaving the ICC to focus on the most serious perpetrators and crimes.[9]

As the ICTY's responsibility has shifted from a broad approach of prosecuting all individuals accused of committing the relevant crimes to a more narrow focus, i.e., concentrating only on those individuals who are most responsible for the most serious crimes, a division of labour between the ICTY and national prosecutors and courts has emerged. This process has been driven from the ICTY side, in large part, by its Completion Strategy, which provides target dates for the completion of its investigations, trials, and appeals.[10] As a part of that Completion Strategy, the ICTY proposed transferring certain individuals, denominated as 'lower and mid-level accused',[11] whom it indicted to courts in the region, subject to the oversight of the ICTY Chambers itself and to monitoring by the ICTY Prosecutor. The transfer of these cases, which primarily have gone to the State Court in Bosnia-Herzegovina, a 'hybrid' court established under Bosnian law with the assistance of international organisa-

4 Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, *supra* note 2.

5 Ibid., Article 9(2).

6 E.g., S.C. Res. 1534, Article 5, UN Doc. S/RES/1534, 26 March 2004.

7 Statute of the Special Court for Sierra Leone, S.C. Res. 1315, UN Doc. S/RES/1315, August 14, 2000.

8 Rome Statute of the International Criminal Court, Article 1, UN Doc. A/CONF.183/9, 17 July 1998.

9 Ibid., Article 17.

10 S.C. Res. 1503, Article 7, UN Doc. S/RES/1503 of 28 August 2003; S.C.Res. 1534, Article 3, *supra* note 6. 'Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Reforming Certain Cases to National Courts', UN Doc. S/2002/678 of 19 June 2002.

11 Ibid., para. 7.

tions, including in particular the Office of High Representative (OHR),[12] and composed of both international and national judges and prosecutors, represents the first time an international tribunal has engaged in such a process.[13] Moreover, the ICTY Prosecutor has also handed over a number of other files, dossiers, and investigative materials that have not led to indictments at the ICTY to national prosecutors for their review and use in local investigations and prosecutions and also provided considerable information as well as expert advice to these prosecutors on an ongoing basis.[14]

This article reviews these developments and discusses the efficacy of such transfers of cases and investigative materials, both in terms of the results obtained and as transitional justice mechanisms. The ICTY's relationship with the societies in the former Yugoslavia and particularly their respective legal systems has been late in developing.[15] Although it can be argued that the steps taken to transfer cases and knowledge to the region were undertaken principally for the purpose of implementing its Completion Strategy, this process has clearly proven beneficial to the national judicial systems of the region. These include not only the transfer of information for prosecution but also capacity building ancillary to the transfer of cases.[16]

12 The Office of the High Representative was established to oversee the civilian aspects and impact of the Dayton Peace Accords. Its principal aim has been to facilitate the transition process of Bosnia and Herzegovina (BiH) becoming a fully functional and independent state. For more information, see <www.ohr.int>; see also The Dayton Peace Accords, 'General Framework Agreement for Peace in Bosnia and Herzegovina', annex 10, Article 1 (14 December 1995), reprinted in (1996) 35 I.L.M. 89, available at <www.state. gov/www/regions/eur/bosnia/dayann4.html>.

13 'Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in proceedings before the Courts in BiH', 'Official Gazette of BiH', no. 61/04. Also, it should be noted that there are some similarities to the Council Order No. 10 trials following the NMT. Nonetheless, this was quite a different process, with judges and prosecutors from the Allied powers handling these cases. See 'Control Council Law no 10, Article III', Appendix D, T. Taylor, '*Final Report to the Secretary of the Army on the Nuremburg War Crimes Trials under Control Council Law no. 10*', 15 August 1949.

14 'Memorandum of Understanding Between the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and The Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina', Article 9 (September, 1995), available at <www.tuzilastvobih.gov.ba/ files/docs/MOU-POBH-OTP_English-Revised-Final250805_.pdf>.

15 See D. Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings', (2002) 26 *Fletcher Forum of World Affairs* 5.

16 See International Centre for Transitional Justice, 'Bosnia and Herzegovina: Selected Developments in Transitional Justice' (October 2004), available at <www.ictj.org/images/content/1/1/113.pdf>; T. Cruvellier & M. Valiñas, International Centre for Transitional Justice, 'Croatia: Selected Developments in Transitional Justice (December 2006), available at <www.ictj.org/static/Europe/TJdevelopments.eng.pdf>; and Human Rights Watch, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina', (2006) 18

In order to begin to evaluate the impact that the transfer of cases has had on the region and its judicial system, we first look at the background of the ICTY and its engagement with the region, thus giving an historical overview of the Tribunal's approach to these issues, including its Outreach Programme and the Rules of the Road project. This is followed by a review of the transfer of cases indicted at the ICTY to national courts, including an examination of the jurisprudence relating to these cases as well as some of the issues that arose in that context. Thereafter, the transfer of investigative materials by the ICTY to prosecutors in the region and the provision of other information and expertise are discussed. Finally, we look at whether these steps taken together are a potential transitional justice model and, in the concluding section of this article, what other international courts and tribunals, particularly the ICC, might learn from these experiences, taking into account both the common features shared by these institutions and the consequences of their differing situations in this regard.

2. Antecedents to the transfer of cases: The Outreach Programme and Rules of the Road Cases

The transfer of indicted cases to domestic judicial authorities and the handover of investigative materials to local prosecutors only commenced in 2004, over a decade after the Tribunal's creation. However, prior to these transfers the ICTY had made other attempts to engage in the region. From the early days of the ICTY's life, the Office of the Prosecutor (OTP) spent considerable time working in the former Yugoslavia, gathering evidence and interviewing witnesses. This work was exceedingly difficult, as until the end of 1995, the conflicts in the region continued unabated and even after the cessation of hostilities, there was considerable hostility to the ICTY and outright non-cooperation by certain states in the region, in addition to many informal barriers to the OTP's work.[17] Thus, the ability to work with or establish partnerships with prosecutors and courts in the region was difficult at best during the Tribunal's early years.

These obstacles were made all the worse by the ICTY's relative isolation from the former Yugoslavia, resulting from its placement in The Hague – a location that while understandable given the circumstances of the Tribunal's birth during a raging war, nonetheless greatly impeded its work in making an impact in the region. Thus, instead of its proceedings contributing to reconciliation in the region, the Tribunal found itself the subject of frequent attacks by nationalist politicians and its record the subject of constant media distortions.[18] None of this should have been particularly

A Human Rights Watch Report, no. 1 (D), available at <www.hrw.org/reports/2006/ij0206/>.

17 Most notably these barriers included a lack of contacts with national NGO's as well as a very limited number of staff in the OTP who spoke any of the languages of the region.

18 L.C. Vorah & J. Cina, 'The Outreach Programme', in R. May et al (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001), 547. Cruvellier & Valiñas, *supra* note 16, at 10-11.

surprising, given not only the ICTY's distance from the region but also the fact that it worked in different languages and applied what could only be seen as a bewildering set of procedures and laws by the local populations. Moreover, those being investigated, indicted or tried were often seen as national heroes by one side to the conflict, regardless of the atrocities that had been committed.

In order to address these and related issues, under the leadership of then ICTY President Gabrielle Kirk McDonald, the ICTY established an Outreach Programme, which sought to provide information on the Tribunal's activities in the languages of the region through representatives on the ground in the respective countries.[19] This was an important development and certainly has proven useful in addressing some of the propaganda against the ICTY and has been a boon to the Tribunal's supporters in the region. It also, through innovative programmes such as the Bridging the Gap series – in which practitioners from the ICTY explained in detail the process of investigation, indictment, trial and appeal of particular accused to victims and others in the region[20] – made an impact on perceptions of the ICTY in the region.

Nonetheless, despite its achievements, and it should be noted that the Outreach Programme has been replicated by all the other international and hybrid tribunals and courts,[21] the Programme was intended primarily as a public information vehicle. While it did assist significantly in facilitating training of judges and lawyers in the region, through training sessions given by Tribunal judges and staff, it was not intended to work with prosecutors and courts in the region on substantive investigations or cases. Some assistance in this regard was provided in building the capacity of national judicial authorities by international organisations, such as the OHR, the Organisation for Cooperation and Security in Europe (OSCE), and various governments and non-governmental organisations (NGOs), but the ICTY played only a peripheral and ancillary role in these efforts.

While the ICTY did not initially have a specific strategy on working with prosecutors or courts in the region, there were developments in the region itself that caused the OTP to become engaged in the prosecution of war crimes in the region and to begin to develop working relationships and partnerships with prosecutors in Bosnia-Herzegovina in particular. These began following the cessation of hostilities in the former Yugoslavia, which formally ended with the Dayton Peace Accords

19 Ibid., at 555.

20 See press releases for the Foca Conference, 'Bridging the Gap Between the ICTY and Communities in Bosnia and Herzegovina', The Hague, RC/P.I.S/901-e (13 October 2004), available at <www.un.org/icty/pressreal/2004/p901-e.htm>; and the Brcko Conference, 'Bridging the Gap Between the ICTY and Communities in Bosnia and Herzegovina', The Hague, RC/P.I.S/845-e (10 May 2004), available at <www.un.org/icty/pressreal/2004/p845-e.htm>.

21 See V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme', (2005) 3 *JICJ* 950; V. Hussain, 'Sustaining Judicial Resources: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals', (Winter 2005) 45 *Virginia Journal of International Law* 563; and J. O'Donohue, 'Towards a Fully Functional International Criminal Court: The Adoption of the 2004 Budget', (2004) 17 *Leiden Journal of International Law* 594.

('Dayton Accords'), and which, among other things, established the new country of Bosnia-Herzegovina.[22] This country consisted of two entities: the Federation of Bosnia-Herzegovina, covering 51% of the territory of the country, and the Republika Srpska with 49% of the territory.[23] Although the Dayton Accords provided that Bosnia-Herzegovina would remain a unified country, the reality of ethnic division was always and continues to be a fact of life in the region.

One of the Dayton Accords' key features is its guarantee of free movement of people, goods, capital and services throughout Bosnia-Herzegovina.[24] Despite this guarantee, the agreement did not have the desired effect of ensuring the safety of movement of persons and goods that would have encouraged crossing the internal borders between entities. In reality, even after the end of hostilities, a *de facto* internal border between the two entities continued to exist.

This continuing division between the two entities was notably demonstrated on 30 January 1996, when two high-ranking officers of the Republika Srpska Army, General Djordje Djukic and Colonel Aleksa Krsmanovic, on a routine trip in the vicinity of Sarajevo took a wrong turn and found themselves in Federation territory. They were arrested, imprisoned and subsequently charged with war crimes against civilians. While the official explanation was that their car was stopped on suspicion that it had been stolen, at the time of the arrest there was no indictment for war crimes against the two Serb officers. Indicting them after the arrest clearly jeopardized freedom of

22 The Dayton Peace Accords, *supra* note 12, Article 1.

23 The Dayton Accords resulted from the efforts of the Contact Group, which was established in the spring of 1994 and consisted of, the United States, Russia, Britain, France, and Germany, along with the European Union Special Negotiator (Karl Bildt, from Sweden). Its goal was to broker a settlement between the Federation and Bosnian Serbs. The Contact Group based its efforts on three principles:

1. Bosnia would remain a single state;
2. That state would consist of the Federation and a Bosnian Serb entity;
3. These two entities would be linked via mutually-agreed constitutional principles, which would also spell out relationships with Serbia and Croatia proper.

In July 1994, the Contact Group put forward a proposed map presenting a 51/49 percent territorial compromise between the Federation and Bosnian Serbs. The Bosnian, Croatian, and Serbian Governments all accepted the proposal. The Bosnian Serbs repeatedly rejected it. At meetings sponsored by the Contact Group in Geneva (8 September 1995) and New York (26 September 1995), the Foreign Ministers of Bosnia, Croatia, and Serbia (now also representing the Bosnian Serbs) agreed to basic principles for a settlement in Bosnia:

1. The preservation of Bosnia as a single state; on an equitable division of territory between the Muslim/Croat Federation and a Bosnian Serb entity based on the Contact Group's 51/49 formula;
2. Constitutional structures;
3. Free and fair elections;
4. Respect for human rights.

Based on the US Department of State, 'Fact Sheet--Bosnia: The Road to Dayton', (November 1995) available at <dosfan.lib.uic.edu>.

24 The 1995 Dayton Peace Accords, *supra* note 12, annex 4.

movement within the newly created state of Bosnia-Herzegovina, as it demonstrated that there were no guarantees for free travel from one entity to another.[25]

On 18 February 1996, the Contact Group convened a conference with the signatories of the Dayton Accords in Rome, in order to resolve the crisis and ensure the free movement of people and goods within Bosnia-Herzegovina. The result of the meeting was the Rome Agreement, which addressed cooperation with the ICTY as well as a wide range of other issues, such as the status of Sarajevo and Mostar and further implementation of the Dayton Accords.[26]

A key feature of the Rome Agreement is contained in Paragraph 5 of the Agreed Measures, which provides:

> "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."[27]

Thus, the parties agreed that certain legal grounds must be established for arrest on war crimes charges in Bosnia-Herzegovina, through a mechanism that was intended to provide for the freedom of movement of individuals throughout the country, to improve cooperation, and to strengthen the relationship with the ICTY. Under the procedures developed pursuant to the Rome Agreement,[28] judicial authorities of Bosnia-Herzegovina which obtained evidence relating to serious violations of international humanitarian law[29] were obliged prior to arresting or detaining a person on those charges to submit a file or dossier of the evidence collected to the ICTY OTP. This file was required to contain all of the relevant evidence against the war crime suspect, including copies of pertinent witness statements, police reports, forensic reports and all other supporting documents and materials. Based on this material, the OTP made findings and issued its recommendation as to whether a *prima facie* case of war crimes existed. The domestic authorities could proceed with an indictment or charges only if the OTP made a positive finding that such a *prima facie* case existed.

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25 S. Latal, 'Nato reports "ominous" cut in contacts with Bosnian Serbs', *Associated Press*, 10 February 1996; C. Hedges, 'Muslim Detention of Bosnian Serbs Threatens Truce', *New York Times*, 7 February 1996; Richard Holbrooke, *To End a War* (1998), 332-334.

26 The Rome Agreement consists of The Rome Statement, Agreed Measures, Joint Statement on Federation, Agreement on Mostar, and Joint Statement between Republic of Croatia and Republic of Serbia.

27 The 1996 Rome Agreement, Agreed Measures, Article 5, available at <www.nato.int/ifor/general/d960218b.htm>.

28 For Rules of the Road procedure, see M. Bisic, 'Ratni Zlocin i Genocid' (War Crimes and Genocide), *ZAP*, July 1999, 154-158.

29 Rome Agreement, *supra* note 27, Article 5. The Rome Statement reflects the work of the Joint Civilian Commission Sarajevo Compliance Conference (18 February 1996).

The examination conducted by the OTP in reviewing these files was a limited one. The OTP examined the material contained in the file to determine whether the evidence was sufficient under international standards to justify the arrest or indictment of a suspect or continued detention of a prisoner. Essentially, the function of the ICTY Prosecutor is analogous to that of a national Prosecutor who is called upon to review a police file and to determine whether, on the basis of the documents in the file, a prosecution would be justified.[30] In common law jurisdictions, the apt analogy would be to the issuing of an indictment by a grand jury or a judge.

Thus, the OTP considered only the sufficiency of evidence, not its probity. Under international legal criteria[31] the evidence is insufficient in cases where it fails to corroborate one of the essential elements of a crime with which a person has been charged. Under the same criteria, evidence is not considered insufficient merely on the basis that there is also other evidence to contradict it. Therefore, the review conducted by the OTP was simply of the material that it had before it for determining whether those materials, if assumed to be credible, sufficiently supported all the charges against the individual. The OTP's finding that the evidence was sufficient did not imply that the proceedings as a whole had been examined and found either consistent or inconsistent with international standards.

Consequently, as applied, the OTP's role under the Rules of the Road Agreement was limited to establishing whether the evidence supported the decision of the national authorities to arrest the accused or to issue an indictment. In essence, the review of war crime cases conducted by the OTP was a limited one, designed to prevent attempts to bring groundless or politically motivated war crimes charges and to restore confidence in the integrity of the national process and thus assist in ensuring the free movement of people throughout the country.

In practice, the OTP developed a methodology in reviewing the cases referred to it under the Rome Agreement that employed seven standard markings, using an alphabetical designations (A-G) to indicate its findings on the sufficiency of evidential material in these cases. The standard marking 'A' indicated that sufficient evidence existed in the file to provide reasonable grounds that a person committed a crime within the jurisdiction of the Tribunal. Thus, with such a marking, local authorities were free to bring war crimes prosecutions against the designated individual(s). On the other hand, standard marking 'B' indicated the opposite, i.e., the evidence was not sufficient, and thus no prosecution could be mounted. In some cases, the OTP could not make a judgement because the file was incomplete or additional evidence was needed and in such cases it issued a standard marking 'C', indicating that further evi-

30 For example, Bosnia-Herzegovina (BiH) Criminal Procedure Code, Official Gazette of BiH 03/03, Article 216 ('The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offence has been committed exist').

31 International legal standards as applied by the ICTY Prosecutor when preparing an indictment for confirmation as prescribed in Rule 47 (B) of the ICTY Rules of Procedure and Evidence, UN Doc. IT 32/32/Rev. 37 ('sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal').

dence was required to reach a decision on the question of sufficiency of the evidence. The vast majority of the cases reviewed by the OTP fell into these three standard markings, although other categories also existed.[32]

From its inception, the OTP's Rules of the Road Project encountered significant issues and difficulties. First and foremost, the obligations on the ICTY stemming from the Rome Agreement were extra-mandate in that they were above and beyond the ICTY's duties provided in its statute. As a consequence, there were no resources or funding provided for the project in the ICTY's budget, and the extra-budgetary funds had to be raised to support the project.[33] Moreover, given that the OTP's staff were fully focussed on investigations, trials, and appeals, additional external legal specialists were required to be identified and recruited to handle the demands of the project. There was also a heavy demand for translation resources to support the effort of these specialists, except to the extent lawyers with the requisite language skills could be identified.

In an effort to assist these reviews, in 1997, the United States Department of State requested the American Bar Association Central and East European Law Initiative (CEELI)[34] to assist the Tribunal in examining the Rules of the Road files. In June 1997, through its sister organisation the Coalition for International Justice (CIJ),[35] CEELI sent a team of three American attorneys to The Hague to assist the OTP in reviewing files.[36]

This assistance was quite valuable in that it helped get the Rules of Road work off the ground; however, such outside assistance could only be temporary, as seconded

32 The standard marking "D" means that the Prosecutor seeks deferral of a case, namely that the case should be prosecuted by the Tribunal. The standard marking "E" indicates that the evidential material does not support war crime allegations. Such a crime may be prosecuted as an ordinary crime. The standard marking "F" denotes a situation in which evidence is not only sufficient, but a suspect himself may be an important witness to the Tribunal. The standard marking "G" means that the submitted evidence establishes the elements of a serious violation of international law other then originally charged by the local authorities.

33 See 'Eleventh Annual Report for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991', UN Doc. A/59/215-S/2004/627 (August 2004), at 72, para. 29016.

34 CEELI is a public service project of the American Bar Association (ABA), which supports the process of legal reform in Eastern Europe and the former Soviet Union, including by responding to requests for assistance in specialized areas of law; CEELI also provides U.S. legal experts for extended visits. See <www.abanet.org>.

35 Until its recent closure, CIJ was an international, non-profit organization working to support the international war crimes tribunals for Rwanda and the former Yugoslavia. CIJ provided support through advocacy, fundraising, working with other non-governmental organisations, and by providing technical legal assistance. CIJ had offices in Washington, D.C. and The Hague, Netherlands. See <www.cij.org>.

36 M. S. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the Rules of the Road for Bosnia-Herzegovina', (1999) 17 *Berkley Journal of International Law* 1.

personnel's work had to be vetted by OTP staff. Moreover, these lawyers could only assist on a short-term basis and as they became familiar with the files and concepts, they would soon depart. Thus, they were gradually replaced by OTP lawyers and staff whose salaries were funded by extra-budgetary contributions. This staff became a fixture in the OTP and reviewed some 1072 cases over the years.[37] The cases that were deemed by the OTP to have met international standards then frequently went to trial and thus to form the foundation of efforts in Bosnia-Herzegovina to address the large number of war crimes that could not be adjudicated by the ICTY.

With the creation of the State Court of Bosnia-Herzegovina (BiH), including in particular the establishment of an Office of the State Prosecutor with the responsibility and resources to prosecute war crimes, the ICTY Prosecutor, Carla Del Ponte, proposed transferring responsibility for the Rules of the Road cases to the BiH State Prosecutor's Office.[38] The reasons that led to this decision were twofold. First, the new State Prosecutor's office was in a better position to review these cases and, with a component of international staff and international supervision,[39] could be trusted to handle them correctly and fairly. Moreover, the adoption of the ICTY's Completion Strategy, as established in Security Council Resolution 1503,[40] which provided target dates for the ICTY to finish its investigations, trials, and appeals, required the OTP to focus on other priorities. As a result, on 1 October 2004, review of the war crimes cases in Bosnia and Herzegovina was transferred from the ICTY to the BiH State Prosecutor's Office.[41]

37 A total of 5,868 Standard Markings were issued for 3,360 suspects (some cases involved more than one suspect and certain suspects were allegedly involved in multiple crimes):

A Standard Markings – 1,561
B Standard Markings – 2,983
C Standard Markings – 1,197
D Standard Markings – 12
E Standard Markings – 95
F Standard Markings – 4
G Standard Markings – 16

38 Eleventh Annual Report of the ICTY, *supra* note 33, para. 288.

39 Two of the main international organisations working in cooperation with the ICTY have been the Organisation for Security and Co-Operation in Europe (OSCE) and OHR. An example of a case being monitored by the OSCE is *Rasević and Todović* case *Prosecutor v. Mitar Rasević and Savo Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005.

40 S.C. Res. 1503, art 7, *supra* note 10.

41 See 'Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Council Resolution 1534 (2004)', at 3, para. 6, UN Doc. S/2004/897 of 23 November 2004; 'Twelfth Annual Report for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991', at. 33, para. 174, UN Doc. A/60/267 – S/2005/532 of 17 August 2005.

The Rules of the Road scheme was originally established to address the issue of freedom of movement within BiH, to prevent persons being arrested on war crimes charges unless a case against them had been reviewed by the OTP and found to be consistent with international legal standards. In practice, the Rules of the Road became an initial filter for national war crimes prosecutions. On one hand, it can be argued that the project was a limited one and that it did little to either improve the skills or capacity of prosecutors or judicial authorities in the region.

However, while one does not want to overemphasize the effects of this project, it did provide some real benefits. Given the large number of cases reviewed, local prosecutors no doubt did begin to get a better sense of the relevant international standards and also the OTP reviews helped end the use of war crimes as a political weapon, as prosecutions based more on political considerations than evidence did not pass muster. Also, important informal contacts developed between the OTP lawyers working on the Rules of the Road cases and local prosecutors. Thus, the dialogue between the ICTY and national prosecutors began with the project, and this was quite important as most of the staff that worked on the Rules of the Road project moved over to the newly established OTP Transition Team in 2004.[42]

Nonetheless, despite the contributions made by the Outreach Programme and the Rules of the Road project, the ICTY's impact as a transitional justice mechanism prior to 2004 was quite limited and primarily consisted of the import of its judicial decisions. The engagement with local judicial authorities was sporadic and not driven by a coherent strategy, thus prior to 2004, one could not credibly identify significant contributions of the ICTY to the development of the court systems in the region or even an active engagement with those institutions.

3. Transfer of cases

3.1. Background and overview

While the ICTY's early engagement in the former Yugoslavia was limited, the adoption of the Tribunal's Completion Strategy opened a new chapter in the relationship between the ICTY and the judicial systems in the former Yugoslavia. Although there were a number of elements in the ICTY Completion Strategy, including setting target dates on the completion of investigations, trials and appeals, a key component of the Strategy was to transfer mid- and lower level accused to courts in the region for trial.

42 UN Doc. A/62/364 of 1 October 2007, at 5, 16-17. The Transition Team was established to help achieve the goals of the Completion Strategy and in particular assist in transferring cases of indicted persons to national courts and other investigation dossiers to domestic prosecution authorities. The Transition Team prepares the transfer of investigation files and provides assistance to national courts and authorities, particularly where cases have been transferred. As complex legal questions arise during and following the transfer of cases and because of the increasing interaction with national prosecutors engaged in trials, the Team's legal expertise will be strengthened.

In order for such transfers to occur, legal mechanisms were needed to effect the transfers, both at the ICTY and in the laws of the countries in the region. As has been frequently the case in the ICTY's work, there was no analogue for such a procedure, as international courts had not transferred cases to domestic courts before. Thus, a series of steps were required to establish the legal mechanism whereby the ICTY, as an UN body, could, in accordance with international standards, turn over its cases to local courts. In order to ensure that these standards were protected, the ICTY needed internal legislation to establish its own procedures but also required some assurances as to the procedures and processes that would be followed in the countries to which the cases would be transferred.

From the ICTY side, Rule 11 *bis* was adopted to provide a legal framework under which a case that had been indicted[43] at the ICTY could be transferred to a domestic court. While there are a number of elements that must be satisfied, which are discussed below, the essential elements were that the local court must be in a position to accept the case and that it must be able to provide a fair trial, meeting international safeguards and standards. An international tribunal established by the United Nations could not be in a position of sending individuals to another jurisdiction for trials without assuring itself that the trials would be fair and would meet international standards.

As the following discussion shows, the ICTY Chambers was required to make those assessments of the respective countries and their legal systems and laws to which cases would be transferred under Rule 11 *bis*, but it was clear from the beginning that most of the cases would be transferred to BiH, as the majority of the crimes under investigation and indictment had been committed there. Given that the judiciary of that country was still recovering from the effects of the conflict and finding its way amidst heavy involvement by the international community in efforts to rebuild the judicial system and establish the rule of law, it was necessary to consider what steps would need to be taken so that the cases could be transferred in accordance with international standards. Moreover, with the creation of the new Bosnian State Court, steps needed to be taken to support its development.

In order to address these issues, the leadership of the ICTY (then President Theodore Meron in particular) and the OHR, which was responsible for providing international support to the BiH State Court, established a number of joint working groups to address potential issues. The approach was endorsed by the Peace Implementation Council[44] and also led to substantial donor support for the BiH State Court, with a long term plan of a court composed initially of international and domestic judges,

43 It should be noted that as a technical legal matter what is being transferred is the indictment of an accused to another court. However, in practice, the transfer actually also includes all relevant material in the case, not simply the supporting material for the indictment. Moreover, given that the term 'transfer of cases' has become part of the parlance of the ICTY and now the ICTR, herein we refer to the transfer of the indictment and the accused as a transfer of the case, as the meaning appears to be clear and uncontroversial.

44 Peace Implementation Council, 'Declaration by the PIC Steering Council', 12 June 2003, available at <www.ohr.int/pic/default.asp?content_id=30074>.

prosecutors, and support staff.[45] The core part of the strategy was for the new court to begin with the cases transferred pursuant Rule 11 *bis*, thus allowing it to build its capacity under the eye of the ICTY, with a gradual decrease and eventual phase out of its international component.

While the international element of the State Court was an important safeguard on the work of the State Court and Rule 11 *bis* provided the ultimate safeguard in that a transferred case could be recalled to the ICTY if international standards were not met, there were a number of other steps taken by the joint working groups that increased the likelihood of the successful transfer of these cases. The joint ICTY-OHR working groups covered a wide variety of topics, ranging from witness protection to the construction of detention facilities meeting international standards and a number of important issues were identified and addressed.[46] Perhaps the most challenging and significant work was done by the joint working group on the legal framework, as new mechanisms needed to be developed under Bosnian law for the transferred cases to be tried in a manner acceptable to the ICTY.

A central factor complicating the task of the joint work group on the legal framework was the adoption of the new BiH Criminal Procedural Code, which essentially moved the country away from its traditional civil law model to one closer to the adversarial system, drawing extensively from the then recent revision of the Italian Criminal Procedure Code.[47] In any event, this working group focused on developing a law of transfer which would allow the ICTY to transfer its indictments to the State Court and avoid legal difficulties. The central elements addressed in the law were three-pronged: (i) providing the legal mechanisms to transfer the accused and the evidence from the ICTY to the State Court; (ii) ensuring that the ICTY indictment was protected from unwarranted revision; and (iii) providing that evidence previously introduced in ICTY proceeding could be used in an appropriate manner in the BiH courts.

45 Security Council, 'Security Council Brief on Establishment of War Crimes Chamber Within State Court of Bosnia and Herzegovina', UN Doc. SC/7888 of 8 October 2003.

46 For example, see ICTY Press Release, 'OHR-ICTY Working Group on Development of BiH War-Crimes Trial Successfully Completed', OHR/P.I.S./713e of 21 February 2003.

47 'Criminal Procedure Code of Bosnia and Herzegovina', *Official Gazette of Bosnia and Herzegovina*, 03/03. Available at <www.ohr.int/ohr-dept/legal/oth-legist/doc/criminal-procedure-code-of-bih.doc>. Also 'Law on the Amendments to the Criminal Procedure Code of Bosnia and Herzegovina', *Official Gazette of Bosnia and Herzegovina*, 26/2004, available at <www.sudbih.gov.ba/files/docs/zakoni/en/izmjene_zakona_o_krivicnom_postupku__13_05_eng.doc>. See also *Codice di procedura penale: edizione aggiornata al 2 febbraio 2004*, Milano: Giuffrè Editore (2004).

A Law on the Transfer of Cases,[48] compatible with new BiH Criminal Procedure Code,[49] was duly adopted. It put in place the legal mechanisms necessary for the transfer of the accused and evidence from the ICTY to the State Court. While these provisions worked smoothly for the most part, the law did require amendment to allow for the use of electronic documents after the BiH Minister of Justice confirmed that only certified paper copies of ICTY evidence and material could be used in proceedings at the State Court.[50] This would have created a huge burden on the ICTY in that its documents are stored almost exclusively in electronic formats, and the law was then amended. The law also provided that charges or counts in the ICTY indictment could not be withdrawn by the BiH State Prosecutor's office. This was to ensure that the integrity of the indictment, which had been confirmed by an international (ICTY) judge, would not be despoiled.

However, it was recognized that additional charges could be added by local prosecutors, given that they could well come across new evidence and would be duty bound to add new charges, and this would not affect the credibility or legitimacy of the ICTY indictment. Finally, issues did emerge regarding the use of evidence that had been introduced in ICTY proceedings. There were a number of decisions by BiH courts that would have made it difficult to use this evidence,[51] but ultimately,

48 'Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in Bosnia and Herzegovina', Official Gazette of Bosnia and Herzegovina, no. 61/04, 46/06, 53/06, 76/06, available at <www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_TRANSFER_OF_CASES_-_Consolidated_text.pdf>.

49 'Criminal Procedure Code of Bosnia and Herzegovina', *Official Gazette" of Bosnia and Herzegovina*, 03/03,. available at <www.ohr.int/ohr-dept/legal/oth-legist/doc/criminal-procedure-code-of-bih.doc>.

50 'Law on Amendments to the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in Bosnia and Herzegovina', art. 8, *Official Gazette of Bosnia and Herzegovina*, No 53/06.

51 An example of this phenomenon occurred in the case of Dominik Iljasevic, where the prosecutor was faced with difficulties in proving the charges on the basis of the available evidence and turned for assistance to the ICTY OTP, which was also preparing a case relating to the same crimes, i.e., the Stupni Do massacre, following its indictment of Ivica Rajić, the commander of the HVO forces that attacked Stupni Do on 23 October 1993. On 18 April 2003, and again on 8 August 2003, the Zenica Cantonal Prosecutor proposed that the court admit into evidence videotaped interviews with Ermin Curtic carried out by the ICTY. The court rejected the motion, declaring that type of evidence inadmissible. (Curtic's contradictory evidence later in the Ilijasevic trial arguably rendered the impact of the ruling moot.) The court established that Curtic had made the statement to the ICTY prosecutors as a suspect, rather than as a witness, so his statement could not be considered a witness testimony, and that irrespective of Curtic's status, his testimony was inadmissible because 'the evidence was not obtained pursuant to the provisions of the law on criminal procedure in Federation Bosnia and Herzegovina.' Balkans Justice Bulletin, 'The Trial of Dominik Ilijasevic', available at <www.hrw.org/backgrounder/eca/balkans0104.htm>.

evidence subject to cross-examination at the ICTY has found its way into State Court proceedings under the provisions of the Law on Transfer.[52]

Other substantive legal issues also arose with respect to all of the countries in the region regarding the application of the principles of command responsibility as established in International Humanitarian Law. These discussions centered on whether command responsibility was recognized in the laws of the former Yugoslavia and whether application of these principles would result in retroactivity, thus violating the principle of *nullum crimen sine lege*, and the principle of legality.[53] While these were important legal issues, there were legitimate differences of opinions and these matters were largely left to be litigated before the relevant courts, including the ICTY.

It should be noted that Rule 11 *bis* also provided that the Prosecutor would monitor the proceedings to ensure that international standards were being met. In order to carry out this responsibility, the ICTY Prosecutor entered into an understanding with the OSCE, to monitor, on behalf of the OTP, the proceedings of cases transferred under Rule 11 *bis* and report back to the ICTY Prosecutor on a regular basis the findings of the monitors. In practice, the OSCE closely monitored the proceedings and reported directly to the ICTY Prosecutor, who then used these reports as the basis of her own reports to the ICTY Chambers on the progress of the proceedings and any relevant issues. While the OSCE did identify various matters of concern, particularly regarding witness protection matters, neither the Prosecutor nor the Chambers deemed these matters sufficiently serious to consider recalling any of the cases to date, and a number of steps were taken by the domestic judicial authorities to address concerns raised in the OSCE reports.[54]

*3.2. Transfers of cases under Rule 11*bis

In carrying out the Rule 11 *bis* transfers, as authorized by UN Security Council Resolutions 1503 and 1534,[55] the OTP filed motions for referral in three countries: Bosnia and Herzegovina, Croatia and Serbia.[56] However, as forecast, all but two of these

52 'Law on the Transfer of Cases from the ICTY to the Prosecutors Office of BiH and the Use of Evidence Collected by the ICTY in proceedings before the Courts in BiH', *Official Gazette of BiH*, art. 3, no. 61/04.

53 M. Škulić, 'Komandna odgovornost – istorijat, Rimski statut i jugoslovensko krivično pravo', (Command Responsibility – history, Rome Statute and Yugoslav Criminal Law), (2002) 88 *Arhiv Za Pravne i Društvene Nauke* 4, 489 – 532.

54 For examples of recent such reports, see OSCE, 'Fifth Report in the Mitar Rašević and Savo Todović Case Transferred to the State Court Pursuant to Rule 11*bis*' (January 2008) and OSCE, '*OSCE Memorandum Republic of Croatia v. Rahim Ademi and Mirko Norac*' (March 2008). Both on file with authors.

55 S.C. Res. 1503, para. 7, *supra* note 10, and S.C. Res. 1534, art. 5, *supra* note 6.

56 *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT to BiH; *Prosecutor v. Mitar Rasević and Savo Todović*, Case No. IT-96-23/2-PT to BiH*; Prosecutor v. Zeljko Mejakić et al.*, Case No. IT-02-65-PT to BiH; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT to Serbia and Montenegro or Croatia (subsequently withdrawn); *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT to Croatia; *Prosecutor v. Ivica Rajić*,

cases went to the BiH State Court, with six cases involving 10 suspects transferred to that court and one case (involving one suspect) to Serbia and another (with two suspects) transferred to Croatia.

For a case to be transferred under Rule 11*bis* it must satisfy a number of criteria. First, Rule 11 *bis* (A) provides for referral after an indictment has been confirmed and prior to the commencement of the trial to the authorities of a State: (i) in whose territory the crime was committed; (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case.[57] The ICTY Prosecutor took the view that there was a hierarchy between these three venues, arguing that the first choice should be the *locus* of the crime, thus contending that witnesses and victims would have easier access to the courts in the area that that the crimes were committed.[58] Moreover, there was a public interest in having the trials take place near the crime or at least in a country of arrest and only as a last resort turning to a third country which might exercise jurisdiction on another basis, e.g., universal jurisdiction. The court rejected this argument and held that those options are not of hierarchical nature and that pragmatic considerations would determine the place of the trial.[59]

However, a different procedural suggestion informally made by the Prosecutor was accepted by the ICTY President and that was to establish a special Referral Bench to hear all motions for transfer of cases.[60] This was a welcome development, as the questions involved in transferring cases are particular ones and involve knowledge of local law and procedure. The text of Rule 11 *bis* (A) was subsequently amended to provide for the establishment of a specific Referral Bench, consisting of three permanent Judges of the Tribunal[61] to hear at first instances all Rule 11 *bis* motions.

On another matter of procedure – the initiation of a request to transfer a case, Rule 11 bis (B) provides that referral may be initiated proprio motu by the Referral Bench or by the Prosecutor. To date, all such motions have been filed by the Prosecutor and

Case No. 95-12-PT to BiH; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT to BiH; *Prosecutor v. Gojko Janković*, Case No. 96-23/2-PT to BiH; *Prosecutor v. Pasko Ljubičić*, Case No. IT-00-41-PT to BiH; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32-PT to BiH; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-PT to Serbia and Montenegro; *Prosecutor v. Dragan Zelenovic*, Case No. IT-96-23/2-PT to BiH (co-accused in Janković but case heard separately); *Prosecutor v. Rasim Delić*, Case No, IT-04-83 to BiH and *Prosecutor v. Milorad Trbic*, Case No. IT-05-88-PT to BiH.

57 Rule 11 *bis*, 'Referral of the Indictment to Another Court' revised 30 September 2002, ICTY Rules of Procedure and Evidence ('Rules'), UN Doc. IT/32/Rev.37.

58 *The Prosecutor v. Mitar Rasević*, Case No. IT-97-25/I-PT, Motion by the Prosecutor Under Rule 11 *bis*, 4 November 2004, para. 6; *The Prosecutor v. Mitar Rasević and Savo Todović*, Case No. IT-97-25, Rule 11 *bis* hearing, 12 May 2005, at 114.

59 *Prosecutor v. Zeljko Mejakić et al,* Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ('*Mejakić* Appeals Decision'), IT-02-65-AR11*bis,* 17 April 2006, para. 43.

60 Recollection of one of the authors, who also served as chair of the joint working group on the legal framework.

61 Judge Alphons Orie, Presiding, Judge O-Gon Kwon and Judge Kevin Parker.

none by the Chambers, which is hardly surprising given the structure of the ICTY and its general approach, which leans toward the adversarial model. Moreover, the Referral Bench has also held that neither the defence nor a state have standing to request a transfer of a case. The court went on to hold that the Prosecutor's motion is simply a formal request that initiates the proceeding and does not bind or limit the Referral Bench's consideration as to the state it designates the case to be transferred to, thus in theory the court could decide to reject the Prosecution's submission and designate a wholly different state.[62] This has not happened in practice, however.

Rule 11 *bis* (B) also provides that the Referral Bench must be satisfied the accused 'will receive a fair trial and the death penalty will not be imposed or carried out'.[63] The death penalty has been abolished by all countries to which the Prosecution requested a referral. The Referral Bench has also found that the conditions necessary for a fair trial have existed in all the jurisdictions in which referrals were sought.[64] This determination has in all likelihood been made more straightforward by the work done by the joint working groups for the BiH State Court as well as the role of the OSCE in monitoring the trials. In addition, the countries in the region have been eager to show that they are capable of conducting fair trials and have worked diligently to put in place the necessary training programmes to accomplish these goals as well as appointing experienced prosecutors and judges to handle these cases.

In addition to these considerations, the Referral Bench has taken into account in determining whether fair trial criteria has been met, the legislation of the relevant countries, particularly whether the standards as prescribed in the Statute of the Tribunal, as well as the International Covenant on Political and Civil Rights and the European Charter on Human Rights have been adopted into law.[65] In *Mejakić*, for example, after it determined that these requirements exist in the legislation of the countries concerned, the Referral Bench concluded that 'the laws applicable to proceedings against the Accused in Bosnia and Herzegovina are generally comparable with the fair trial guarantees provided in Article 21 of the Statute'.[66]

62 *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2, Decision on Referral of Case Under Rule 11 *bis* ('Janković 11 *bis* Decision'), 3 July 2005, para. 2.

63 Rule 11 *bis* (B).

64 The Prosecutor requested referrals in 14 cases, see *supra* note 56. Bosnia and Herzegovina (11 cases), Serbia and Montenegro (1 case) and Croatia (1 case).

65 *Mejakić* 11 *bis* Decision, *supra* note 56, para. 68.

66 In *Mejakić* 11 *bis* Decision, *supra* note 56, para. 81, the Referral Bench held:

> "As a general matter to the question of fair trial, the Referral Bench is satisfied that the laws applicable to proceedings against the Accused in Bosnia and Herzegovina provide an adequate basis to ensure compliance with the requirement for a fair trial. Since there have been no cases referred from the Tribunal to the authorities of Bosnia and Herzegovina which have yet been tried, there is no basis upon which this issue can be evaluated by reference to past actual experience. The Referral Bench considers that the legal structure in Bosnia and Herzegovina, as it now stands, is sufficient to safeguard the right of the Accused to a fair trial".

Also note *Mejakić* 11*bis* Decision, para. 117.

However, the critical questions in Referral Bench's determinations have turned less on the question of fair trial and more on the core of issues of the gravity of crimes and the level of responsibility of the accused. Rule 11 *bis* (C) establishes these threshold questions, which the Referral Bench has held are to be determined in relation to 'only those facts alleged in the Indictment…'.[67] Put in the context of the applicable Security Council Resolutions, the gravity of the crimes and level of responsibility of the accused are the essential elements in determining whether the accused fits into the category of mid- or low level accused.

In applying this legal test, while some weight is given to the formal role of, or position held by, the accused, his actual role is a more dispositive element in determining the level of the accused. Thus, in the case of a general of the Croatian Army (Rahim Ademi), it was determined that he would be transferred under the Rule 11 *bis* regime, while cases against generals of Bosnian Serb Army (Dragomir Milošević) and Army of Republic of Bosnia and Herzegovina (Rasim Delić) were found to be unsuitable for transfer. The Referral Bench held that '…the level of responsibility should be interpreted to include both the military rank of the Accused and their *actual role* in the commission of the crimes'.[68] Moreover, it is noteworthy that the Referral Bench also rejected the Prosecution's argument in the *Dragomir Milošević case* that crimes similar to those for which the accused had been indicted had already been tried in a previous case (*Galić*)[69] and, as a matter of policy, the Tribunal's resources should go to trying other crime bases; therefore, the case should be transferred. Thus, the Referral Bench made clear that the criteria would be applied *stricto sensu*, rather than take account of other policy considerations.

This approach of putting weight on both the formal and the actual roles was further shifted towards emphasis on the actual as opposed to the formal roles by the ICTY Appeals Chamber in the case of *Lukic and Lukic*, which granted the appeal of the accused Milan Lukic.[70] The Referral Bench, looking at both Lukic's formal and active roles, found that despite the seriousness of his crimes and his active role, he did not hold a substantial formal role and granted the transfer. In reversing this decision and denying the transfer, the Appeals Chamber held that the combination of the gravity of crimes and the position of the accused as one of the principal paramilitary leaders in the former Yugoslavia, made his case appropriate to be tried before the Tribunal, rather than a court in the region.[71] The Appeals Chamber also emphasized

67 *Prosecutor v. Radovan Stanković*, Decision on Referral of Case Under Rule 11 *bis,* para. 18, Case No. 96-23/2-PT (17 May 2005), *Prosecutor v. Zeljko Mejakić et al*., Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis* ('Mejakić 11*bis* Decision'), Case No. IT-02-65-PT, 20 July 2005, para. 20.

68 *Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis* (*Ademi-Norac* Decision), Case No. IT-04-78-PT, 14 September 200).

69 *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, 30 November 2006.

70 *Prosecutor v. Milan Lukić & Sredoje Lukić*, 'Decision on Milan Lukić's Appeal Regarding Referral', Case No. IT-98-32/1-AR11*BIS*.1, 11 July 2007.

71 Ibid., para. 26.

the fact that none of the paramilitary leaders from the former Yugoslavia had been tried before the Tribunal and specifically noted the notorious role played by paramilitary leaders during the conflict.[72] Thus, it can be argued that the Appeals Chamber introduced additional policy considerations into the determination of when a case would be transferred and further downplayed the formal role that an accused might have played in the military and/or political structures at the time of the conflict. In one sense, this is as it should be: the ICTY should be trying the most serious crimes, regardless of the rank of the accused. Nonetheless, this decision also arguably made the criteria of most senior accused all the more difficult to apply in individual cases.

Once the Referral Bench is satisfied that the elements identified in Rule 11 *bis* (B) and (C) have been satisfied, it considers which state is most appropriate for the referral. In making this determination, the court takes account of the following factors: the place where the crime(s) occurred; the nationality of victims; and the nationality of the accused.[73] However, this determination is usually fairly straightforward, as the gravaman of the factors tend to lean toward one state or another. In one case, the picture was much less clear, as the Prosecutor had put forward two countries (Serbia and Montenegro and Croatia) – with the various factors pointing in different directions – as possible locations for deferral.[74] However, since this motion was withdrawn by the Prosecutor prior to hearing, there is no guidance from the Chambers on which of those factors would have been decisive in an actual case.

Following the decision to transfer, a number of technical matters must be addressed. Rule 11 *bis* (D) prescribes the applicable procedure, setting forth the steps to be taken after the Referral Bench issues an order on the referral of a case to national authorities. These include an order to the Registrar to hand over the accused, if in the custody of the Tribunal, to the national authorities. The Referral Bench may also order that the protective measures for certain witnesses remain in force; order the Prosecutor to provide to the national authorities material supporting the indictment and all other appropriate evidentiary material; and provide that the Prosecutor may send observers to monitor the proceedings on her behalf.[75] The question of protective measures for witnesses is a particular sensitive one, as witnesses have put their faith in an international court and their identities may now be known by national prosecutors and judges. Thus, generally the protection orders entered by the Tribunal are carried over to the national authorities and they are bound by these orders.[76]

One of the questions that have been raised during the Rule 11 *bis* proceedings has been which substantive law should be applied, once a case has been transferred to a

72 Ibid., paras. 25-26.

73 *Janković* 11*bis* Decision, *supra* note 56, para. 24.

74 *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT.

75 Rule 11 *bis* (D).

76 Examples include *Prosecutor v. Pasko Ljubičić*, 'Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11*bis*', para 5(ii), Case No. IT-00-41-PT (12 April 2006) and *Prosecutor v Zeljko Mejakić, Momcilo Gruban, Dusan Fustar, Dusko Kerevic*, 'Decision on Joint Defence Appeal Decision Against Decision on Referral Under Rule 11 *bis*, para. 73, Case No. IT-02-65-AR11bis.1 (7 April 2006).

state's authorities. This is because in Bosnia and Herzegovina the applicable law is the law enacted after the alleged crimes took place. This is in contrast to the applicable law in Croatia and Serbia,[77] which holds that the applicable law is the law in place at the time when the alleged crimes occurred. This question, which was prefigured in the discussions of the joint working groups for the BiH State Court as noted above, raises the issue of possible retroactive application of a law. Nonetheless, the Referral Bench, rightly, held that it is not the competent authority to decide on this issue.[78] Of course, if the application of local laws were to undermine the prosecution of the accused, then the order of transfer could be revoked by the court at the request of the Prosecutor, pursuant to Rule 11 *bis* (F). Moreover, in line with this approach, the Referral Bench also held that, to be able to order a referral of a case, it has to be satisfied that there exist 'appropriate provisions to address most, if not all, of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure', thus if there were significant crimes not covered by the relevant country's law, there would be no referral.[79]

Monitoring of the proceedings of a referred case is an important protection to the process and would provide a basis for the revocation of referral in the event of miscarriage of justice or a failure to meet international standards. Thus, while the wording of Rule 11 *bis* (D) regarding monitoring of domestic proceedings may appear to create the impression that monitoring is not mandatory, the Referral Bench, in all its referral decisions, has ordered the Prosecutor to both monitor the proceedings and to report regularly to the Referral Bench on the course of those proceedings.[80] The principal reason for the Referral Bench's position in this regard is made clear in the Referral Bench's Decision in *Prosecutor v. Rahim Ademi and Mirko Norac*, in which the court held:

> "[The] monitoring mechanism enables a measure of continuing oversight over trial proceedings should a case be referred. Although the monitoring mechanism serves also to guarantee the fairness of the trial to the Accused, as repeatedly expressed by the Referral Bench and accepted by the Appeals Chamber, it was primarily created to ensure that a case would be diligently prosecuted once it had been referred."[81]

77 At the time when the Rule 11 *bis* proceedings were taking place, the country was known as was Serbia and Montenegro.

78 *Mejakić* Appeals Decision, *supra* note 56, para. 43.

79 Ibid., para. 63.

80 For example, in the *Mejakić* 11 *bis* Decision, *supra* note 56, 44, the Referral Bench held:

> "Futher orders the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include any reports received by the Prosecutor from the international organisation monitoring or reporting on the proceedings".

81 *Ademi-Norac* Decision, para. 57.

Monitoring is particularly important in the light of Rule 11 *bis* (F), which provides for the deferral of the case back to the Tribunal. Deferral of a case back to the ICTY is only possible prior to the entry of judgement at first instance, i.e., before the accused is found guilty or acquitted by a national court, pursuant to a request by the Prosecutor and provided the State concerned is given an opportunity to be heard on the matter. Thus, the Prosecutor must be in a position to monitor the proceeding in order to make such a motion in a timely matter – the Prosecutor cannot wait until the rendering of an unsatisfactory judgement.

In addition, the OTP is routinely ordered to transfer all of its materials supporting the indictment and relating to the case to the national state authorities as soon as possible and not later than 30 days after the decision becomes final.[82] In the first case transferred by the ICTY, *Prosecutor v. Radovan Stanković*, a dispute arose about whether these materials could be provided by the Prosecution in an electronic format. While in this instance the case materials were certified paper copies in order to comply with BiH law, as noted above the Law on Transfer was subsequently changed to allow for the provision of electronic certified copies, thus avoiding the waste of time and resources that occurred in *Stanković* with the copying of approximately 15.000 pages.[83]

The parties to a referral proceeding have a right of appeal against a decision ordering or denying a referral as a matter of right, as provided by Rule 11 *bis* (I). This right has been exercised on a number of occasions, most notably in *Lukic*, discussed above, which overturned the Referral Bench's Decision to transfer this accused to Bosnia-Herzegovina. In the first appeal of a Rule 11 *bis* referral (*Stanković*), the Appeals Chamber characterised an appeal in the Rule 11 *bis* proceedings as '… more akin to an interlocutory appeal',[84] no doubt reflecting the importance of hearing the appeal expediously in view of the impact delay would have on both the work of the ICTY and also the domestic authorities as well as the accused and defence counsel. It also provided guidance regarding time limits for briefs in those proceedings.[85]

At this stage a number of the cases that were transferred to the BiH State Court have been tried and several have been through the appeals process as well.[86] Only one case was transferred to Croatia, *Ademi-Norac*, and that trial is still on-going at

82 Ibid.

83 Information on file with authors.

84 *Prosecutor v. Radovan Stanković,* Decision on Defence Application for Extension of Time to File Notice of Appeal, para. 16, Case No. IT-96-23/2-AR11*bis*.1 (9 June 2005).

85 Ibid., para. 17.

86 Two cases have finished completely, *Prosecutor v Radovan Stanković*, Case No. X-KR-06/70 (28 March 2007) and *Prosecutor v Gojko Janković*, Case No. X-KR-05/161 (23 October 2007). One has finished in the first instance (*Prosecutor v Mitar Rasević & Savo Todović*, Case No. X-KR-06/275 (28 February 2008). Three are currently underway (*Prosecutor v Mejakić et al.*, Case No. X-KR-06/200, *Milorad* Trbic, Case No. X-KR-07/386 and *Pasko Ljubičić*, Case No. X-KR-06/241).

the time of writing,[87] and only one case was referred to Serbia, which has not gone to trial due to questions regarding the mental health of the accused. Nonetheless, even with an incomplete record of the Rule 11 *bis* transfers, a number of observations are possible. There have, of course, been some issues, particularly regarding witness protection, with judges and parties both having revealed protected witnesses identities usually due to lack of vigilance or failure to adequately understand witness protection issues.[88] The OSCE has also identified other process related issues, as to the conduct of the proceedings regarding such issues as detention orders. Despite these issues, however, thus far there have been no issues that have raised significant fair trial issues, and indeed neither the Prosecutor nor the Referral Bench have put forward the idea of revoking any Rule 11 *bis* referral.

In addition, much has been gained in the referral process. The ICTY has been allowed to focus on its remaining caseload, including particularly the most senior accused, and local prosecutors and courts have had the benefit of trying cases that had substantial groundwork done by ICTY investigators and prosecutors. Moreover, relationships developed between ICTY prosecutors and their counterparts in the region, thus allowing for information sharing and strategic discussions. However, this point should not be overemphasized, as the relationships developed were limited and often were with international prosecutors at the BiH State Court, as language differences made communication with domestic prosecutors difficult. More substantial contacts emerged between national prosecutors and the ICTY OTP's Transition Team, which was established specifically to deal with the transfer of cases and transition issues, and these contacts are likely to prove valuable as the ICTY moves to the handing over of non-indicted 'category 2 cases', which are discussed below.

Thus, some important developments have occurred, at least vis-à-vis the BiH State Court, as a result of these there referrals. Of course, as has been documented by Human Rights Watch,[89] the International Centre for Transitional Justice,[90] and others, significant issues remain with respect to the prosecution of war crimes in the countries of the former Yugoslavia.

87 *The Prosecutor v. Rahim Ademi and Mirko Norac*, 'Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule *11*bis', Case No. IT-04-78-PT, 14 September 2005.

88 See Human Rights Watch, 'A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Repbulic', 18 *A Human Rights Watch Report* 3 (D), 13, 33-35 (March 2006), available at <www2.ohchr.org/english/bodies/hrc/docs/ngos/hrw-chanceforjustice.pdf>, and Human Rights Watch, 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro', 16 *A Human Rights Watch Report* 7(D), 19-23 (October 2004), found at <hrw.org/reports/2004/icty1004/>.

89 Human Rights Watch, 'Narrowing the Impunity Gap, Trials before Bosnia's War Crimes Chamber', (2007) 19 *A Human Rights Watch Report* 1 (D), available at <hrw.org/reports/2007/ ij0207/ij0207web.pdf>.

90 International Centre for Transitional Justice, 'Report Assesses War Crimes Mechanisms in Serbia' (11 February 2008), available at <www.ictj.org/en/news/features/1496.html>.

3.3. Prosecutor to Prosecutor cooperation: 'Category 2 Cases' and other forms of assistance

In addition to accused transferred pursuant to Rule 11 *bis*, the ICTY OTP had conducted other investigations which never reached the indictment stage. Due to the time constraints established by the UN Security Council, the OTP was directed to complete all of its investigations by December 2004, issue its remaining indictments, and concentrate on the prosecution of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction.[91] The question remained as to what would happen with the investigations against those who did not belong to that rather narrow circle of perpetrators and against whom the OTP already had started investigations and collected evidence.

In an effort not to have these materials and this investigative work simply be left on the proverbial wayside, the OTP began discussions with national prosecutors in the region, primarily the BiH State Court Prosecutor, about the transfer of these materials. These materials tended to be associated with particular individuals and crimes which they had committed, thus they have been referred to as 'cases', although in actual fact they are collections of materials associated with particular crimes. Given that Rule 11 *bis* cases were the first priority, the other non-indicted 'cases' quickly became knows as 'Category 2 cases', hence the appellation.

In contrast to the regime under Rule 11 *bis*, the arrangements for Category 2 cases is handing over of material, albeit in a highly organised format, from one prosecutor's office to another, with no oversight by the ICTY or other entities accompanying this transfer of material. While the ICTY OTP clearly has an interest in these 'cases' and the national prosecutors are keeping OTP staff well informed on their progress, it has no formal role to play in the prosecution or adjudication thereof. Moreover, unlike in the Rule 11 *bis* cases, there is no monitoring or reporting obligation, as the OTP has no formal role after providing the material to national prosecutors and has no mechanism to recall the case, no matter how dissatisfied it may be with local prosecution efforts. The ICTY Prosecutor when reporting to the UN Security Council can and no doubt will report on the progress of these 'cases', but the national prosecuting authorities are on their own, for good or ill.

We would argue that this is how it should be. The Rule 11 *bis* transfers involve a very different set of circumstances, in that the cases were indicted by an international court and should not be changed at the whim of national authorities. Moreover, the Rule 11 *bis* cases have given national prosecutors an opportunity to learn under the tutelage of the ICTY. With the 'Category 2 cases' they should be able to take a further step to be fully responsible for their own prosecutions, albeit with the aid of the previous work of the ICTY. Even though they are not subject to the oversight of the ICTY, other international actors and NGOs, particularly in Bosnia-Herzegovina, will carefully monitor their work. Thus, while it is too early to make a fully informed judgement, we would argue that the 'Category 2 case' innovation is one that is worth trying and has a number of potential benefits.

91 See *supra* note 10.

In order to put these cases together, the OTP Transition Team collects and gathers investigative material, such as witness statements, documentary evidence and relevant reports, that relate to certain areas/incidents/people, and, where applicable, supplemented with material from Rules of the Road cases. The Transition Team also constructs a summary of the 'case', outlining the principal factual and legal issues as well as an accompanying analysis. These summaries and analyses have proven useful to national prosecutors who then take this material and use it as a basis to complete the investigation and, if warranted, bring charges.

In addition to the 'Category 2 cases', the ICTY OTP provides support to the national prosecutors on the development of their own cases though the vehicle of Requests for Assistance (RFAs). RFAs are a traditional method of states requesting and receiving judicial assistance from other states and organisations. Given that the ICTY OTP has at this stage collected over six million pages of material, including witness statements, documents, video and audio files, relating to the conflicts in the former Yugoslavia, this material contains potentially very valuable information to national prosecutors in their own investigations. Thus, for national prosecutors in the countries of the former Yugoslavia as well as other countries this material is of great interest, and the OTP assists them by providing such materials pursuant to RFAs.

In addition to responding to RFAs, the OTP has provided the non-confidential portions of certain of its data and evidence collection to all of the war crimes prosecutors in the region via remote electronic access. However, there are limitations to this approach, as not all documents are electronically stored and certain material regarding protected witnesses or other confidential material are not available. It should be underlined that some information which is provided pursuant to ICTY Rule 70[92] cannot be disclosed to anyone outside the OTP without the consent of the provider and would always be excluded from any such search.

Given that the remote searches do not cover all of the OTP's databases, the OTP also allows national prosecutors to travel to The Hague and search all of its non-confidential data, subject to confirmation that no confidential data has been accessed. In this way, national prosecutors can work more directly with OTP staff and have their questions answered regarding that data. National prosecutors have expressed satisfaction with making their searches on-site in The Hague, and it has proven a valuable innovation in supporting national prosecutions.

92 Rule 70 (Matters not Subject to Disclosure), ICTY Rules of Procedure and Evidence, *supra* note 31, provides:

> "Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules. If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused…"

Despite this assistance, it must be pointed out that most of the efforts to date focus on the provision of information to national prosecutors. The ICTY has, via the transfer of cases and materials, provided an important service to national prosecutors. Without this information, they would be hard pressed to pursue further investigations and prosecutions. However, despite these important steps, the ICTY has done much less in terms of transferring its know-how, that is assistance on how to prosecute and adjudicate war crimes cases and on the types of strategies that work in such cases. Much less has been done on this front, for reasons that are considered below.

4. Conclusions: The transfer of cases and transitional justice

While the idea of 'transitional justice' is the subject of frequent and intense discussion, it is a term that is endowed with 'a multiplicity of meanings' even by those most closely associated with the concept.[93] Nonetheless, it is widely agreed that transitional justice is composed of certain common elements, including assisting victims to know the truth about the conflict and holding the perpetrators of mass crimes accountable in some fashion.[94] Thus, it is clear that prosecutions, provided that they are fair and not tied to some ulterior political or ideological agenda, are one of the principal means of transitional justice.

If we begin with this premise, then it is apparent that local prosecutions of serious violations of international humanitarian law are an important element of transitional justice. However, in the case of the former Yugoslavia, for many years following the conflict, war crimes prosecutions were frequently politically motivated or the product of nationalist ideologies. This is one of the reasons the ICTY's work was of great importance. However, it soon became clear that the ICTY would only prosecute a relatively limited number of the most serious perpetrators and thus other means were necessary to complement the efforts of the ICTY if a serious attempt were to be made at transitional justice. Moreover, despite various attempts, the efforts to establish a truth and reconciliation commission were fruitless.[95]

For these reasons, local prosecutions have become an important feature of transitional justice efforts in the former Yugoslavia. The Tribunal's support for such efforts was late in coming. Indeed, as one of the authors previously commented elsewhere, almost a decade after its creation, 'the [ICTY's] lack of impact on at least preparing and buttressing the local courts for prosecuting war crimes is troubling'.[96] This lack of

93 The Secretary-General, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, para. 5, UN Doc. S/2004/616 of 23 August 2004.

94 See generally N. J. Kritz (ed.), *Transitional Justice: General Considerations* (1995).

95 See International Centre for Transitional Justice, The Former Yugoslavia: Truth-seeking Initiatives, at <www.ictj.org/en/where/region4/510.html>.

96 Tolbert, *supra* note 15, at 10. For a somewhat different view and a useful overview of the ICTY's engagement in general and the relationship with the BiH State Court in particular, see W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the

engagement resulted in part from the very design of the ICTY, located in The Hague and focused on its own cases, but also in part by a failure to engage the region on any level, including not hiring legal staff from the region and a lack of the contact with the principal national legal actors. While more recent developments, including the creation of a transition team and the transfer of cases, have ameliorated these failures, it has been a difficult legacy to overcome.

In spite of limited engagement with the region during its first decade of existence, except through its groundbreaking Outreach Programme, the Tribunal, particularly the OTP, has played an important role in terms of transitional justice in recent years. In one sense this role was foisted on it, as the Rules of the Road project was to some extent pushed on it by an anxious international community and the deeper involvement of the transfer of cases has emerged, to a large extent, from the pressures of the Completion Strategy.

Despite the origins of the Rules of Road project and the transfer of cases elements of the Tribunal's work, much has been achieved over the last five years. The Rules of the Road project helped end the use of political or ideological war crimes prosecution in the region, an essential first step in establishing the rule of law and *sine qua non* for transitional justice in Bosnia-Herzegovina – how can transitional justice occur when the machinery of justice is used to perpetuate the conflict by other means. More importantly, the partnership established with the BiH State Court and the transfer of the Rule 11 *bis* cases to that court has provided a solid basis for national judicial authorities in that country to try cases with the oversight of the international community, using the investigative work of the ICTY. With this successful step now largely behind it, national prosecutors can move forward more independently with the 'category 2 cases' but still with the investigative materials provided by the ICTY. Finally, they are in a position to conduct their own investigations but with the access to ICTY databases and additional information obtained via RFAs.

This is a reasonably coherent approach to the development of legal capacity and to transitional justice at least with respect to the sharing of information with prosecutors in Bosnia-Herzegovina and in this sense it is a good model to consider for other international courts. Of course, this situation is not necessarily typical due to the constant international presence and substantial investment in Bosnia-Herzegovina over the last 15 years. Due to these particular circumstances, ICTY's late engagement with the region was regrettable but still of value.

Other aspects of this approach are less positive. As noted above, the transfer of cases has largely revolved around the transfer of information, rather than know-how. For this model to be more useful, greater effort and commitment would need to be given to the latter issue, which is difficult given the workload of ICTY staff, the distances involved, and the constant departure of ICTY staff. Moreover, while cases and information have also been transferred to Serbia and Croatia, the level of engagement has been substantially lower, although this development is largely attributable to the locus of most of the crimes being in Bosnia-Herzegovina.

State Court of Bosnia & Herzegovina,' (2007) Univ. of Penn. Law School, Paper 185, available at http:/lsr.nellco.org/upenn/wps/papers/185.

Although the immediate practical lessons from the Rule 11 *bis* approach are most likely to be of use to the ICTR, as it is involved in such transfers at the time of writing, in the longer term the ICTY's experience regarding the transfer of cases would seem most applicable to the ICC in its future work. Like the ICTY, it is far away from the scenes of the crimes that it is investigating. Moreover, through complementarity and due to its limited capacity, the ICC will obtain a great deal of information that it will not be able to act upon and which would be useful in prosecutions by national authorities. While it will not face the Completion Strategy pressures placed on the *ad hoc* Tribunals, if it is to be effective in enabling transitional justice, it can learn some valuable lessons from the ICTY.

On the positive side, as the above discussion shows, it is clear that the transfer of information can be effective in supporting local prosecutions, particularly when there is a coherent plan of international support; this support will be all the more substantial if ways and means can be found to utilize national lawyers in the ICC's work and to transfer know-how to the national side. The ICC enjoys certain advantages that the ICTY did not have. It has not only the benefit of the ICTY's experience, and eventually that of the ICTR, but as a permanent institution, it can develop the internal infrastructure necessary to carry out the transfer of information to domestic judicial authorities and not simply react to events or developments, such as the imposition of the Completion Strategy. Thus, consideration should be given by the ICC Prosecutor to the creation of a specialized unit, similar to the ICTY's Transition Team, that would focus on providing information to national judicial authorities, and, where possible and appropriate, work with other actors (e.g., development agencies, NGOs) to assist in building capacity in the relevant national systems. Some of the tools developed by the ICTY, such as electronic data bases and a specialized request unit designed to respond to RFAs, would be very useful in this regard. In any event, the early creation of such a transitional unit would represent an advance over the late engagement that the ICTY had with domestic judiciaries in the former Yugoslavia.

The ICC is also in a better position regarding certain of the substantive legal issues faced by the ICTY, as the ICC regime ensures that there that there is a uniform body of law that applies to all state parties to the ICC Statute, in that state parties, by ratifying the statute, accept the legal norms established by it.[97] Thus, there should be no question regarding the state of the law (e.g., command responsibility, retroactive application of the law) with respect to international humanitarian law as was faced by the ICTY in the former Yugoslavia. However, given that the ICC will likely be sharing information, akin to the ICTY's 'Category 2 cases' or providing evidence via RFAs rather than transferring indicted cases, this advantage is unlikely to have much consequence.

While the ICC will be in an overall better position than the ICTY on sharing information with local judiciaries, in some respects it will face even greater challenges. Despite the problems with the judicial systems in the former Yugoslavia, these are pale in comparison to the capacity issues arising in some of the countries in which the ICC is investigating or has brought charges, e.g., Sudan, the Democratic Republic

97 Rome Statute, *supra* note 8.

of Congo. Moreover, in the former Yugoslavia, there was a substantial international effort, particularly in BiH, to address rule of law and judicial issues, and the ICTY reaped the benefits of these efforts in transferring cases and working with domestic judicial authorities. Thus, the ICC will have more difficulty in finding national judicial partners with which to provide information and work constructively.

While the ICC's work, like that of the ICTY, will continue to largely focus on its investigative and judicial work, rather than on issues of transitional justice, it has an historic opportunity to support transitional justice efforts in the countries in which it works. This support will no doubt vary from country to country, sometimes providing information and evidence to national prosecutors, in other cases to truth and reconciliation commissions, and perhaps to other investigations as well. Thus, some advance work, including the establishment of internal structures and data bases, would be very useful in preparation for those opportunities. In any event, hopefully, the ICC will learn from the positive aspects of the ICTY's transfer of cases and materials while avoiding the ICTY's first decade of largely failing to engage with the region and its legal professionals in meaningful ways, thus losing opportunities to make a difference in terms of transitional justice and reconciliation.

Chapter 10 The responsibility to enforce – Connecting justice with unity

*Rod Rastan**

1. Introduction

The issue of international cooperation has come to take on an increasingly focal role in discussions surrounding the effectiveness of the International Criminal Court. Five years into the Court's life and ten years since the adoption of the Rome Statute the success or failure of the Court continues to be judged not by the standard of its fair trials guarantees, the expeditious of its proceedings or the quality of its jurisprudence, but by whether it can apprehend the accused and get its trials underway. This foundational challenge for many international courts and tribunals is compounded by the statutory limitation of gravity as an admissibility threshold before the ICC as well as the policy decision of the Prosecutor to focus on the persons bearing the greatest responsibility. This means that in each situation the Court is likely to aver from focussing on low-intensity crimes committed by easy-to-catch 'small fry', but will direct its activities from the outset towards mass atrocities committed under the orders of senior military and political actors, whether from State or non-State entities, based on the evidence.

This paper will examine the central premise underlying the cooperation regime of the ICC Statute, namely the duty assumed by States Parties to act as the enforcement arm of the Court. It will discuss how the structural basis of a system based on proxy enforcement will inevitably manifest itself through irregular support. In an effort to identify more clearly the responsibilities of States in this regard, the paper will locate cooperation towards the ICC in the context of broader notions of collective security and the newly emergent doctrine of the responsibility to protect. This will show that, to maximise its effectiveness, the Rome system should be seen as creating a covenant of undertakings between the individual State and the collective; suggesting that the pursuit of justice (understood here as the rule of law pursuant to the ICC Statute) will only be effective if it is matched by the necessary degree of unity within the international community.

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2. Cooperation: a two-pillar system

It is an indispensable attribute for any court to be able to rely on the expectation that its decisions will be enforced. Under the statutory scheme set for the ICC, nonetheless, the execution of judicial decisions is entrusted not to the hands of a dedicated enforcement agency, but is instead to be implemented indirectly by States Parties, who serve as the proximate source of compliance. In this way, the ICC is intended to function as a part of a global network of judicial authorities. The system of enforcement established by the Rome Statute is thus made dependant on national support (including through international organisations) for all matters pertaining to the collection of evidence, the compelling of persons, the issuance of travel authorisations for witnesses to travel to the Court, the conduct of searches and seizures, the forfeiture of assets, the execution of arrest warrants and the surrender of persons.

In the light of this division of labour between the ICC and States Parties, the failure to date of State Parties to ensure the execution of the majority of the arrests warrants issued by the Court has put the issue of international cooperation at the centre of deliberations. The judges are increasingly inquiring as to the fulfilment by States of their cooperation obligations, particularly in respect of the warrants of arrests issued by the Court.[1] The President of the Court and the Prosecutor, moreover, have made repeated calls on States to shoulder their responsibilities under the Statute.[2] As Philippe Kirsch, noted in his 2006 address to the Assembly of States Parties (ASP) and again to the United Nations General Assembly in 2007, the Rome Statute establishes a two-pillar system: a judicial pillar, represented by the Court itself, and an enforcement pillar, which belongs to States.[3] In response to these appeals, States Parties, in turn, have placed the issue of cooperation at the centre of their deliberations. The omnibus resolution of the ASP at its fifth session stressed "that effective cooperation remains essential for the Court to carry out its activities," urged States to comply with their obligations in the area of judicial assistance, encouraged the intensification of support to the ICC, and tasked the ASP Bureau to examine ways to improve cooperation with the Court.[4]

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1 See e.g. Pre-Trial Chamber examination of State cooperation with regard to the execution of its warrants of arrest: *Prosecutor v. Joseph Kony et al.*, *Order to the Prosecutor for the submission of additional information on the status of the execution of the warrants of arrest in the situation in* Uganda, 30 November 2006.

2 Address by Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice, Nuremberg, 26 June 2007; available at www.icccpi.int/otp/otp_events/LMO_20070624.html.

3 Address by Philippe Kirsch, President of the ICC, to the United Nations General Assembly, 9 October 2006; available at <www.icc-cpi.int/library/organs/presidency/PK_20061123_en.pdf>. Address by Philippe Kirsch, President of the ICC, to the United Nations General Assembly, 1 November 2007; available at www.icc-cpi.int/library/organs/presidency/PK_20071101_ENG.pdf.

4 Resolution ICC-ASP/5/Res.3, ICC-ASP/5/32, 1 December 2006, paras 30-36.

Part of the challenge of a twin-pillar system is that while the Court is independent of States and does not act on instructions from any external source, States Parties are also independent of it and cannot be ordered by the Court.[5] The task is therefore one of coordination and the assumption of responsibilities, and the definition of rights and obligations. It may be useful, in this regard, to recall that the regime established by the Rome Statute differs both from the inter-State system of mutual legal assistance, which is premised upon notions of reciprocity and national interest, and from the model created by the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, where judicial intervention was conditional upon prior sanction by the Security Council. By contrast, the ICC Prosecutor is empowered to open investigations, subject to judicial authorization, at his own initiative. Moreover, even with referrals by States Parties or the Security Council, the Prosecutor is granted discretion in determining whether to even initiate an investigation over and above the identification of the focus of his prosecutorial strategy. In this way, the Court is entitled to act, and to request compliance from States with its requests for cooperation, even in situations and cases where States or the Security Council have not requested intervention. The ability of the ICC to act independent of prior political sanction represents a significant challenge to state-centric assumptions of world order. It will, however, paradoxically, only become effective if the Court is able to rely on effective forms of cooperation from States and, where appropriate, the Security Council.

3. Horizontal and vertical regimes revisited

In elaborating a conceptual framework for the cooperation regime under Part 9 of the Rome Statute, much of the debate to date has looked at the degree to which the treaty text manifests either 'horizontal' or 'vertical' characteristics. As described by the Appeals Chamber of the ICTY, these two terms attempt to distinguish the consensual and reciprocal legal framework governing inter-State legal assistance in criminal matters as distinguished from the hierarchical and supranational relationship of an international court towards national authorities.[6] As Swart notes, in inter-State practice there is no customary rule of international law imposing a duty of States to cooperate in criminal matters beyond their treaty obligations: "Sovereignty, equality, reciprocity, the existence or absence of mutual interests, and, to a greater or

5 See discussion on the issue of the Court's compulsory powers in R. Rastan, 'Testing Cooperation: The International Criminal Court and National Authorities', (2008) 21 *Leiden Journal of International Law* 431.

6 See *Blaškić Subpoena Interlocutory Appeal*, recalling the *Amicus curiae* brief submitted by J.A. Frowein et al. for the Max Planck Institute; ICTY, Appeals Chamber, *Prosecutor v. Blaškić* (IT-94-14), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, dated 29 October 1997. See also Falk who refers to "statist logic", representing the predominant horizontal ordering of international society since the Peace of Westphalia that is associated with the will of the territorial sovereign State, and a 'supranational logic' that aspires to a vertical ordering from above; 'Theoretical Foundations of Human Rights', in R. Falk (ed.), *Human Rights and State Sovereignty* (1981), 33.

lesser extent, the need to protect individual persons against unfair treatment by the requesting State are the main determinants of inter-State cooperation".[7] By contrast, a distinctly vertical regime is said to have been created by the *ad hoc* Tribunals: as emphasised by the Report of the Secretary-General to the Security Council on the establishment of the ICTY stating that "an order by a Trial Chamber … shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[8]

The manner in which the Rome Statute creates its own unique mixture of the horizontal and vertical regimes has been treated in detail elsewhere and space does not permit its rehearsal here.[9] Suffice to recall that the Statute, a product of several years of negotiations, recalls some elements which are drawn from inter-State practice and others which clearly mirror the law and jurisprudence of the *ad hoc* Tribunals. The differences between these horizontal and vertical regimes are usually described in order to draw out the distinctly hierarchical normative obligations placed on States to cooperate with international courts and tribunals. Thus, for example, in the ICTY Appeals case cited above, the Appeals Chamber used these terms in addressing a legal challenge brought by a sovereign State (Croatia) as to the extent of its obligations under public international law in the light of the assertion of authority by the Tribunal to issue binding orders to its competent authorities. In the case at hand, the government of Croatia accepted the opinion of the Appeals Chamber as binding and adjusted its cooperation accordingly. It was, in other words, a cooperating State that accepted the authority of the legal command. The issue in contention was therefore placed within the context of an internal dispute resolution mechanism that enabled the Tribunal to resolve the challenge by itself.

The usefulness of distinguishing between horizontal and vertical powers breaks down, however, where the requested State ceases to engage with the Tribunal or refuses to cooperate. Looking again to the experience of the ICTY, the recurrent non-compliance by the authorities of Serbia/Serbia and Montenegro/ Federal Republic of Yugoslavia and the entity level authorities of the Republika Srpska within Bosnia and Herzegovina demonstrate the marginal relevance of vertical rule-validation for explaining compliance by recalcitrant States. The challenge to the authority of the Tribunal in these instances clearly was not one could be resolved internally by appealing to normative hierarchies, but had to be referred to external authorities. At the same time, norm-defection was partly to be explained by the fact that, although the

7 For an elaboration of the characteristics of the horizontal vs vertical models see B. Swart, 'General Problems', in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1591; G. Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002), 87.

8 *Report of the Secretary General*, S/25704, 126. See *also* S/RES/978(1995) and S/RES/1031(1995). The ICTY Appeals Chamber has stated, moreover, the provisions on cooperation "impose an obligation on Member States of the United Nations towards all other Member States or, in other words, an obligation '*erga omnes partes*'"; *Blaškić Subpoena Interlocutory Appeal*, para. 26.

9 See, e.g., Swart, *supra* note 7, 1591; Sluiter, *supra* note 7, 8; Rastan, *supra* note 5.

Tribunals enjoy delegated authority via Chapter VII of the UN Charter, the Security Council failed to take action to remedy the reported deficiencies beyond deploring and condemning non-cooperation. As former ICTY President Meron noted, "[v]erbal admonitions, even made under Chapter VII, not accompanied by credible sanctions or threats of use of force have not proved adequate to force compliance. The need to back up international criminal tribunals with power, power of enforcement, has been demonstrated once again".[10] As a result of the apparent inconsequence of violating international norms, the recalcitrant State came to refuse cooperation either as a matter of fact, by remaining passive, or as a matter of law, by questioning both the authority and domestic effect of the issued command.

In the absence of judicial powers to directly compel State cooperation under threat of penalty, and faced with the effective unavailability of the Security Council as an enforcement agent, the one principal tool that has served to promote compliance with the ICTY has been the political support exercised by other key international actors. In the context of the Balkans, this has taken the form of policy linkages between the cooperation of States with the Tribunal and their participation in the European Union's Stabilisation and Association Process and NATO's Partnership for Peace programme. Similarly, the lifting of economic sanctions and the rendering of multilateral and bilateral assistance, notably by the World Bank and the U.S. has in several instances been made conditional on substantive progress with ICTY cooperation. Thus, while judicial findings and notifications of non-compliance have seldom directly led to cooperation from the requested State or to enforcement action from the Security Council, they have exercised considerable influence in the context of other multi- and bilateral processes in bringing about changes in the behaviour of the States of the former Yugoslavia.

Verticalism still has an explanatory role here, since it is was the acceptance by these international actors of the vertical, supranational authority of the Tribunal that was determinative of their policy decision to institute such issue-linkage strategies towards the recalcitrant State. The very definition of "recalcitrance", moreover, presupposes consensus as to rule from which the impugned State deviated. This is not normative authority that the Tribunal exercises vis-à-vis the requested State, though, but vis-à-vis the international community as a whole.

For the ICC, the exercise of its powers will, in a similar manner, largely depend on the acceptance of its authority in the first instance by the requested State and, should that fail, by the international community. The demonstration by the Court of its impartiality and independence – i.e. the effective functioning of the judicial pillar – will be critical in establishing recognition for its authority. Under the enforcement pillar, in turn, it is the interplay of the relationship between the individual State and the collective, and the predictability of its outcome, that will be decisive in ultimately determining the compliance rate enjoyed by the Court. In line with the twin-pillar system established by the Rome Statute, an important aspect bearing on considerations of cooperation, thus, will be the coercive or incentive-generating measures that are ap-

10 'Comments in the ILA Panel on the ICTY' (1999) ILSA Journal of International & Comparative Law 5, 347.

plied by authorities other than the ICC itself. Such processes will seek to promote an enabling environment for the Court by increasing the political effects of non-compliance and its impact on a State's overall reputation on the international sphere. In this manner, the adoption of issue-linkage strategies will seek to link a state's record of cooperation in one area (ICC cooperation) to its ability to participate in other spheres of international activity (political, trade, development etc).[11]

In practice it is not easy of course to draw a straightforward correlation between one sphere of activity and another. War crimes prosecutions, in particular, often occupy a crowded and complex international space along side parallel humanitarian, security and political interests. Within this environment, moreover, support for issue-linkage has often proven weakest the closer the temporal proximity to the actual conflict itself.[12] This indeterminacy in reputational assignment has resulted in the variability accompanying the compliance rates of recalcitrant States in the light of their alternating cost-benefit calculations at any given time.[13] Where issue-linkage has proved successful, third States have been willing to grant conditional loans and subsidies or technical assistance in order to create positive incentives for compliance. In the context of the ICTY, because of a shared community of values among Member States of the EU and NATO, international norms and standards have come to perform functions that critically impact on the rational self-interest of political actors, creating thereby a convergence between compliance and strategic national interests.[14]

The successful adoption of linkage strategies, nonetheless, has in general remained rare and has been employed only in connection with high priority consensus-generating issues. It may be a damning but fair assessment to say that the prevention of genocide, war crimes and crimes against humanity and their effective repression has not yet reached a universally accepted level of priority to warrant significant policy re-alignment in the political, military and economic spheres. Thus, for example, while the linkage between peace and justice has increasingly come to be recognised at the level of principle,[15] the willingness of the international community to seek the enforcement of judicial decisions has fallen back on the discrete decisions of indi-

11 On compliance theories, see generally G. Downs and A. Trento, Conceptual Issues Surrounding the Compliance Gap, in E. Luck & M. Doyle (eds.), *International Law and Organization: Closing the Compliance Gap* (2004), 19.

12 See e.g. the varying responses towards prosecutions in the former Yugoslavia or Sierra Leone/Liberia during the conflict itself, at the time of peace negotiations, and in the later post-conflict/recovery period.

13 The alternating responses of the Government of Sudan to the international community with respect to the humanitarian, security, political and judicial processes provides one example.

14 Compare, also, the competing linkage strategies on ICC issues employed by the U.S. (bilateral immunity agreements) and the EU (Cotonou Agreement with the African, Caribbean and Pacific Group of States) in their relations with third States.

15 See, *inter alia*, S/2004/616 (2004); S/PRST/2004/34 (2004); S/RES/1674 (2006); A/RES/61/15 (2007); and A/RES/62/12 (2007).

vidual States to transform such principles into practical policy priorities. Evidently, political support for the Court, by its nature, will remain both unpredictable and subject to competing priorities. Successful enforcement, therefore, will depend on the convergence of a number of policy considerations for each State.

4. The responsibility to enforce

The newly emergent doctrine of the responsibility to protect (R2P), as introduced by 2001 report of the International Commission on Intervention and State Sovereignty and as subsequently discussed within United Nations forums,[16] offer a conceptual framework to contextualise the obligations incumbent on States to fulfil the goals of the Rome Statute. Correlation between the ICC and the R2P doctrine may help sharpen focus on the importance of collective strategic prioritisation of the issue of state cooperation.

The thesis underlining the R2P doctrine derives from the broader concept of collective security underpinning the UN Charter and also draws on the momentum created by the adoption of the Rome Statute itself in 1998. If the ICC Statute is about repression once crimes have occurred, the R2P doctrine is about prevention and protection against ongoing crimes. Like the ICC Statute, the doctrine is structured around the premise that where a state is unwilling or unable to fulfil its own primary responsibility, the responsibility is transferred to the international level. As the Commission's report states "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it the principle of non-intervention yields to the international responsibility to protect". These elements were held to extend to the responsibility to prevent; the responsibility to react; and the responsibility to rebuild. In a similar vein, paragraphs 138-139 of the outcome document adopted by UN Members States at the conclusion of the 2005 UN World Summit, and as re-affirmed by the Security Council in resolution 1674, provides, *inter alia*:

> "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity … We accept that responsibility and will act in accordance with it … In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[17]

16 See Report of the International Commission on Intervention and State Sovereignty (2001); Report of the High-level Panel on Threats, Challenges and Change, A/59/565 (2004); World Summit Outcome, A/60/L.1 (2005); S/RES/1674 (2006).

17 A/60/L.1 (2005), paras 138-139.

The declaration identifies a set of shared community values and principled commitments around which discussions over the fight against impunity can be clustered. To this end, while the actual or apprehended commission of genocide, war crimes or crimes against humanity can be said to trigger an international responsibility to intervene in order to prevent further human suffering, the ICC holds out to potential and actual violators the tangible threat of punishment.[18] As witnessed in the context of Darfur – for many the stillborn testing ground for the R2P doctrine – the power of the ICC to prosecute such crimes, however, will remain ineffective if accused persons are not surrendered for trial.[19] There must, thus, be a corollary responsibility assumed by the international community should a State fail to enforce judicial decisions related to the underlying protective norm.

For ICC State Parties, this responsibility is to be found in the Statute itself. In particular, while the Statute draws on the principles of consent and non-intervention with respect to its requests for cooperation to individual States, it threatens punitive referral to the collective community of States should cooperation not be forthcoming. In particular, although the Rome Statute does not authorise intervention in an armed conflict or internal affair of another State, it provides for the referral of matters of non-compliance to the ASP and/or the Security Council for their resolution. The ICC Statute, in this way, relies on a shouldering of enforcement responsibilities involving the requested State and the international community. Much like the responsibility to protect or the collective security regime of the UN Charter, the responsibility to enforce the Court's decisions is shared.

Enforcing judicial decisions relating to alleged perpetrators of these crimes embraces three specific responsibilities outlined in Commission's report: the 'responsibility to prevent', through dissuading the perpetration of future crimes; the 'responsibility to react', which may include the concurrent adoption of coercive measures such as targeted financial sanctions and travel bans or the development of arrest operations involving national or regional assets; and the 'responsibility to rebuild', to the extent that failure to remove individuals sought by the Court may retard or obstruct peace-building and recovery efforts.[20] In line with the primary responsibility of the territorial State, moreover, the exercise of these responsibilities may be posited along

18 The preamble of the ICC Statute, moreover, recognises that such crimes threaten the peace, security and well-being of the world, thereby linking the Court's mandate with the collective security machinery of the United Nations.

19 This judicial function has led one of the report's Commissioners to call for the recognition of a 'responsibility to prosecute' as a central element of the duties incumbent on States. See Ramesh Thakur, '*Responsibility to Protect – and Prosecute?*', The Hindu (10 July 2007); available at <www.hindu.com/2007/07/10/stories/2007071053730800.htm>.

20 See e.g. in the case of Ahmad Harun, wanted by the Court for persecution, murders, forcible transfers, imprisonment or severe deprivation of liberty, acts of torture, rapes and other inhumane acts upon civilians, and his subsequently appointment to the post of State Minister for Humanitarian Affairs where he has responsibility over the IDP camps in Darfur and acts as the main interlocutor for humanitarian organisations.

a scale of options involving less intrusive measures to those that require coercive application.

For any collective international responsibility to become effective, however, unity is the essential prerequisite. The assumption of such a responsibility requires, firstly, unity of thought as to the norm that is to be protected. In this instance, international *opinio juris* appears to have coalesced around the most basic norms of humanity governing the prevention and repression of atrocities crimes. In the realm of practice, in turn, should a State manifestly fail in its own primary responsibility, the international response will only be effective in altering state behaviour if it is matched by unity of action. Where a recalcitrant State is able avoid its obligations by exploiting divisions within the international community or by bypassing measures aimed at bringing pressure to bear, the collective response will have been fatally undermined. Thus, just as for the UN, where the aspiration for unity amongst its member nations serves as the defining attribute of Organisation's name, so for the ICC the implementation of its mandate will only become effective where it is matched by the necessary demonstration of collective unity.[21] For the principle of unity to operate effectively, states must so align their national interest with the collective interests of humanity that they would stand ready to take action to uphold shared community values. At the same time, a prevalence of disunity will result in irregularity, unpredictability and the disordering of the overall scheme.[22]

5. Cooperation in practice

The next section will examine how issues of international cooperation have affected the operation of the Court.

5.1. Self-referrals and proprio motu *powers*

In September 2003, the Prosecutor, Luis Moreno Ocampo, announced to the second session of the ASP his intention, after receiving communications from individuals and non-governmental organisations, to open an investigation in relation to the situation in the Democratic Republic of Congo (DRC), particularly in the light of the violence in Ituri. The Prosecutor stated that he stood ready to seek authorisation from a Pre-Trial Chamber to start an investigation under his *proprio motu* powers,

21 The reverse is also true: i.e. whereas the perpetuation of a culture of impunity is likely to sow the seeds of future conflict and division, the purpose of enforcing justice is to buttress fundamental values and community interests, thereby contributing to unity or, in the words of the preamble, to the 'peace and security and wellbeing of the world'. See, e.g., O. Triffterer & M. Bergsmo, in commentary to preamble citation 1: "The enforcement of international criminal law through an international jurisdiction has the potential to contribute to the further *unification* of humankind by bringing peace through justice"; O. Triffterer (ed.), *Commentary on the Rome Statute* (1999), p. 7. See also discussion on Uganda below.

22 K. Barnes, paper delivered at the Conference on Law, De Poort, the Netherlands 14-17 December 2006.

but noted that "in light of the current circumstances in the field, the protection of witnesses, gathering of evidence and arrest of suspects will be extremely difficult without the strong support of national or international forces". He cautioned that if such cooperation were not forthcoming his Office would need to investigate from the outside and rely on international cooperation for the arrest and surrender of the alleged perpetrators.[23] As such, he invited the DRC authorities to refer the situation themselves or to otherwise lend their active support to the ICC. He noted:

> "Our role could be facilitated by a referral or active support from the DRC. The Court and the territorial State may agree that a consensual division of labour could be an effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. The Office could cooperate with the national authorities by prosecuting the leaders who bear most responsibility for the crimes. National authorities with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible".[24]

In April 2004, the Office of the Prosecutor received a referral of the situation from the Government of the DRC together with its pledge to cooperate with the Court.[25] The issue of cooperation, thus, served as the lead consideration in the substitution of a *proprio motu* trigger mechanism in favour of a State referral, or what has come to be coined as "self-referral".

A similar dynamic operated in relation to the opening of the second investigation in relation to the situation in Northern Uganda. Following an assessment of gravity with respect to the seriousness of the different situations within the Court's jurisdiction, the Office of the Prosecutor maintained its policy of inviting and welcoming referrals by territorial states in the interests of increasing the likelihood of cooperation and in situ support.[26] In the two situations, thus, the availability of external *proprio motu* intervention served as a powerful incentive for the States Parties concerned to provide their active cooperation to the Court, most notably through referring the situation themselves. For both the DRC and Uganda, it is uncertain whether such referrals would have been forthcoming without the availability of an independent triggering mechanism.[27]

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23 See Report of the Prosecutor at the Second session of the Assembly of States Parties, 8 September 2003, p.4; <www.icc-cpi.int/library/organs/otp/LMO_20030908_En.pdf>.

24 Ibid; see also *Paper on some policy issues before the Office of the Prosecutor* (2003), p.5; <www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf>.

25 ICC Press Release, '*Prosecutor receives referral of the situation in the DRC*', ICC-OTP-20040419-50 (19 April 2004); <www.icc-cpi.int/pressrelease_details&id=19&l=en.html>.

26 *Report on the activities performed during the first three years (3 Year Report) (June 2003 – June 2006)*, p.7; <www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html>.

27 Schabas, noting that the ICC Prosecutor has yet to invoke his powers and shows little inclination to do so, suggests that, for all the battles fought in Rome, the exercise of *proprio muto* powers has become an "issue that has thus far proved to be of little importance". See

5.2. Cooperation with an unable State: DRC

Once a referral is received, cooperation is not guaranteed of course: the opening of an investigation will only be the start the process, not the end goal. For States such as the DRC the question arises as to availability of domestic powers to assist the Court with its investigations and the enforcement of its warrants.

In the course of the ICC's activities in the DRC, the lack of domestic capacity was partly offset by the international peacekeeping presence on the ground, known by its French acronym "MONUC" (*Mission de l' Organisation des Nations Unies en République démocratique du Congo*). To this end, following the opening of the ICC's investigations in the DRC, the mandate of MONUC was revised to enable the possibility for ICC cooperation. Although proposals in the Security Council for explicit reference to the ICC were rejected, sustained debate resulted in the adoption of a broadly framed provision in Resolution 1565 authorising MONUC to "cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations". Agreement on this compromise text, however, excluded the provision from the categories of tasks for which the use of force was permitted.[28] It therefore could not be relied upon for the implementation of ICC requests that required the exercise of coercive powers.

Following consultations, the Memorandum of Understanding between the ICC and the UN on cooperation from MONUC ("MONUC MoU") arrived at a creative solution to this restriction by cross referencing other provisions of MONUC's mandate where use of force is permitted. Paragraph 4 of Resolution 1565, for example, authorises MONUC to use all means necessary under a broad heading enabling assistance to the DRC authorities in order to promote the re-establishment of confidence and to discourage violence, in particular by deterring the use of force to threaten the political process. Also of relevance, paragraph 5 (c) authorises use of force for the disarming of "foreign combatants". Moreover, Security Council Resolution 1493 "[a]uthorizes MONUC to use all necessary means to fulfil its mandate in the Ituri district and, as it deems it within its capabilities, in North and South Kivu". MONUC had already implemented such provisions to assist the DRC authorities in the arrest and detention of combatants and militia leaders located in its areas of deployment. Following this precedent, the parties agreed that MONUC could agree to assist the DRC Government, upon its request, in carrying out the arrest of persons sought by

W. Schabas, '*The enigma of the International Criminal Court's success*', OpenDemocracy.net (17 February 2006). As described above, however, this appears to inadequately appreciate the many ways the potential for *proprio motu* referral can prompt State action. Nonetheless, there will obviously remain a need for the ICC to guard against countries ingeniously dumping cases on the Court so as to either avoid their own responsibility, to garner international attention, or to pursue their own domestic political agendas against rival groups.

28 S/RES/1565 (2005), 5 (g), but see 6. See also interpretative statements on adoption S/PV5048.

the Court in the areas where it was deployed and consistent with its mandate.[29] Other enforcement powers made available under similar arrangements included MONUC's preparedness to assist in search and seizure operations, the securing of crimes scenes, the transportation of suspects, security support, and emergency temporary refuge for ICC staff and witnesses. At the same time, the MoU reserved ample flexibility for MONUC to consider such requests on a case by case basis, taking into consideration issues of security, operational priorities, consistency of the requested measure with its mandate and rules of engagement, as well as the capacity of the DRC authorities themselves to render the assistance sought. The enforcement powers of MONUC were thus made available at the request of the DRC government, rather than that of the ICC. Such cooperation under the MoU has to date resulted in the facilitation by MONUC of ICC staff security; transportation and logistical support; and assistance to the DRC authorities in exercise of compulsory powers for the surrender of persons sought by the Court.[30]

Without the political support of the DRC national authorities agreeing to MONUC indirectly assisting the Court in this manner, and given the absence of an otherwise enabling mandate, the peacekeeping mission would have been severely limited in its ability to assist the Court in the exercise of coercive measures. The responsibility to enforce in the DRC, thus, has been implemented by the combination of political will from national authorities coupled with the military and logistical capacity of international community. For the same reasons, however, the conditions that fostered cooperation in the DRC may be at considerable variance with other situations where UN peacekeepers are deployed.[31]

5.3. Cooperation in the midst of negotiations: Uganda

If the situation in the DRC was referred to the Prosecutor in view of the inability of the DRC authorities to conduct genuine national proceedings in the midst of an ongoing conflict, the referral of the situation in Northern Uganda was premised on the inability of the national authorities to apprehend the accused. For the DRC, even if MONUC was able to assist in the arrest of persons alleged to have committed serious crimes, the authorities were unable to conduct genuine domestic against persons

29 See Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, 8 November 2005; <www.icc-cpi.int>.

30 In addition, assistance has been provided to the ICC on a bilateral basis by France and Belgium for the transport of the accused from the DRC to The Netherlands.

31 Another area where the issue of international cooperation had a considerable impact was the decision of the Prosecutor to limit the range of charges that Thomas Lubanga was being initiatally investigated for and to apply for the immediate issuance of an ICC arrest warrant, based on concerns over his availability for surrender: "The decision on the timing and the content of the charges was triggered by the possible imminent release of Thomas Lubanga Dyilo [pursuant to then domestic military proceedings in relation to a different case]"; *3 Year Report*, para. 16.

for war crimes related offences.[32] For Uganda, the issue was less one of institutional inability, but the need for outside intervention to bring the members of the Lord's Resistance Army (LRA).[33]

In Uganda, the challenge for cooperation was not the conduct of investigations, which were conducted swiftly in ten months with the active support of the national authorities, leading to applications for arrest warrants against Joseph Kony and four other LRA commanders, but in the effort to maintain support for the ICC within the broader civil society. In particular, the work of the Court quickly became entangled in the milieu of debates over the cessation of the conflict in view of the re-launched negotiations between the Government of Uganda and the LRA. International consensus towards the work of the Court in Northern Uganda also splintered: with some quarters criticising the ICC for fuelling instability and uncertainty in the face of ongoing peace efforts,[34] while others credited the ICC for contributing to the sharp drop in attacks and in forcing the LRA to the negotiating table.[35] In the midst of these developments, it was suggested that the Government of Uganda and/or the LRA could negotiate directly with the ICC, by asking the Prosecutor to withdraw the warrants in the interests of justice so as to promote domestic transitional justice mechanisms. The response of the ICC, predictably, was to stress the Court's role as a judicial institution whose actions must be guided by the law, not the process of political bargaining. In this context, outside commentators came to direct discussions over the appropriateness of transitional justice mechanism towards the complementarity provisions under Article 17 of the Statute, by which the Court shall consider any challenges brought to the admissibility of specific cases before it. Similarly, discussions over peace and justice were directed towards the role of the Security Council under Article 16. Nonetheless, the Prosecutor maintained emphasis on the many ways in

32 On ongoing challenges for war crimes related trials in the DRC see, *inter alia*: Report of the independent expert appointed by the Secretary-General on the situation of human rights in the Democratic Republic of the Congo (Titinga Frédéric Pacéré); A/HRC/7/25 (2008); *'Chaos in the Courts'*, IWPR, AR No. 158, 27 February 2008; '*Kilwa Trial: a Denial of Justice – A Chronology October 2004-July 2007'*, Global Witness/RAID/ACIDH/ ASADHO, 17 July 2007.

33 Although the Government of Uganda had limited the referral to the "situation concerning the Lord's Resistance Army", the Prosecutor informed the Ugandan authorities that the Office would interpret the referral as covering crimes committed by all parties in Northern Uganda; *3 Year Report*, para 25. As in the DRC, a factor that may have influenced the support of the Government for the work of the Court was the anticipated focus of the Prosecutor's investigations on armed opposition groups. The challenge for referring States and the ICC in these situations will therefore be to ensure that cooperation remains consistent where the Prosecutor examines responsibility imputable to the national authorities or their allies.

34 See e.g. Bigombe, *'Others Criticize ICC Arrest Warrants'*, <www.ugandacan.org/ item/542>.

35 See e.g. International Crisis Group, *Peace in Northern Uganda?*, Africa Briefing N°41, 13 September 2006.

which judicial efforts may contribute towards peace and the cessation of violence.[36] Moreover, he described the conditions for negotiations laid down by the LRA – the resumption of violence unless the warrants are withdrawn – as blackmail.[37] The call for States not yield to political pressures found echo in the address of the President of the Court to the UN General Assembly:

> "Throughout the course of history, genocide, crimes against humanity and other serious international crimes have not arisen spontaneously. Rather, these crimes have occurred – and continue to occur – in the context of complex political conflicts. More often than not, there were attempts to resolve such conflicts through expedient political compromises. More often than not, these compromises ignored the need for justice and accountability. And more often than not, expedient political solutions which ignored the need for justice unraveled, leading to more crimes, new conflicts and recurring threats to peace and security … It is clear of course that the situations and cases before the Court are linked to broader, complex political issues and developments, as has always been the case in similar situations in the past. Nevertheless, compliance with the decisions of the Court is not just another issue on the negotiating table".[38]

Efforts by the LRA and others to cast the ICC as the stumbling block to peace and to thereby blame the Court for the continuing commission of crimes, have to some extent come to colour the perception of domestic and international actors, and consequently impacted the overall level of support for the work of the Court in relation to Northern Uganda. Political actors, for example, have questioned the wisdom of the Court's insistence on the execution of the warrants; peace negotiators have criticised the Court for not giving guarantees to Joseph Kony; while some amongst local displaced communities have come to believe that the ICC represents the sole bar to their sustainable return. These conditions have undercut the ability of the international community to foster conditions favourable for the arrest of the accused simply because there is no consensus on what needs to be done. The absence of unity of thought here has served to dampened emphasis on the responsibility to enforce.

5.4. Cooperation with an unwilling State: Sudan

The situation in Darfur, Sudan, represents the first situation where the ICC has exercised its jurisdiction with respect to the territory of a State not Party to the Statute, and which has at least nominally contested the jurisdiction of the Court and the admissibility of its cases.[39] This has had several important consequences on cooperation.

36 *Nuremberg Address* (2007).

37 Ibid.

38 *Address to the UNGA* (2007).

39 Such contestation has only occurred in the public arena: no formal challenge has been brought to date by the Sudan pursuant to Article 19 of the ICC Statute.

Because Sudan is not a Party to the ICC Statute, and in the absence of a declaration of its *ad hoc* consent, the Court's exercise of jurisdiction rests solely on the referral of the situation by the Security Council.[40] Its power to seek cooperation from the Sudan likewise flows from the same legal basis. In particular, as part of its resolution referring the situation, the Security Council, acting under Chapter VII of the UN Charter, imposed a binding obligation on the government of the Sudan and all other parties to the conflict to "cooperate fully" with the ICC. This duty applies irrespective of whether Sudan is a Party to the Rome Statute or not. Rather, the legal basis for Sudan's duty to cooperate derives from Article 25 of the UN Charter whereby all Member States agree to accept and carry out the decisions of the Security Council. In such a situation, a State not Party to the Rome Statute is obliged to cooperate with the ICC on the basis of the Security Council resolution itself, not the Rome Statute. The legal basis for the ICC to interact with that non-Party State, perforce, derives from Article 87 (5) of the Rome Statute, which provides that the Court may invite any State not party to the Statute to provide assistance under Part 9 on the basis of an ad hoc arrangement, an agreement or "any other appropriate basis". In the case of a Security Council referral, the Chapter VII resolution directing a State to cooperate with the ICC forms the relevant "appropriate basis" for the Court to issue its requests: i.e. the conclusion of an ad hoc agreement or arrangement with the non-Party State is not be a pre-requisite.[41] Accordingly, the ICC may transmit requests to a State not party to the Statute for any of the forms of cooperation specified under Part 9 pursuant to the obligation imposed upon that State in the pertinent Security Council resolution to cooperation fully with the Court.

In the case of Sudan, the possibility to obtain the cooperation of the national authorities was not barred from the out-set. As indicated in his reports to the Security Council, the Prosecutor was able to secure some degree of cooperation during the investigation of the first case. This included responses to requests for provision documents, including materials from the National Commission of Inquiry; the facilitating of five missions by the Office of the Prosecutor to Khartoum to gathering information on national proceedings, including meetings with government Minsters, relevant departments, as well as members of the Special Court for Darfur, the Judicial Investiga-

40 S/RES/1593 (2005).

41 It has been suggested that, according to Article 4 (2) of the ICC Statute, the ICC can only seek cooperation from a non-Party State "by special agreement" with that State; *Situation in Darfur, (Defence) Conclusions aux fins d'exception d'incompétence et d'irrecevabilité,* 9 October 2006, ICC-02/05-20, p.16. This, however, misapplies the scope of Article 4, which relates to the recognition of the ICC's legal personality on a State's territory, and not the exercise of the Court's jurisdiction or the issuance of cooperation requests. Moreover, the provision refers to those functions and powers the Court may exercise "as provided in this Statute", consistent with the principle of consent under the law of treaties. As Kress & Prost point out, the principle of consent under the Rome Statute "is without prejudice to legal consequences that may stem from other legal sources"; See C. Kress & K. Prost, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 1061. As noted above, one such source would be a Chapter VII resolution from the Security Council.

tions Committee, the prosecution services and senior officials of the Ministry of the Interior; and the taking of a number of formal interviews by the Prosecutor's Office, including that of a senior official.[42] Such cooperation was geared by the Government of Sudan towards facilitating an admissibility assessment, rather than providing a secure and enabling environment for the conduct of on-site investigations by the Office of the Prosecutor.

As a result, a further important consequence deriving from considerations of cooperation was the decision not to conduct ICC investigations inside Darfur. This was based on insecurity prevalent in Darfur and in light of the Prosecutor's duty to take measures for the protection of victims and witnesses during investigations (Article 68). The absence of a functional and sustainable protection system inside Darfur coupled with the desire to avoid exposing victims and witnesses through direct contact with the ICC meant that the next logical choice was to exploit the ready availability of direct witness testimony in other locations around the world.[43]

The limited forms of cooperation provided by the Government of Sudan were suspended once the Office of the Prosecutor proceeded to file its evidence with the judges.[44] Although no formal challenge to date has been brought pursuant to Article 19 of the ICC Statute, and notwithstanding the jurisdictional discussions above, the government of Sudan has publicly stated that it rejects the jurisdiction of the Court based on the argument that it is neither a Party to the Statute nor otherwise provided its consent. It has also questioned publicly, in view of complementarity, the admissibility of the cases brought before the Court on the grounds that it has established its own national institutions and, moreover, conducted proceedings in relation to the persons accused. In the absence of either cooperation or the formal filing of a legal challenge, the matter of non-compliance was reported by the Prosecutor to the Security Council in December 2007, the first such notification in relation to any situation before the ICC.[45]

As with the previous experience of the *ad hoc* tribunals, the issue of cooperation has become one that cannot be resolved by the ICC alone, but has necessitated referral back to the international community. While the Court can continue to play a

42 *Third Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)* (14 June 2006); <www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf>; *Fifth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)* (7 June 2007); <www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC5-Darfur_English.pdf>.

43 See *supra* note 29 and accompanying text, referring to the possibility of the Prosecutor conducting the DRC investigation from outside should cooperation not be forthcoming.

44 Considerations of cooperation also determined the decision of the Prosecutor to seek, in the first instance, summons to appear against Harun and Kushayb and only in the alternative warrants of arrest; see *Prosecutor v. Ahmad Harun and Ali Kushayb*, Prosecutor's Application under Article 58(7), 27 April 2007, ICC-02/05-56, paras. 270-278.

45 *Sixth Report of the Prosecutor of the ICC, to the UN Security Council pursuant to UNSC 1593 (2005)* (5 December 2007); available at <www.icc-cpi.int/library/organs/otp/OTP-RP-20071205-UNSC-ENG.pdf>.

role in liaising with national authorities to share information, galvanise support and promote enforcement, the judicial pillar can be said to have completed its initial task with the issuance of the arrest warrants. Once this is done, responsibility falls to the enforcement pillar belonging to States. Should the territorial State fail to cooperate, in turn, the responsibility to secure enforcement must perforce shift to the collective community of States if the system is to remain effective. The Principals of the ICC, as with the predecessor Tribunals, have therefore expended considerable effort in reminding States of their responsibility for ensuring the enforcement of the Court's warrants and maintaining support for its activities. As President Kirsch has noted,

> "[R]elative silence has been observed in situations where public support for the Court and for the need for justice more broadly would be expected. Silence in these situations may send the wrong message to perpetrators and potential perpetrators of serious international crimes and if the very purposes for which the Court was created are to be preserved. It is important that the international community reaffirm its fundamental commitment to the principles of justice and international law enshrined in the Charter of the United Nations and in the Statute of the ICC."[46]

The Prosecutor has been more explicit, invoking the legal responsibility of States Parties to ensure the enforcement of the Court's decisions under the Statute:

> "The Rome Treaty consolidates the 'duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. They have to 'guarantee lasting respect for and the enforcement of international justice'. They have to seriously address the issue of arrest."[47]

In the situation in Darfur, thus, cooperation has become a responsibility of all States, a shared burden, according to the procedure foreseen under the Rome Statute and the UN Charter, requiring States to take appropriate measures to ensure the enforcement of the Court's decisions. If the international community fails, however, to rally in a united manner around the Court to insist on the enforcement of its decisions, the very system created by States will have been undermined.

6. The Assembly of States Parties – Responses to the challenge of cooperation

One early step States Parties have taken to respond to the crises and challenges thrown up by the issue of state cooperation has been to engage in wide-ranging con-

46 *Address to the UNGA* (2007).

47 *Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, Eleventh Diplomatic Briefing* (10 October 2007); available at <www.icc-cpi.int/library/organs/otp/ICC-DB11-ST-LMO-ENG.pdf>.

sultations on the topic, under the auspices of the ASP Bureau.[48] The resultant report of the Bureau on cooperation submitted to the ASP in 2007 emphasises the many ways States can contribute to "create and promote an enabling environment for the Court". Specifically, the report elaborates a series of recommendations for assistance in the areas of analysis, investigations, prosecutions and judicial proceedings, arrest and surrender, witness protection and support, as well as logistics and security. In relation to areas falling to the general responsibility of all States Parties the report suggests that, in their bilateral contacts, "States Parties should support and promote the Court and its specific activities. Such support encompasses a range of issues such as: (a) Promoting the signing, ratification and implementation of the Rome Statute; (b) Supporting the Court's general activities, including public support; (c) Promoting respect for the Court's independence; (d) Supporting situation-specific activities of the Court, including arrest and surrender of wanted persons". The following extracts appear particularly relevant to discussion herein:

> "39. Arrest and surrender of persons wanted by the Court remains a crucial issue. The Court cannot fulfil its mandate without it, as there can be no trials without arrests. The Rome Statute is a two-pillar system, and the Court depends on States Parties for the implementation of arrest warrants.
>
> 71. … States Parties should use their membership within the relevant organisation to generate political support aimed at ensuring maximum cooperation from all relevant actors, in particular with regard to arrest and surrender. Other organisations may have strong international mandates, which can generate additional momentum for cooperation and arrest and surrender. This could take the form of freezing of assets, travel bans as well as more general sanctions.
>
> 77. States Parties should always promote the general and situational activities of the Court in regional and international organisations. This can be done through resolutions, declarations and other forms of political support, as well as different forms of technical assistance. These tools may also be used to facilitate arrest and surrender, with a last resort being the use of coercive instruments available within some of these organisations."[49]

The assumption of the responsibilities outlined in the report would go some way towards meeting the resolve of States Parties under the preamble of the Statute "to guarantee lasting respect for and the enforcement of international justice". In particular, the identification of specific recommendations that are endorsed by all States Parties may help concretise the generic authority of the ASP to consider "any question relating to non-cooperation".[50] The difficulty for States, however, will be to move

48 *Report of the Bureau on cooperation*, ICC-ASP/6/21,19 October 2007; available at <www.icc-cpi.int/library/asp/ICC-ASP-6-22_English.pdf>. *See* recommendations endorsed by ASP Resolution ICC-ASP/6/Res.2, 14 December 2007.

49 Ibid.

50 See Article 112 (2) (f) of the ICC Statute.

from words to action. Upon their fulfilment nonetheless will depend the successful operation of the twin-pillar regime foreseen by the Statute.

7. Conclusion

The Rome Statute sets up a system for the enforcement of international criminal law through the close and coordinated interaction of an international court with competent authorities at the domestic level. As demonstrated by experience, the promotion of predictability in this area may have little to do with discussions over normative hierarchies or the notion of horizontal vs. vertical powers. While these terms have some value in describing the conceptual framework, they have only marginal relevance for explaining rates of enforcement by recalcitrant States. Rather, gaps in compliance can be said to be inherent to the structural design of such courts, due to the rejection of a direct enforcement model in favour of an indirect one. Because an international court cannot compel States to render routine enforcement nor directly impose penalties in the face of non-compliance, the performance of the system will therefore continue to be influenced by factors unrelated to the judicial functions of the Court. Nonetheless, because of issues of structural design, the confluence of such external processes will remain critical for the enforcement of the ICC's decisions and the fulfilment of its mandate. As President Kirsch has pointed out:

> "… public and diplomatic support of the United Nations for the Court and for international justice more broadly is vital to ensuring a strong and effective Court. Such support fosters an environment in which States are more likely to comply with their legal obligations and to cooperate with the Court. Public and diplomatic support can also contribute directly to the prevention of crimes by reinforcing expectations, including among potential perpetrators, that the Court's decisions will be carried out and that the international community's commitment to justice will be upheld".[51]

Commenting on the role of the ICC and States under this system, moreover, the Prosecutor has stated:

> "As the Prosecutor of the ICC, I was given a clear judicial mandate. My duty is to apply the law without political considerations … And yet, for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground, to indict or withdraw indictments according to short term political goals … It is essential on the contrary to ensure that any conflict resolution initiative be compatible with the Rome Statute, so that peace and justice work effectively together. Arrest warrants are decisions taken by the judges in accordance with the law, they must be implemented".[52]

51 *Address to the UNGA* (2007).

52 *Nuremberg Address* (2007).

The successful enforcement of the Court's decisions will therefore require the assumption of responsibilities by the international community should an individual State fail in its duties to cooperate with the Court. Much like the preventative principle expressed under the responsibility to protect to which it was a precursor, or the threat of united reprisal action under collective security arrangements, the system is predicated on the successful operation of a covenant of undertakings between the individual State and the collective.[53] In the context of the ICC, such a covenant is formed between the States that are Party to the Rome Statute, and may, in the case of a Security Council referral, be extended to embrace all UN Member States as a result of their duties under the Organisation's Charter. As described above, such enforcement will only be effective, however, if the ICC can rely on unity of thought[54] and action[55] from the collective community of States. If the non-compliance procedure is to genuinely influence State behaviour, therefore, the support for justice must be matched by concerted, consistent and unified action by the international community under a notional responsibility to enforce.

53 The linkage of these crimes to the United Nation's collective security regime in its maintenance of international peace and security is made explicit in the preamble: "*Recognizing* that such grave crimes threaten the peace, security and well-being of the world"; preamble citation 3, ICC Statute; see also Security Council debate on the protection of civilians in armed conflict, S/PV.5319 (9 December 2005); *Nuremberg Address* (2007).

54 See discussion above on Uganda.

55 See discussion above on Darfur.

III Prosecutorial Policy and Practice

Chapter 11 Peace, Security, and Prosecutorial Discretion

*Jens David Ohlin**

1. Introduction

The problem of prosecutorial discretion at the International Criminal Court has received some critical attention, but the current scholarship has insufficiently addressed the theoretical problems raised by the prosecutor's unique brand of discretion.[1] From a historical perspective, this is a relatively new issue for international criminal justice. The question of prosecutorial discretion was largely absent at Nuremberg, except insofar as the question was implicated by the standard complaints of victor's justice.[2] But such complaints were largely directed at the entire enterprise,[3] not the selection of individual cases.[4] The operation of the ICTY and ICTR led to the first real discussion of the issue of prosecutorial discretion, when various groups, mostly Serbian, complained bitterly that the ICTY prosecutor was slow to investigate ethnic

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1 The ICTY Prosecutor's decision not to investigate the NATO bombing of Serbia produced some commentary. See e.g., A.-S. Massa, 'NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?" (2006) 24 *Berkeley Journal of International Law* 610.

2 On the issue of victor's justice, see T. Meron, 'From Nuremberg to The Hague', in *War Crimes Law Comes of Age* (1998), 198 (arguing that the fact "that victors sat in judgment did not corrupt the essential fairness of the proceedings").

3 See generally G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008).

4 The selection process for cases at Nuremberg may have been capricious. Taylor complained in his memoir that if Krupp had been tried at the International Military Tribunal, he would have received a death sentence or a long prison sentence, as opposed to the lower sentence he received at the U.S. Military Tribunal sitting at Nuremberg. In fact, Taylor blamed much of this on the British (in addition to Justice Robert Jackson, his predecessor and prosecutor at the IMT) for failing to investigate the health of Gustav Krupp, who was originally selected as a Nuremberg defendant. Had they discovered earlier that he was not fit to stand trial, the younger Krupp could have been selected for the IMT. See T. Taylor, *The Anatomy of the Nuremberg Trials* (1992).

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 ISBN 978 90 04 16655 4. pp. 185-208.

Albanians and others for atrocities committed by the KLA.[5] At the ICTR, Carla del Ponte initiated an investigation against ethnic Tutsis for atrocities, a move which was largely credited for getting her removed as ICTR prosecutor after pressure from the Rwandan government.[6] These incidents received both worldwide attention and scholarly appraisal.

To my mind, though, a far more significant event for the question of prosecutorial discretion happened in the early years of the International Criminal Court, though its true significance went largely unnoticed by many scholars writing on the issue. Specifically, the Security Council's first referral to the Court of the Darfur situation led the ICC prosecutor to conclude, in a letter dated 1 June 2005, that there was "a reasonable basis" to initiate an investigation into the situation in Darfur.[7] The seemingly innocuous letter, barely a few sentences long, raised an interesting paradox for international criminal justice, and one that perfectly highlights both the institutional challenges facing the court in its early years, as well as a fundamental ambiguity about the appropriate role for an international criminal court within the larger system of public international law. This chapter aims at a complete explanation of my argument for why this short letter by the ICC Prosecutor is so significant, and why it represents a view of prosecutorial discretion that is, in my view, profoundly misguided.

2. The first referral

The Prosecutor's letter was somewhat strange, insofar as it indicated that he had concluded that there was a "reasonable basis" for an investigation, even though the Security Council, in making its referral to the ICC prosecutor, had already determined that an investigation was needed.[8] It would be one thing if the prosecutor had concluded that there was a reasonable basis, on the basis of his evaluation of the relevant facts, to proceed with the prosecution of a particular suspect. But this is not what he said in the letter. He concluded that there was sufficient basis to proceed with an investigation.[9]

5 Kosovo Prime Minister Ramush Haradinaj was indicted in 2005. See ICTY, *Prosecutor v. Haradinaj et al*, Case No. IT-04-84-I, Initial Indictment (2005) (indictment for war crimes and crimes against humanity for actions while commanding KLA). For a discussion, see P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95 *American Journal of International Law* 7, 9 (noting strained NATO-Kosovo relations due to ICTY investigation of KLA activities).

6 See M. Simons, 'Rwanda Is Said to Seek New Prosecutor for War Crimes Court', *New York Times*, 28 July 2003, at A2 ("tribunal officials contended that Rwanda wanted her replaced to try to block several pending indictments of members of the government").

7 See Luis Moreno Ocampo, *Letter to Judge Claude Jorda* (June 1, 2005), available at <www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf>.

8 See UN Security Council Res. 1593 (March 31, 2005) ("*Determining* that the situation in Sudan continues to constitute a threat to international peace and security").

9 See *Letter to Judge Claude Jorda*, supra note 7, at 1 ("I have determined that there is a reasonable basis to initiate an *investigation* into the situation in Darfur, The Sudan.") (emphasis added).

At issue in this short letter is more than just semantics, or a carefully chosen set of words. Rather, at issue is nothing less than the institutional division of power between the Security Council and the International Criminal Court. In domestic penal systems, the institutional balance of power between courts, legislators, and executive officials is well traveled, but within international law the question is more vexing, particularly since there is no agreed upon institution with the power to pass judgment on the institutional competence of the various actors in the system (with the very limited exception of the international court of justice).[10] In this case, the emergence of the ICC as the first ever treaty-based and permanent international criminal court means that the question has never directly been addressed. The Security Council's referral of the Darfur case to the international court is the first opportunity to probe this complex dilemma, but it will by no means be the last.

The standard view in the literature recognizes wide prosecutorial discretion to the ICC Prosecutor.[11] While this certainly accords with our understanding of prosecutorial discretion in domestic criminal law, particularly in common law countries where prosecutors enjoy wide discretion that is rarely challenged,[12] there are several reasons to tread carefully in this area. A greater sensitivity to sources of law is required. Specifically, the ICC prosecutor believes that in cases of Security Council referrals he has the authority to decide on his own whether to initiate an investigation. In support of this view, scholars usually refer to Article 53 of the Rome Statute, which specifically indicates that the prosecutor shall consider, in deciding whether to initiate an investigation, the following factors: whether the information provided to the prosecutor "provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed," whether the case is admissible under Article

10 See UN Charter Articles 92-96. During the original negotiations over the UN Charter, the delegations offered competing proposals over which organ would have authority to definitively interpret the Charter. While some countries favoured the ICJ, others suggested the General Assembly could issue interpretations or that each international organ could interpret the charter on its own. The history is recounted in R. B. Russell, *A History of the United Nations Charter* (1958), at 925-27. As a final result, the Charter includes no explicit directive over which institutional body has final authority to interpret it.

11 See A. M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 *American Journal of International Law* 510, 515 ("The independence of the International Criminal Court, and particularly of its Prosecutor, from direct political control is rightly celebrated as a salutary development."); C. Gallavin, 'Prosecutorial Discretion within the ICC: Under the Pressure of Justice', (2006) 17 *Criminal Law Forum* 43. Cf. Alexander K.A. Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court', (2007) 39 *NYU Journal of International Law and Politics* 583.

12 This is certainly the case in both the United States and Canada. See *Krieger v. Law Society* (Alta.), 217 D.L.R. (4th) 513, 527 (2002) ("the independence of the Attorney-General, in deciding fairly who should be prosecuted, is ... a hallmark of a free society"), cited in Danner, *supra* note 11, at 515. For a discussion of a rare example, see the discussion of *Johnson v. Pataki, supra* notes 40-43 and accompanying text.

17; and taking into account "the gravity of the crime and the interests of victims" whether the investigation serves the "interests of justice."[13]

So far so good. These provisions would seem to settle the matter, in that they grant wide discretion to the ICC Prosecutor to consider all matters pertaining to the "interests of justice" in deciding whether to move forward with an investigation. One can only assume that the phrase "interests of justice" was chosen by the Assembly of State Parties because of its broad meaning and application.[14] Indeed, it is difficult to think of a factor that would *not* be relevant under the banner of the "interests of justice." One might as well have used the term "all things considered."

This is precisely what happened in the Darfur investigation, after the ICC Prosecutor received the first ever referral of a situation from the Security Council. After dispatching former ICTY President and Judge Antonio Cassese to the region, and receiving a comprehensive report from his commission detailing evidence of widespread international crimes in the region, the Security Council referred the matter to the ICC Prosecutor.[15] In making its referral, the Security Council took notice of the International Commission of Inquiry, and also invited "the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity."[16]

Of course, one might have a debate about the concept of a "referral." Is it a request, a demand, a suggestion, or a directive? The word is sufficiently ambiguous to make it popular among diplomats. However, this much is certain. The ICC Prosecutor responded by letter to the Pre-Trial Chamber on 1 June 2007, announcing that the OTP had finished its review "to determine whether the criteria to initiate an investigation are satisfied" and concluded that such an investigation was warranted.[17]

The standard view among international lawyers was that nothing untoward or unusual occurred during this brief exchange between the Security Council, the OTP,

13 But see P. Kirsch & D. Robinson, Referral by State Parties, in A. Cassese, P. Gaeta, J. Jones (ed.), *The Rome Statute of the international Criminal Court: A Commentary* (2002), 619 (hereinafter *Commentary*); L. Condorelli & S. Villalpando, Referral and Deferral by the Security Council," in *Commentary,* at 627. See also A. M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 *American Journal of International Law* 510. Robert Cryer's excellent book on the subject does not deal with the subject of discretion within the context of a Security Council referral, perhaps because the author believes that the "possibility of the Security Council referring such a situation is low". See R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005), 162.

14 See C. J. M. Safferling, *Towards an International Criminal Procedure* (2001), 177 (discussing Rome negotiations over prosecutorial discretion).

15 See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (2005) (recommending Security Council referral to prosecutor after finding evidence of war crimes and crimes against humanity).

16 S.C. Res. 1593 of 31 March 2005.

17 See *Letter to Judge Claude Jorda*, *supra* note 7, at 1.

and the Pre-Trial Chamber.[18] The Prosecutor's decision was entirely consistent with Article 53 of the Rome Statute, and in particular his authority to make a determination about the suitability of an investigation by "taking into account the gravity of the crime and the interests of victims," and his authority to reject an investigation if "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[19] However, I argue in the rest of this chapter that in cases of Security Council referrals, such prosecutorial discretion is inconsistent with basic principles of international law and the proper role of the Security Council. And I make this argument with full knowledge of the relevant Rome Statute provisions which would appear to argue to the contrary.[20] In this respect, I wish to make the startling claim that the Rome Statute is wrong in this regard and violates basic principles dealing with the structure of international organizations. Implicit in this argument is a general theory about the dual or hybrid nature of the ICC as a both a criminal court adjudicating the guilt or innocence of particular suspects, and a security court redressing the balance of power between warring ethnic and national groups. A full explanation of this theory follows.

3. The Security Council's Chapter VII authority

What the standard view of ICC prosecutorial discretion fails to fully appreciate is the importance of the Security Council's Chapter VII authority to restore international peace and security. This is arguably the most important authority exercised by the Security Council, and it is invoked not only when the Security Council authorizes military intervention (under Article 42), but also when it established the ICTY and ICTR and, most importantly, when it referred the Darfur situation to the international criminal court (pursuant to Article 41). This was not some administrative or bureaucratic decision, but rather a profound decision that implicated the greatest geo-political powers of the Security Council.[21]

In short, the view I explore here is that when the Security Council invokes its Chapter VII authority in making a referral, such referrals are mandatory and binding expressions of international law, and in so doing the Security Council constricts the prosecutorial discretion that the ICC prosecutor otherwise enjoys under the Rome Statute in cases initiated *proprio motu* or by referral from state parties. Therefore, it is not for the ICC prosecutor to determine whether, under Article 53 (1) c, an investigation is appropriate given the "interests of justice" and the "interests of victims," for this is precisely what the Security Council has already determined by invoking its Chapter VII authority to restore peace and security by making a referral to the court. Such global considerations as the interests of victims and the interests of justice are collective considerations of peace and security that implicate regional considerations

18 See e.g., L. Condorelli and A. Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', (2005) 3 *JICJ* 590.

19 Rome Statute Article 53 (1) (c).

20 Id.

21 See Louis Henkin, *How Nations Behave: Law and Foreign Policy,* 2nd ed. (1979).

that the post-Westphalian system of international law has delegated to the Security Council, not to the Rome Statute's Assembly of State Parties to, in turn, delegate to the ICC Prosecutor.

The first objection to this restrictive view of prosecutorial discretion at the ICC is that the view is inconsistent with the language of the Rome Statute, and even possibly inconsistent with the intentions of the signatories of the Rome Statute, who would seem to have been clear in their wishes in assigning such responsibilities to the ICC Prosecutor in Article 53.[22] While divining the intentions of the framers is never easy, the matter is somewhat irrelevant. Even assuming, *arguendo*, that the parties of the Rome Statute meant to confer such authority to their prosecutor, they never had such authority to confer in the first instance, for the simple reason that the UN Charter reserves this authority to the Security Council through Chapter VII. It is axiomatic that under basic and universally recognized principles of international law, negotiators of a multi-lateral treaty cannot reserve for themselves powers reserved by the UN Charter for the Security Council, no matter how you interpret the treaty in question.[23] There is a basic hierarchy in international law with the UN Charter at the top and multilateral treaties and other instruments below it. If there is a perceived conflict between them, one must either interpret the treaty consistent with the UN Charter,[24] or one must reject the relevant treaty provision in question as being unlawful for transgressing the law of the UN Charter.[25]

3.1. General and specific discretion

In my view, the best way to understand prosecutorial discretion at the ICC under Article 53 is to make certain elementary distinctions between prosecutorial discretion as per an entire investigation and prosecutorial discretion as per a particular prosecution.[26] The ICC Prosecutor clearly has discretion with regard to particular defendants, and the prosecutor cannot and should not proceed against any defendant

22 See Condorelli & Villalpando, *supra* note 13, at 633 (discussing independence of the Prosecutor).

23 See generally A. von Verdross, 'Forbidden Treaties in International Law', (1937) 31 *American Journal of International Law* 571; Q. Wright, 'Conflicts Between International Law and Treaties', (1917) 11 *American Journal of International Law* 566; D. Shelton, 'Normative Hierarchy in International Law', (2006) 100 *American Journal of International Law* 291, 297.

24 This avenue is suggested by Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 3, opened for signature May 23, 1969.

25 See UN Charter, Article 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."); Vienna Convention on the Law of Treaties, Article 53 ("Treaties conflicting with a peremptory norm of general international law") and Article 64 ("Emergence of a new peremptory norm of general international law").

26 This distinction is suggested, but not fully developed by, various commentators writing on the subject. See e.g., Condorelli & Villalpando, *supra* note 13, at 633.

for whom there is insufficient evidence of complicity in an international crime as defined by the statute, or for which there is some statutory bar to prosecution such as admissibility under Article 17. This level of discretion is implicit in the notion of criminal adjudication, and one could not envision a system where the prosecutor in question fails to have this kind of discretion. Of course, if there is no evidence of a crime, a prosecution cannot proceed.

But one must distinguish between this kind of particular prosecutorial discretion with the more general prosecutorial discretion invoked by the Rome Statute's provisions on the powers of the OTP. Indeed, if the prosecutor were to have decided, in the wake of the Security Council's Chapter VII referral of the Darfur situation, that an investigation was not warranted because of the interests of the victims in the Darfur region and the interests of justice in the Sudan and neighbouring countries, then it is not clear how we should interpret this decision. It would seem, in other words, to contradict the very basis for the referral in the first instance, which was premised on the Security Council's legal judgment that intervention by the international court was required in order to restore international peace and security. If one takes the legal basis for such referrals seriously – i.e. one thinks of Chapter VII authority as something more than just an excuse or legal fiction to make such pronouncements – then the Security Council's actions would seem to allow less room for prosecutorial discretion than the Assembly of State Parties had initially anticipated. Indeed, however one wishes to conceive of prosecutorial discretion, it cannot be interpreted in such a way that the prosecutor has the power to ignore judgments made by the Security Council – a power that no one has under international law.

At issue in this argument is a fundamental distinction between adjudication of individual and collective disputes.[27] The International Criminal Court, insofar as it is a criminal court, is designed for solving individual disputes, like any other criminal court, where matters of guilt, innocence, evidence, and individual culpability are the key concepts. But when the Security Council makes a referral to the ICC, it does so with a completely different goal in mind: the resolution of disputes at the collective level. Indeed, the entire structure of a Security Council referral is that the Council determines that peace between groups can only be secured if, among other initiatives, the guilty individuals are brought to justice under the rule of law. This shows the connection between the individualized nature of criminal law and the collective nature of international law. The twin goals of international law – peace and security for collective groups, nations, states, and peoples – can only be realized through the prosecution of particular individuals. This is the essence of international criminal law's hybrid nature as an intellectual descendant of two traditions: domestic criminal law and public international law.[28] It has always been this way since Nuremberg.

27 See J. E. Alvarez, 'Judging the Security Council', (1996) 90 *American Journal of International Law* 1, 21 ("the Council has gone beyond attributing responsibility to states and has found or suggested that individuals may be accountable for internationally wrongful acts").

28 On this point, see G. P. Fletcher & J. D. Ohlin, *Defending Humanity: When Force is Justified and Why* (2006), 8-11.

One might view this process, somewhat polemically, as a case of institutional hijacking. When the Security Council makes a Chapter VII referral, it hijacks the ICC in order to fulfill its objectives. Of course, this is a hijacking with a certain degree of consent, because the Rome Statute makes explicit provisions for the Security Council referrals and contemplates how they might be handled. But it is precisely in this latter regard that one sees the hijacking, for the process does not work exactly as the Assembly of State Parties would prefer, because the process of Security Council referrals restricts the prosecutor's independence and his capability of exercising a kind of global prosecutorial discretion.

3.2. Two courts in one

It is in this regard that it is best to consider the International Criminal Court as two courts in one. The court's functioning is infected by a degree of schizophrenia that can only be clarified if the two elements are kept apart. In the first instance, it is a criminal court exercising judicial discretion in prosecuting individual soldiers for international crimes. But in the second instance, it is a "security court" exercising classic diplomatic functions of public international law, designed to restore and improve regional peace and security. In a single phrase, one might sum up the goals of the court in this way: it is designed to stop war.[29] It is important to remember just how striking this goal is, given the circumstances. Not only is it totally out of character with a regular criminal tribunal to have such goals (criminal courts are designed to deal with justice in the aftermath of violence, not prevent it), but it is also totally out of character with the goals of Nuremberg, which was designed to adjudicate guilt in the aftermath of international criminality, but played no role in actually ending the war.[30] No one was crazy enough to suggest such a thing – not Bernays, not Biddle, not Jackson, not Taylor – for the violence was stopped with counter-violence. In this second stage of international criminal justice, however, we have moved into a new paradigm: international criminal proceedings as a way to stop further bloodshed.[31] It is important to remember just how far we have departed from the traditional goals of domestic criminal proceedings. The importance of this sentiment stems not from the need to criticize the legitimacy of such proceedings, but rather from the need to properly conceptualize the institutional authority of such tribunals and proceedings, especially as against other institutional actors within our post-Westphalian system. One cannot operate a tribunal within a system of international law and then, at the same time, pretend to be outside of it, and immune from the standard channels of international legal authority.

The distinction between the ICC as a criminal court and the ICC as a security court shows up in other areas of the court's operation, in addition to prosecutorial

29 See Rome Statute preamble ("recognizing that such grave crimes threaten the peace, security and well-being of the world").

30 See generally T. Taylor, *The Anatomy of the Nuremberg Trials* (1992).

31 For a discussion, see B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 74.

discretion. For example, funding of the court's operations has been a source of frequent controversy in the court's first five years of operation, and is further evidence of the dichotomy expressed above. Article 115 of the Rome Statute contemplates that funding for Security Council referrals will come from the United Nations, as approved by the General Assembly. In this regard, the situation makes perfect sense. When a case is initiated by the prosecutor *proprio motu*, or by referral from a state party, the funding comes from the Assembly for State Parties or voluntary contributions. However, when the case's appearance before the court is mandated by Security Council vote, then the burden of funding falls to the United Nations.

However, as everyone is well aware, the United Nations has not paid for any aspect of the ICC Darfur investigation. The Security Council decreed in Resolution 1593 that no part of UN funds should be used to pay for the current investigation, a constraint largely dictated by the US delegation as a price for their abstention from the vote (as opposed to a veto).[32] In essence, the reality of the situation highlights the *de facto* power of the Security Council in these situations. The Security Council can refer a situation to the court in order to restore international peace and security, while at the same time refusing to pay for the investigation. This suggests an extraordinary degree of *de facto* control. Nonetheless, it must also be conceded that as a matter of *Realpolitik* the ICC prosecutor can claim a level of prosecutorial discretion inconsistent with the view expressed here, and nothing will come of it. Although it is of course possible for the Security Council to respond to a future ICC prosecutor's refusal to investigate, after receiving a Security Council referral, such an enforcement action seems highly unlikely.

The general schizophrenic nature of the international court can also been seen in its provisions on complementarity. First of all, the UN Security Council has the authority under Article 16 to block ICC investigations and prosecutions for 12 months, a power that may be renewed by subsequent vote so as to effectively permanently quash a case if so desired by the Security Council. Under Article 17, the court is called upon to consider the admissibility of a case in situations where a state has jurisdiction over the crime and is conducting its own sincere investigation and prosecution of it, thus triggering the court's constraints based on complementary jurisdiction. That being said, Article 18, which creates the process for preliminary rulings regarding admissibility, only applies to issues of complementarity for referrals from state parties or investigations initiated by the prosecutor *proprio motu*. Security Council referrals are specifically exempted from the procedural mechanics of Article 18. This fact, when combined with the fact that Security Council referrals are nowhere mentioned in Article 17, as well as the fact that the Security Council has the power to stop an investigation under Article 16, suggests the strong possibility that Security Council referrals are not subject to the usual constraints of complementarity.[33] Indeed, if the Security Council has already referred the matter to the ICC, this would suggest that the Security Council has come to its own conclusions about the veracity and sincerity

32 See UN Security Council Res. 1593 of 31 March 2005.

33 See G. P. Fletcher & J. D. Ohlin, 'The ICC – Two Courts in One?', (2006) 4 *JICJ* 428.

of any competing state prosecutions, and has already concluded that such prosecutions are likely to be ineffectual.

If such a situation were ever to arise in the future, the court would be required to determine whether it had authority to review a Security Council decision, i.e. whether it had the judicial authority to evaluate, *de novo*, whether the demands of complementarity had been met. Of course, as a matter of prediction, it seems clear that the International Criminal Court would find that it does have such discretion. It is highly unlikely that the court will be staffed by sitting judges who are inclined to take the conservative legal view that the court – an independent judicial body – must bow to determinations made by the Security Council, an explicitly political legal body. That being said, the fact that the court's judges are likely to find greater discretion for themselves – as the ICJ has always done in the past – is no evidence that their view of their own authority within the international legal system is correct.

An analogy would be helpful. When the Security Council created the ICTY and the ICTR, again pursuant to its Chapter VII authority, it did so by giving the respective tribunals primary jurisdiction. In other words, the *ad hoc* tribunals could try any suspect, as long as they could get them in custody, irrespective of whether a state was also engaging in domestic prosecutions. There were substantial reasons for this attitude. First, some of the national systems, such as Rwanda, barely had functioning legal systems that could accommodate such prosecutions, while other governments, such as Serbia, were so deeply involved in the original international crimes that the Security Council was rightly sceptical that their domestic institutions could impartially engage in criminal prosecutions under the rule of law.[34] And furthermore, even if they could have engaged in impartial criminal prosecutions, they certainly would not have been viewed as such by victim groups of other nationalities, thereby threatening the very security goals underlying the initial creation of the tribunals in the first place.

The ICC, by contrast, was not created by the Security Council or the United Nations, but by the Assembly of State Parties, with limited power, and they developed a more moderate system of jurisdiction that was, in its own way, subsidiary to national penal systems. That being the case, however, this more modest system evaporates when the Security Council "hijacks" the ICC and turns it into a security court. In this instance, the ICC looks more like the permanent successor to the *ad hoc* ICTY and ICTR, with their primary jurisdiction backed up by Security Council authority, and one wonders what meaningful restraints the notion of complementarity can provide in such circumstances. It seems clear that, despite arguments to the contrary, the

34 Mark Osiel makes the interesting point that domestic courts often do not have expansive theories of liability (such as joint criminal enterprise and command responsibility), thus explaining why international lawyers disfavour national prosecutions. See M. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751. Of course, the one notable exception is the United States, which already has expansive theories of liability such as conspiracy and *Pinkerton* liability. For a discussion, see J. D. Ohlin, 'Group Think: The Law of Conspiracy and Collective Reason', (2008) *Journal of Criminal Law & Criminology* 147.

notion of complementarity simply does not apply in cases of Security Council referrals.

All of this has deep implications for matters of prosecutorial discretion. Matters of complementarity provide a wide area for the ICC prosecutor to exercise his discretion (with some oversight from the Pre-Trial Chamber), but if the view I am expounding is correct, the ICC prosecutor simply does not have this level of discretion at all. In a Security Council referral case, the prosecutor cannot decline to prosecute a case on the grounds of a national prosecution and the notion of complementarity, because the Security Council has transformed the court, in this instance, into a permanent successor of the ad hoc tribunals, and the Security Council has already determined that such intervention is required.

3.3. Judicial review

Could the Court exercise some kind of judicial review of these determinations? It seems unclear how, for a determination by the Security Council is the highest form of law under the current system. There are only three theoretical possibilities. The first is that the court is incapable of reviewing such determinations and must accept them without further review; the second is that the court may review such determinations but must grant deference to the Security Council determination; and the third is that the court may review such determinations *de novo*, and come to their own conclusions about these matters. It is imperative that we consider in our analysis the relevant factors for each possibility.

Several factors weigh in favour of finding a court's authority to review a Security Council review *de novo*. First of all, the ICJ has implicitly kept for itself such authority in the face of Security Council legal findings, a fact which is in evidence most recently in the *Bosnia v. Serbia Case*.[35] Second, the ICTY in *Tadić* reviewed the authority of the Security Council to create an ad hoc tribunal in the first instance.[36] While conceding that it was unclear whether the court had the power, in this way, to engage in a *de facto* judicial review of the Security Council resolution in question, Judge Cassese, writing for the majority, found this power and authority implicit in the very notion

35 See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 91, at para. 212 (February 26, 2007) ("The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached."). Similarly, the ICJ concluded in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that Article 51 did not apply in cases of military threats from non-state actors, even though a contrary position is taken by the Security Council in recognizing the relevance of Article 51 in responding to acts of terrorism.

36 See ICTY, Appeals Chamber, *Tadić*, 2 October 1995, at 29-30 (including review of whether Security Council acted within the limits of the Charter).

of adjudication itself, i.e. *la compétence de la compétence*.[37] Indeed, such discretion would also appear to be implicit in the notion of an independent judiciary.

On the other hand, however, one might note the supremacy of the Security Council in the current system, and that matters of adjudication are not wholly foreign to the Security Council's powers, thus suggesting that only a higher body – of which there is none – or an equal branch, may engage in this kind of review. Furthermore, the Security Council engages in many adjudicative functions pursuant to Articles 33, 34, and 35 of the UN Charter respectively, which deal with dispute resolution powers. True, Article 36 deals with referral of such disputes to the ICJ, but the subsequent provision, Article 37, deals with the Security Council's own ability to resolve such disputes without the ICJ.[38] Like or not, then, the Security Council is already engaged in the process of quasi-legal adjudication, messy as it might be.

With that in mind, the only proper way of understanding the relevant division of power between the Security Council and the ICC, is that the former deals with matters of collective justice, while the latter deals with matters of individual justice. It is for the Security Council to keep the peace among the various groups at each others' throats in an international conflict, and it is for the ICC to implement these decisions by pursuing individual cases against particular defendants for particular crimes committed against particular victims. The minute one of these institutions crosses this fundamental divide and seeks intervention in the other sphere, it betrays its fundamental purpose and starts exercising discretion that it does not have. It is for this reason that it would be somewhat absurd for the ICC prosecutor to decide, upon receiving a Security Council referral, that he was declining to investigate the matter in the "interests of justice" or for the "interests of victims." This would be like the ICTY or ICTR prosecutor deciding that the genocides in question were not sufficiently grave to warrant international prosecutions and, while keeping his or her offices open for business, not engaging in any prosecutions. To engage in such an action would be to thumb one's nose at the Security Council.

3.4. Domestic prosecutorial discretion

An analogy from domestic prosecutorial discretion might be helpful. In 1997, the local district attorney in the Bronx, Robert Johnson, commenced a prosecution for first-degree murder in connection with the killing of a police officer. Although the New York State legislature had passed a law authorizing the death penalty for first-degree murder, Johnson announced that he would probably not seek the death penalty in this case. Johnson had previously announced that he would probably never seek the death penalty in any case, because he opposed the legislature's decision to restore capital punishment in the state. Some elected officials in the state concluded that the death penalty was appropriate in this instance, and were particularly disturbed that a local district attorney was seeking, in effect, to personally block a legislative decision.

37 *Tadić* at 15-18.

38 For a discussion, see Louis B. Sohn, 'The Security Council's Role in the Settlement of International Disputes', (1984) 78 *American Journal of International Law* 402.

Johnson argued that all of this fell within his prosecutorial discretion – that he could prosecute which crimes he felt like and could seek those penalties that he felt appropriate, even if the law allowed for hasher treatment, and that the only check on his discretion was the democratic process.[39] Voters could, if they wished, kick him out of office during the next election. The Governor of New York felt that this check was insufficient, removed Johnson from the case by invoking a rarely-used state law,[40] and appointed a special prosecutor who would seek the death penalty.[41]

For our purposes here, the controversial issue of the death penalty is irrelevant, and what matters is that Johnson sued the governor, arguing that the governor had no authority to remove a sitting district attorney from the case simply because the district attorney exercised his discretion in a manner contrary to the governor's liking. In finding for the governor, the New York State Court of Appeals refused to uphold the district attorney's discretion, and found that the Governor acted consistently with a New York law that allowed the governor to remove a district attorney in particular cases.[42]

Indeed, there was something odd about Johnson's decision that, as a policy matter, he would never apply the death penalty. Although one might be sympathetic to his decision (if one rejects the death penalty), there is nonetheless something odd about a prosecutor who uses his discretion to, as a matter of policy, reject a constitutionally valid policy decision made by the legislature about the basic structure of the penal system and criminal process. Although Johnson clearly had the discretion to decide how to proceed with individual cases, his discretion clearly did not extend to rejecting general policy determinations made by the legislature in carrying out its legislative function.[43] This is the distinction between the legislature's authority to hand down general and prospective rules, and the prosecutor's discretion to apply them against particular defendants.

With this in mind, it becomes clearer how an ICC prosecutor would fail if he were to decline an investigation on the grounds that it was not in the interests of justice. Such decisions are the kind of decisions made by the Security Council in its referrals, and prosecutorial discretion is not some wide concept that can be stretched to all four corners of the international legal system. It is, rather, a tightly controlled concept, giving each actor within the system the authority to deal with discrete questions that fall within their relative competence. Outside of this sphere of competence,

39 Johnson was re-elected overwhelmingly, despite his opposition to the death penalty and his pledge not to use it.

40 N.Y. Executive Law § 63 (2). The case is discussed in Abby L. Dennis, 'Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power', (2007) 57 *Duke Law Journal* 131, 157.

41 The legal issue became moot because the defendant in the case committed suicide before trial.

42 See *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997). In the past, the law had been invoked in situations involving corruption.

43 *Johnson v. Pataki*, 691 N.E.2d at 1007.

however, one's discretion evaporates and one begins to trample on the discretion of others.

3.5. The interests of peace

In September 2007, the Office of the Prosecutor released a position paper regarding prosecutorial discretion that made a promising gesture in the direction of understanding the limited nature of prosecutorial discretion when faced with matters of collective peace and security.[44] However, as the following analysis will indicate, the brief comments by the ICC Prosecutor in interpreting Article 53, while promising, are not sufficient to resolve all concerns.

The Prosecutor noted, in the first instance, that a decision not to investigate "in the interests of justice" under Article 53 would be exceptional in nature: "The role of the Office of the Prosecutor is to investigate and prosecute those responsible for crimes under the jurisdiction of the Court, subject to Article 17 of the Rome Statute. Taking into consideration the ordinary meaning of the terms in their context, as well as the object and purpose of the Rome Statute, it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice."[45] The Prosecutor then also noted that Article 53 is to be understood against a general background presumption in favour of investigation and prosecution.[46] Consequently, the reasons to decline an investigation on the grounds of the "interests of justice" criterion are quite narrow, the prosecutor concluded, since "[t]he interpretation of the concept of 'interests of justice' should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Statute,"[47] in particular, the desire to end impunity for perpetration of the most serious crimes of concern to the international community.

The Prosecutor then suggested that the following factors are relevant for an "interests of justice" analysis: the gravity of the crime, the interests of the victims, the particular circumstances of the accused, and "other justice mechanisms,"[48] a reference to the court's complementary jurisdiction and the requirement that it defer to local proceedings that meet certain criteria.[49] This is especially important in cases dealing

44 Office of the Prosecutor, *Policy Paper on the Interests of Justice* (September 2007), available at http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf.

45 Id. at 3.

46 Id.

47 Id. at 4.

48 In addition to local prosecutions under domestic criminal law, the OTP specifically recognized the legitimacy of other forms of local judicial intervention: "As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice." Id. at 8.

49 See also Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* (September 2003) (noting that "The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the

with large numbers of offenders who cannot be dealt with by the ICC, under its current level of resources, such that prosecutions must be completed at the local level or risk creating an "impunity gap."[50]

However, perhaps the most important comments by the Prosecutor involved a legal distinction between the "interests of justice" and the "interests of peace." In a section that suggested some sensitivity to the very issues that are addressed in this chapter, the Prosecutor indicated that the "Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victim and witnesses under Article 68."[51] However, the Prosecutor was wisely unwilling to make the final inference and suggest that such matters inevitably lead to a consideration of matters of international peace and security, since " the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions,"[52] and the "concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute… [and] should not be conceived of so broadly as to embrace all issues related to peace and security."[53] This suggests that the Office of the Prosecutor is not entirely insensitive to the distinction that I have emphasized in this chapter between the interests of justice at the individual level (specific discretion) and the interests of peace and security at the collective level (general discretion).[54] Indeed, the comments in the *Policy Paper* suggest that the OTP has some understanding that while collective consequences justify the operation of international criminal justice, these collective consequences, insofar as they may bleed into matters of collective security, are the concern of the Security Council.[55]

Given the preceding elements of the *Policy Paper on the Interests of Justice*, it would appear then that the OTP is well on its way to understanding the analysis presented in this chapter. However, several cautionary notes are in order. First, the comments by the OTP are in no way legal binding; they are not words from a decision by a Trial or Pre-Trial Chamber that can be considered an official judicial interpretation of Article 53 of the Rome Statute, such that future litigants may rely on this interpretation

one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.").

50 *Policy Paper on the Interests of Justice*, *supra* note 44, at 8; *Paper on Some Policy Issues Before the Office of the Prosecutor, supra* note 49, at 3.

51 Id. at 9.

52 Id. at 8.

53 Id.

54 See *supra* section 3.1

55 For a more complete discussion of this theoretical paradigm, see *infra* section 4.2.

as binding precedent.[56] Second, they are just the words of the current ICC Prosecutor and could certainly be withdrawn or revised by a subsequent prosecutor with a different interpretation of Article 53 of the Rome Statute or a different understanding of the institutional division of power of between the ICC Prosecutor and the Security Council. Third, these comments are abstract in nature, divorced from application in any particular case, and what matters most is how Article 53 will be applied in particular cases. Given the paltry number of investigations and prosecutions conducted to date, it is unclear how the OTP will apply this understanding to its current work.

Fourth, there is always the possibility that other factors that remain as permissible under this interpretation of Article 53 will covertly track considerations of collective peace and security. For example, both the Rome Statute[57] and the *Policy Paper*[58] make specific reference to the gravity of the crime as an important factor. Indeed, when the Prosecutor declined to investigate in Iraq, he made specific reference to the lack of gravity,[59] given the number of victims at issue in other cases being pursued by the OTP. One can well imagine a situation in the future where a prosecutor's decision is heavily influenced by matters of collective peace and security, but the decision is publicly justified by appealing to the gravity of the situation. Such camouflaging would be easy to accomplish, especially since it is unclear what kind of legal threshold is established by the Rome Statute's use of the term "gravity" in Articles 17 and 53. If the Security Council decided that a situation was important enough to warrant exercise of its Chapter VII authority to make a referral to the International court, an ICC Prosecutor's decision to decline to investigate on grounds of "gravity" would admittedly appear suspicious, although the prosecutor does technically have authority to use this discretion under Article 53. Yet again, though, it is important to distinguish between the gravity of the conduct in one particular case and the gravity of the conduct of the entire situation. If the overall situation was sufficiently grave that the Security Council felt it necessary to intervene in the situation by making a referral, the Prosecutor should be hard pressed to decline to intervene on grounds of gravity, though he may decline to prosecute a particular defendant for lack of gravity. But a blanket refusal to investigate on grounds of gravity, after a Security Council referral, runs the risk of being seen as a covert attempt to squeeze matters of collective peace under the rubric of "gravity."[60]

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56 This might be contrasted with, for example, the Pre-Trial Chamber I's Decision on the Prosecutor's Application for a Warrant of Arrest, *Prosecutor* v. *Lubanga,* 10 February 2006, ICC-01/04-01/06-8.

57 See Articles 17 (1) (d), 53 (1) (c), and 53 (2) (c).

58 *Policy Paper on the Interests of Justice*, *supra* note 44, at 4-5.

59 Luis Moreno-Ocampo, *Letter Regarding Situation in Iraq* (9 February 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

60 Indeed, it is important to emphasize that a decision not to investigate can have great consequences. See A. J. Colangelo, 'Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor Not to Investigate NATO Bombing in the Former Yugoslavia', (2003) 97 *Northwestern University Law Review* 1393

The fifth and most important point about the *Policy Paper* is that its comments are completely skeletal and do not even address the question of Security Council referrals. Although the *Policy Paper* indicates that the OTP clearly understands the distinction between the interests of justice and the interests of peace, the OTP has not gone the final step, at least in this document, and traced explicitly the implications of this view when the Security Council makes a binding referral to the ICC pursuant to a finding that such a referral is necessary for the maintenance or restoration of collective peace and security. If it is true that there is a distinction to be made between the interests of justice and the interests of peace (understood as a question of collective security), then the Office of the Prosecutor's discretion is severely limited in cases of Security Council referrals. While individual matters pertaining to a particular victim or a particular defendant may be relevant for proceeding in any one case (based on individual culpability), such factors could hardly derail the investigation of an entire situation. For example, the Prosecutor gives the example in the *Policy Paper* of a defendant who is terminally ill,[61] but it is difficult to imagine an entire situation where all potential defendants suffered from the same disqualifying condition. Such global disqualifying conditions can usually only come from collective matters of peace and security. But once matters of collective peace and security are removed from the mix, the OTP's discretion to decline to investigate an entire matter are severely restricted. If the OTP properly understands the relationship between the Rome Statute and the other institutions of international law, this conclusion should follow as a matter of law.

4. A theory of international criminal law

This basic distinction between the relative institutional competence of the Security Council and the ICC Prosecutor, between collective security and determinations of individual culpability, between a security court and a criminal court, and the discretion of the prosecutor in light of these distinctions, raises the question of the basic fundamental goals of international criminal law. Does the enterprise exist to redress the balance of power between warring ethnic groups (as the Security Council hopes), or does the discipline exist to hold individuals accountable for their crimes (as the court hopes)? Or is it both? Only by answering these fundamental questions can we understand why a tension exists between collective and individual adjudication, which is the source of the tension that we have identified in prosecutorial discretion at the ICC.

("Her controversial decision not to prosecute is tantamount to a judgment of not guilty. Indeed, a decision not to prosecute here can be as important, or more important, than a judicial decision in terms of licensing a certain degree of civilian death or 'collateral damage' and the tactical methodology permitting those casualties under international law.").

61 *Policy Paper on the Interests of Justice*, *supra* note 44, at 7.

4.1. Paradigms of criminal justice

The first point to be made is that these two fundamental views about the goals of international criminal justice represent conflicting moral theories about the nature of the adjudicative process and criminal punishment. In basic legal theory, there are two theoretical possibilities for justifying a system of penal law. In the first, punishment and incarceration are justified on consequentialist grounds because, for example, punishing perpetrators will prevent them from committing future criminal acts.[62] This is known in the literature as specific deterrence.[63] The other more global version of this first rationale for incarceration is that it will discourage other potential criminals from straying from the demands of the law. As everyone knows, this is called general deterrence.[64]

Criminal law theory has witnessed an increased attention to a second theoretical justification for punishment, which is essentially deontological. Inspired by Kant, retributivists argue that punishment of the guilty is an *a priori* good, simply because the guilty deserved to be punishment.[65] While positive consequences may indeed flow from such punishments, this increased social utility does not, by itself, justify the practice. The justification comes from the internal logic of moral desert and punishment.[66] There is something abhorrent about the prospect of the guilty going free.[67]

These two paradigms of criminal justice are in great tension in international criminal justice.[68] On the one hand, the trial and conviction of war criminals is important for its own sake, i.e. for purely retributive reasons.[69] Since Nuremberg, participants

62 See M. S. Moore, 'A Taxonomy of Purposes of Punishment', in L. Katz et al. (ed.), *Foundations of Criminal Law* (1999), 60.

63 Id.

64 See G. P. Fletcher, *Rethinking Criminal Law* (1978), 414.

65 See J. Finnis, 'The Restoration of Retribution', (1972)32 *Analysis* 131; Fletcher, *Rethinking Criminal Law*, *supra* note 62, at 459-60.

66 Tellingly, Fletcher's discussion of retributivism in domestic criminal law appeals to genocide, war crimes, and crimes against humanity as paradigmatic examples of evil conduct that intuitively spark retributive sentiments. See G.P. Fletcher, 'The Place of Victims in the Theory of Retribution', (1999) 3 *Buffalo Criminal Law Review* 51, 52-53.

67 For an explicitly Kantian defense of retributive punishment in international criminal law, see A. Fichtelberg, 'Crimes Beyond Justice?: Retributivism and War Crimes', (2005) 24 *Criminal Justice Ethics*.

68 See generally M. Findlay & R. J. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (2005).

69 See A. Ahmad Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law', (2005) 9 *Buffalo Criminal Law Review* 273 (arguing "the need for international criminal law arises from the defective embodiment of… [the] relational structure in social groups and failing states, defects which devolve retributive justice into cycles of escalating violence. The displacement of group vengeance by legal process is not the (broadly consequentialist) ground of the relational structure, but rather a reason for one set of social institutions rather than others to occupy a position of authority within that (broadly deontological) structure").

in the developing system of international criminal justice have spoken honestly about the imperative to initiate prosecutions for those who commit the core international crimes. To ignore them, they say, is to surrender to impunity. Indeed, this notion of ending impunity is codified in the Rome Statute preamble as one of the core rationales for the development of the International Criminal Court.[70] It is, in effect, the *grundnorm* of international criminal justice. This notion of ending impunity was also an important factor behind the general trend toward using universal jurisdiction for domestic prosecutions of international crimes.[71] If a truly international prosecutorial forum was impossible, then a domestic prosecution, even by a state with limited contacts with the crime, was better than letting the defendant go unprosecuted.[72] Impunity itself was the enemy.[73]

On the other hand, though, the first paradigm of criminal justice – based on consequentialism – is also highly represented in international criminal law.[74] Deterrence is clearly important to some international criminal lawyers, either in the form of preventing specific defendants from engaging in international crimes in the future,[75] or deterring other individuals from straying from the demands of international criminal law or *jus in bello* while on the battlefield.[76] Although there is some question about the degree to which genocidal criminals are susceptible to the usual inducements, this idea nonetheless has some real purchase among international criminal lawyers.[77]

But there is another consequentialist rationale for international criminal justice, one that is more collective in nature and which gets to the core of our current discussion about prosecutorial discretion at the ICC. The real rationale for punishing war criminals is, of course, that it has consequences at the collective level: warring ethnic

70 See Rome Statute, prmbl ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes").

71 See P. L. Hoffman, 'Wartime Security and Constitutional Liberty: Justice Jackson, Nuremberg and Human Rights Litigation', (2005) 68 *Albany Law Review* 1145, 1148 (referring to the "emerging anti-impunity framework that is emerging at the international level, as is further evidenced by the principle of universal jurisdiction for human rights crimes").

72 The legal and theoretical foundation for universal jurisdiction is discussed by Andreas Zimmermann in C. Tomuschat & J.-M. Thouvenin (ed.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006).

73 See *supra* note 50 and accompanying text (discussing impunity gap).

74 See e.g., M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539, 577 ("the influence of retribution increasingly is challenged by deterrence and expressivism").

75 ICTY, *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21, para. 1234 (deterrence is "probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law… the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again").

76 *Čelebići*, Trial Chamber Judgment, para. 1234 ("persons in similar situations in the future should similarly be deterred from resorting to such crimes").

77 For a discussion of this issue, see I. Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 *European Journal of International Law* 561; A. Altman & Christopher Heath Wellman, 'A Defense of International Criminal Law', (2004) 115 *Ethics* 35.

groups will be more willing to put down their arms and forego reprisal attacks if they believe that aggressors (whether those who committed genocide or crimes against humanity or war crimes) will have to face legal scrutiny in a court of law.[78] If they believe that justice will be done in this forum, then maybe, just maybe, the rule of law will be upheld and the group can forego collective revenge as a military avenue for redress of their grievances.[79] If justice for the guilty can be meted out by an international court, then victims need not hand down justice by their own hands. The result is an end to the cycle of violence.[80]

As one can see, we have now advanced three plausible justificatory reasons for international criminal law: the first retributive, the second consequentialist at the individual level, and the third consequentialist at the collective level.[81] For the moment, we should set aside the second possibility, because it is fraught with empirical questions about its applicability in the context of international crimes (as opposed to domestic penal law, where such matters of deterrence are much more likely to succeed).[82] The first and the third are left as plausible contenders, but which one is more important? Do they conflict with each other?[83]

I wish to suggest here that both the first and the third rationales serve as underlying foundations for international criminal justice, and that the connection between them yields a deeper understanding of the enterprise that will be relevant for our current discussion about prosecutorial discretion.[84] Far from conflicting, the first and third rationales are closely tied together. The very reason that collective groups are willing to put down their weapons and forego reprisal attacks is because they want to see justice achieved for its own sake.[85] So although international criminal law is con-

78 For proposals of reform in light of the distinct foundation for punishment in international criminal justice, see Findlay & Henham, *supra* note 68, at 273 (2005) (tension between restorative justice and retributive goals).

79 See generally M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1999).

80 See generally M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998).

81 Some scholars have argued for hybrid accounts. See, e.g., R. Henham, 'Theorising law and legitimacy in international criminal justice', (2007) 3 *International Journal of Law in Context* 257.

82 David Wippman offers an analysis of this issue in his article 'Atrocities, Deterrence, and the Limits of International Justice', (1999) 23 *Fordham International Law Journal* 473.

83 For an excellent discussion of the challenges faced by both retributive and deterrence sentencing, see generally M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007).

84 Compare with D. Luban, 'A Theory of Crimes Against Humanity', (2004) 29 *Yale Journal of International Law* 85, 140 ("The jurisdiction implicit in crimes against humanity is not international jurisdiction, nor even universal jurisdiction in the familiar lawyer's sense of jurisdiction that falls to the courts of any state, but rather what might be called vigilante jurisdiction in which the criminal becomes anyone's and everyone's legitimate enemy.").

85 Compare with L. May, *Crimes against Humanity: A Normative Account* (2005) (offering theory of moral legitimacy for international criminal law that connects individual and collective by appeal to Hobbesian "security principle").

sequentialist at the collective level, it is retributive at the individual level. The victims want the guilty to be punished, not because it will deter some future, unknown and hypothetical individual from committing an international crime, but rather simply because they believe that the offenders deserve to be punished for what they have done.[86] Victims will naturally favour an institutional design, such as the international criminal court, that facilitates such punishment, and the result will be greater likelihood that victim groups will forego collective reprisals against whatever national group that first victimized them.[87] So far from being in tension, the two rationales are mutually supporting. In fact, they are essentially intertwined with each other.

This vision of the true justification for an international criminal court is essential for the proper understanding of institutional competence in general and prosecutorial discretion in particular. As indicated above, the International Criminal Court is really two courts in one: a security court and a criminal court. It is a security court in the sense that it is designed to pursue the collective consequentialist goals that we just discussed. On the other hand, it is also a criminal court designed to purse the individual retributive goals implicit in the penal law. These two sides of the court's life each draw support from each justification: the ICC as a security court is justified by collective consequentialism, while the ICC as a criminal court appeals to this notion of *a priori* retributivism.

4.2. Chapter VII and collective consequentialism

The important thing to understand here is that the rationale for the court's work, discussed above, is a matter of collective peace and security, which are matters that fall within the ambit of the Security Council. The collective consequentialism of the ICC is a matter that directly implicates the Security Council's authority under Chapter VII of the UN Charter to restore international peace and security. Not only is the Security Council entrusted with this authority, but when it acts under this authority, its pronouncements are the highest form of international law, binding on all states, even those who would otherwise wish to dissent from such judgments; Security Council resolutions take precedence over voluntary treaty commitments and even, arguably, aspects of customary law. The only thing that a Security Council resolution cannot override, on matters of international peace and security, is the UN Charter itself. While some may point out that the Security Council's authority to work in the area of international peace and security is not exclusive, in the sense that other institutions may resolve disputes as well, it is axiomatic that the Security Council determinations made pursuant to its Chapter VII authority are binding on all other actors within the

86 Cf. Haque, *supra* note 69, at 323 ("The exercise of the right to punish on behalf of the human community is conditioned on the inability or unwillingness of the state in which a crime occurs to discharge its duty to deliver retributive justice to its own citizens)"

87 But see Drumbl, *supra* note 83, at 62 (questioning collective consequentialist rationales, especially attempts to "operationalize" them in ICTY Sentencing judgments).

modern UN-based system of international law, and these resolutions are hierarchically superior to other sources of law regarding international peace and security.[88]

If this were the end of the analysis, the matter would be simple. The Security Council's authority would be unquestioned. However, the operation of the International Criminal Court also implicates matters of ordinary criminal law, in the sense that the court is a traditional criminal court engaged in the traditional functions of all criminal courts: to identify crimes that have occurred, find defendants responsible for them, hold a fact-finding proceeding consistent with the rule of law, and sentence the guilty for their crimes. All of these functions of the criminal court implicate many different procedural issues, just one of which is prosecutorial discretion: the decision of the prosecutor on which cases merit his – and the court's – attention. There are, though, many others. All of this suggests that the court needs to function as a criminal (not just a security) court, and one cannot view the court as simply an appendage of the Security Council. To suggest something of the sort would be to radically violate our understanding of what it means for a criminal court to be an independent adjudicative body.

However, one can also do the opposite. One can exaggerate the degree to which the court is truly independent, untethered from both the Security Council and the larger system of international law that gave birth to it. It is a criminal court, true, but it is a criminal court like no other. For all of these reasons, one needs an appropriate and subtle understanding of relative institutional competence in order to understand the international court's relationship with the other major institutions of international law and, in particular, the Security Council.

I wish to argue here that the only way of understanding the court's proper relationship with the Security Council and other institutions is to understand the hybrid nature of the court as a security court and a criminal court. These two aspects of the court's functioning cannot be separated from each other. It is not as if the court is a security court in one instance and a criminal court in another. The combinations are more interwoven. At work, therefore, is an institutional division of power between other organs of international law when matters of collective peace and security implicate the workings of a criminal court. Although it is important to maintain the independent workings of the criminal court, this independence goes to matters of individual criminal justice. As to matters of collective security, these are matters allocated to the Security Council under the UN Charter.[89]

There are several practical consequences to these theoretical observations. First, and most importantly, prosecutorial discretion is a function of a prosecutor operating in a normal criminal court. The current Rome Statute, by contemplating Security Council referrals to the court, creates a confusing situation where the two strands of

88 See D. Shelton, "Normative Hierarchy in International Law," (2006) 100 *American Journal of International Law* 291; see *also* Alvarez, *supra* note 27, at 2 (referring to the UN as "a hierarchical collective security scheme with the Council at its apex").

89 This conclusion is suggested by, though perhaps not explicitly stated in, the OTP's statement that matters pertaining to the interests of peace fall "within the mandate of other institutions." See *Policy Paper on the Interests of Justice*, *supra* note 44, at 9.

the court become crossed. Unfortunately, the terms of the Rome Statute, in trying to give the prosecutor and the court as much discretion as possible, go too far and claim for the prosecutor a role that is simply inconsistent with the basic principles of international law.[90] Moreover, they are also inconsistent with the basic foundational principles of international criminal law, as I have attempted to outline them in this chapter.

In exercising his discretion in cases stemming from a Security Council referral, the ICC prosecutor should be limited to matters dealing with individual cases. He can determine whether a crime has been committed, whether there is sufficient evidence that can be admitted at trial and, if the resources of the Office of the Prosecutor are too limited to simultaneously prosecute all defendants at once, he must decide which cases should be given priority and tried first. However, the idea that the Prosecutor can, in the words of the Rome Statute, decide whether to commence an investigation based on the "interests of justice" and the "interests of victims," suggests a discretion that treads uncomfortably on matters collective in nature. When the court is acting in its capacity as a security court, as it inevitably does when it acts on a referral from the Security Council, then the Security Council has already made the determination that intervention by the court is necessary in order to restore international peace and security. Simply put, the prosecutor cannot substitute his discretion for the discretion of the Security Council in such situations.

5. Conclusion

Of course, it may be difficult to determine in any particular case why a prosecutor has declined to proceed with a prosecution. If a prosecutor simply does nothing, it may be impossible to know whether the prosecutor declined because he did not have the evidence or because he believed that the interests of global justice "required" that he decline the case. These situations might inevitably fall below the radar. The fact that the reasons for these decisions might remain elusive is not a reason to ignore a question that implicates the foundational question of why we have an international criminal court and how it should function.

In the Darfur case, the only Security Council referral to date, the Prosecutor decided that there was a sufficient basis to commence an investigation. So there was no conflict between the Security Council and the prosecutor in this one case. As to future cases, and future prosecutors, the result may be different. It is at least possible to imagine a prosecutor who refuses to proceed with an investigation, despite a referral, simply because he believes that it is not in the interests of justice to proceed.

90 It should be clear that my argument cannot be rejected by appeal to the negotiating history of the Rome Statute. Simply put, the argument advanced in this chapter suggests that the Rome Statute's provisions on prosecutorial discretion, at least when the phrase "interests of justice" is interpreted broadly, violate basic principles of international law as embodied in the UN Charter. Consequently, appeal to the intention of the drafters of the Rome Statute is irrelevant. Indeed, the analysis explicitly concedes that the drafters may have had the broadest interpretation of the phrase in mind.

In my view, such an outcome would be deeply problematic, both for the court and for the United Nations. Although some might hail such a decision as a victory for judicial independence, such a celebration would be premature and short-sighted. As important as it is to protect the court's independence, it is equally important to remain faithful to the original Chapter VII powers that make Security Council referrals possible in the first place. Like it or not, the *ad hoc* tribunals and Security Council referrals are authorized under Chapter VII authority, a power once reserved for military action and other non-military solutions such as blockades and economic sanctions – large-scale cooperative actions meant to forestall violent war or, at the very least, prevent it from escalating. The idea that an international institution could use Chapter VII to create another institution (the *ad hoc* tribunals) is a young idea.[91] Now that it has been accepted, it must be taken seriously.

Just as any court in a domestic penal system must understand its role compared with the other branches of government within its domestic constitutional structure, so too the ICC must understand its role relative to the other institutions of international law. The Prosecutor must recognize that his authority is bounded not just by the terms of the Rome Statute but also by the "constitutional" structure dictated by the UN Charter. The Assembly of State Parties cannot, through the creation of the Rome Statute, change or alter that basic structure.

There are also important policy grounds for insisting that the ICC prosecutor limit his discretion and avoid matters of peace and security. If an ICC Prosecutor were to fail to investigate after a Security Council referral, this would seriously undermine the authority of the court as a permanent successor to the ICTY and ICTR. Moreover, if national or sub-national groups acting under a threat of conflict were aware that a Security Council referral could be disregarded by a prosecutor, they may be less willing to resort to the court's process and may instead resort to more violent initiatives, thus sparking the very kind of collective instability that the whole process is meant to avoid.

The proper role for the ICC Prosecutor is, in the final analysis, to act as a simple prosecutor: prosecute defendants when the evidence warrants it. Matters of peace and security must be left to the Security Council, just as a domestic prosecutor must leave matters of policy to the legislative and executive branches. The Prosecutor's role, even where discretion is concerned, is to implement policy, not create it. Within the context of the ICC, that means interpreting prosecutorial discretion very narrowly and carefully treading the rocky terrain between collective security and individualized criminal law.

91 See *Tadić*, paras. 29-40.

Chapter 12 The selection of cases by the Office of the Prosecutor of the International Criminal Court

*Fabricio Guariglia**

1. Introductory remarks

The selection of cases for investigation and prosecution in the context of international crimes is a thorny issue that has haunted all criminal jurisdictions to date. How to select among hundreds of instances of brutal victimization, each of them demanding restoration and accountability in equal terms? How to determine who, within a huge spectrum of individuals involved in those crimes, from foot soldier to general, from municipal leader to prime minister, should be singled out for prosecution? In the reign of radical evil,[1] is there truly room for pragmatic considerations and for attempts to maximize, in a utilitarian calculus, the positive impact of a confined number of investigations and prosecutions? Or should rather a Kantian approach prevail, and thus all efforts be exhausted to ensure that every single instance of victimization and every single perpetrator is adequately dealt with? These questions are not new. Yet, they are still debated, over and over again, each time that a new effort aimed at ensuring accountability, be it national or international, starts taking shape.

The manner in which any jurisdiction approaches this complex matter can have far-reaching consequences and adversely affect its legitimacy and legacy. The selectivity of the post World War II prosecutions at Nuremberg and Tokyo is frequently stressed in negative terms, including the well-known allegations of victor's justice and complete impunity of the Allies.[2] In the case of the Tokyo International Military

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1 Nino refers to the Kantian concept of "radical evil" (offences against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate) in the context of massive human rights violations. See *Radical Evil on Trial*, 1996, Introduction, p. vii.

2 For a more balanced discussion of this aspect of the Nuremberg legacy, see M. Kelly & T. McCormack, *Contributions of the Nuremberg Trial to the Subsequent Development of International law*, in D. Blumenthal & T. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengance?* (2008).

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 209-217.

Tribunal (IMT), the criticism to the Tribunal's selectivity was first formulated in the scathing dissents of some of its very own judges.[3]

One could contend that in the case of the IMTs of Nuremberg and Tokyo the critical discussion surrounding the selection of the cases that were ultimately brought to justice was inextricably linked to the particular genesis of those Tribunals and its consequences in terms of their legitimacy. However, the vexing questions of if and how selectivity should take place can also affect jurisdictions that are far less problematic in terms of legitimacy, such as the UN-established *ad hoc* Tribunals. The ICTY – where a rich discussion took place as to the types of cases on which the Tribunal should focus its limited resources (the so-called "big fish" vs. "small fish" debate, triggered by the arguably low level of the first perpetrators to be indicted, such as Dusko Tadic or Drazen Erdemovic) – provides a clear example.[4] The underlying philosophical question has been: should prosecutions before international tribunals focus on those at the top of the decision-making process, or should they also include individuals situated in lower positions, and even executioners?

The rationale behind the affirmative answer to the first limb of the question would be that cases brought against those individuals located at the superior echelons present a higher "aggregate value". Those at the top of the system are the ones that "control the anonymous will of its components";[5] accordingly, who pulls the trigger is not that important, since executioners are merely replaceable parts. In addition, it has been stated that the prosecution of those in leadership positions will normally provide a "broader narrative", tell "a more complete story" about the crimes and their context than the prosecution of a low-level perpetrator.[6] Hence, the argument could be properly made that "minor offences" and "minor roles" should not be prosecuted, or at least not by international jurisdictions, and be left for national authorities instead. From this viewpoint, the criticism of the ICTY's initial prosecutions would appear to be correct.

However, a number of arguments can and have been offered in reply. First, it can be argued that within the universe of international crimes, there is no such thing as "minor crimes" and "minor roles". A single event in the Milosevic Kosovo indictment, the massacre of Racak, involved the execution of over 40 civilians – an incident that would be viewed by all jurisdictions in the world as extremely grave. Erdemovic, a perpetrator located at the lowest echelons of the chain of command, killed around 200 people under his own admission. Under this competing logic, any jurisdiction dealing with crimes of this scale should refrain from getting entangled in superficial numeric calculations and overly simplistic divisions of roles, when reality shows that gravity is widespread and that all individuals involved play important parts that ena-

3 See R. Cryer, *Prosecuting International Crimes* (2005), pp. 43-48.

4 See P. Akhavan, *'Justice in The Hague, Peace in the Former Yugoslavia?'* (1998) 20 *Human Rights Quarterly*, 777-781.

5 In the words used by the Argentine Court of Appeals for the Federal District of Buenos Aires in *Juntas* trial judgement, applying a theory of co-perpetration by means to hold the commanders criminally responsible; see (1988) 8 *Human Rights Law Journal*, 415-417.

6 See Akhavan, *supra* note 4, at 778-779.

ble the commission of the crimes. In addition, the perpetration of low-level perpetrators can "bring home" the "daily aspect of the abstract narrative of ethnic cleansing, explaining how ordinary people participated in killing and brutalizing their fellow human beings",[7] thus making visible in a powerful way the macro-criminality of genocide, war crimes or crimes against humanity, which otherwise may end up being perceived by the general public as something akin to a natural catastrophe, a non-human event.[8] It may be precisely in cases involving low- and mid-level perpetrators that criminal prosecutions are particularly adequate to provide the transformation of a cog in a wheel back into a human being.[9]

The proposition that will be defended here is that any justice system that wishes to adequately deal with international crimes should first be aware of its limitations and avoid unrealistic expectations. The beneficial effects of criminal prosecutions for gross violations of international humanitarian law and human rights law – which include providing "great occasions for social deliberation and for collective examination of the moral values underlying public institutions",[10] and perforating the dominant narratives created by the groups involved in the crimes and shattering the accompanying "states of denial" by which societies refuse to accept even the very existence of the crimes[11] – can be otherwise jeopardized. Pretending that no choices will be made, i.e. that no case will be prioritized while others are deferred or even sidelined is not only dishonest, but also inefficient: such a position merely masks unavoidable and "unofficial" selection processes, thereby effectively precluding the formulation of transparent criteria and the scrutiny of the manner in which those criteria are applied in practice. As one commentator puts it, the question is not "whether selective prosecution should occur, as it is essentially impossible that it does not, but when selective prosecution is unacceptable".[12]

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7 See Akhavan, *supra* note 4, at 780.

8 For a discussion of the need – and the limitations- of the criminal justice system to translate this macro-criminality into tangible instances of human conduct, see H. Jäger, 'Betrachtungen zum Eichmann-Prozeß', (1962) 45 *Monatsschrift für Kriminologie und Strafrechtsreform*, 73-83.

9 H. Arendt, *Eichmann in Jerusalem* (1992), p. 289. A valid question, however, is whether in the case of low level perpetrators at least some of the same goals cannot be achieved through mechanisms other than the criminal process; see for instance the community reconciliation in Timor-Leste, and the reintegration of perpetrators of past wrongs into their communities, which successfully involved 1,371 perpetrators (for a report, go to http://www.ictj.org/static/Timor.CAVR.English/09-Community-Reconciliation.pdf).

10 Nino, *supra* note 1, p. 131.

11 The term is taken from the homonymous book by Stanley Cohen. As Cohen explains, within the elementary forms of denial there are those which operate as collective defence mechanisms developed to cope with guilt, including the creation of myths and the adoption of unspoken arrangements for concerted or strategic ignorance. See S. Cohen *States of Denial* (2001), Chapter 1, "The elementary forms of denial".

12 See Cryer, *supra* note 3, p. 192 noting that even in those systems where the principle of mandatory prosecution (*Legalitätsprinzip*) prevails, there is recognition that processing all cases is simply not possible.

2. The selection of cases by the Office of the Prosecutor of the International Criminal Court

2.1. Governing principles

If, as discussed, the question of which cases should be singled out for prosecution and under which criteria is always a central one, in the ICC it becomes particularly critical, due to the global nature of the Court (which implies the existence of multiple situations, each containing hundreds or even thousands of potential individual cases) and its necessarily finite resources. The OTP has developed the following guiding principles for the purposes of selecting cases for prosecution:[13]

Independence: In accordance with its duties under Article 42 (1), the OTP acts independently, and members of the Office "shall not seek or act on instructions from any external source". However, the duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, the importance of the cooperation of any particular party, or the quality of cooperation provided. The selection process is conducted exclusively on the available information and evidence and in accordance with the Statute criteria and the policies of the Office.[14]

Impartiality: The concept of impartiality is most frequently applied with respect to judges, but it is also a relevant principle in the context of case selection by the OTP. In situations involving multiple groups with potential responsibilities, the OTP conducts its selection analysis in a non-partisan manner, applying the same methodology and standards for all groups. In the view of the OTP, impartiality or even-handedness does not mean "equivalence of blame" or that all groups must be prosecuted regardless of the evidence. It means that the Office will apply the same methods, the same criteria and the same thresholds for all groups, when determining whether the level of criminality meets the thresholds warranting investigation or prosecution. Thus, impartiality may in fact require different outcomes for different groups, if some groups did not commit crimes or their crimes do not meet the thresholds to warrant prosecution before the Court. The relevant consideration is that OTP strives to follow a coherent rule, whereby like cases are treated alike.[15]

Objectivity: The OTP will investigate and consider incriminating and exonerating circumstances equally, in order to establish the truth (Article 54 (1) (b)). This means, for example, that an initial hypothesis that a particular person or group warranted prosecution may be rejected after investigation. The policy of the OTP is to apply this

13 The following section closely follows a draft paper on selection criteria which the OTP distributed in July 2006 in the course of a meeting with NGO representatives.

14 See generally OTP, Draft Paper, Criteria for selection of situations and cases (2006).

15 To use a measure for legitimacy at the international level proposed by Thomas Franck (quoted by Cryer, *supra* note 4, p. 196).

principle during the pre-investigation phase of situation selection as well as in the course of an investigation; thus the OTP will consider any factors either supporting or undermining a reasonable basis to proceed with investigation.

Non-discrimination: The principle of non-discrimination flows from, and is subsumed by, the principles of impartiality and objectivity. It is nonetheless worth highlighting that the selection process of the OTP does not draw any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status (Article 21 (3)). Under a leading case in international criminal law (the so-called *Celebici* case*),* the Prosecution's discretion to determine who to prosecute must remain undisturbed, except where it can be demonstrated that there are unlawful or improper motives for prosecution, including discriminatory ones.[16]

2.2. When to move forward?

Gravity is an overarching consideration and a critical admissibility factor which must be analyzed before any decision to investigate or to prosecute is made. Although any crime falling within the jurisdiction of the Court is a serious matter, the Statute (Articles 53 (1) (b), 53 (2) (b) and 17 (1) (d)) clearly foresees and requires an additional consideration of "gravity". Thus, even where subject-matter jurisdiction is satisfied, it must still be determined whether the case is of sufficient gravity "to justify further action by the Court".[17] The gravity requirement is also reflected in Article 8 (1), which is not part of the definition of war crimes, but rather an indication that the Court should focus in particular on war crimes "when committed as part of a plan or policy or as part of a large scale commission of such crimes".[18]

The OTP has expressly declined to open an investigation on the basis of individual communications due to lack of gravity (Iraq report, noting that the conduct attributed to nationals of the relevant State party included no more than 20 victims counted)[19] and has made clear that it intends to intervene only in relation to situations and

16 *Prosecutor v. Delalic et al* (*Celebici* case), Appeals Judgement, 20 February 2001, para. 611.

17 Whereas Article 53 (1) refers to admissibility of "the case", it appears that the Article is simply following the wording of Article 17. At the stage of initiating an investigation there is not yet a "case". Hence, in the view of the OTP, it is necessary to consider the situation in a generalized manner, taking into account the likely set of cases that would arise from investigation of the situation.

18 Given that Article 8 (1) uses the term "in particular", the Office has concluded that there is scope to consider other war crimes in exceptional circumstances; for example, where an isolated war crime results in a large number of victims or some other great impact.

19 10 February 2006 Update on Communications Received by the Prosecutor: http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf.

Annex 1: Iraq Response http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

cases that meet a certain threshold of gravity, consistent with the letter and the spirit of the statute. Factors that the OTP will consider when analyzing gravity include the scale of the crimes, the nature of the crimes and the manner of their commission. In this context, "scale" means more than just numbers, and may include considerations of temporal or geographical intensity. As to the nature of crimes, the OTP recognizes that all crimes under the Statute are very serious. Nonetheless, it has highlighted some crimes of particular concern including killing, rape and child conscription. The OTP also considers particular aggravating aspects in the manner of commission of the crimes. This may include episodes of significant cruelty, crimes against particularly defenceless victims, crimes involving discrimination on grounds referred to in Article 21 (3), and abuse of *de jure* or *de facto* power (e.g. the responsibility to protect).[20] The OTP considers as relevant factors whether the crimes deliberately targeted civilians, vulnerable groups, or persons involved in a humanitarian assistance or peacekeeping mission, as well as crimes intended to obstruct justice (particularly those targeting ICC witnesses or staff) and crimes committed with intent to spread terror.[21] Finally, the OTP has clarified that geographic location of the crimes is not a factor that it will take into account.

These are simply factors to be considered; none of them are rigid requirements. The OTP position is that no fixed weight should be assigned to the criteria but rather a judgment will have to be reached on the facts and circumstances of each situation.

Where the available information provides a reasonable basis to believe that one or more crimes within the jurisdiction of the Court have been committed, the next step is to consider admissibility. There are two aspects to admissibility: gravity and complementarity. The Statute does not stipulate any mandatory sequence in the consideration of gravity and complementarity, but the Prosecutor must be satisfied as to admissibility on both counts (gravity and complementarity) before proceeding further.

2.3. Who must be prosecuted?

Whereas assessment of gravity during the situation selection phase is necessarily general, at the case selection phase one must look at the gravity of a particular "case" in question. Since a case comprises both crimes and perpetrators, the "gravity of the case" includes both the gravity of the crimes and the extent of responsibility of the perpetrator. With respect to gravity of crimes, the OTP considers the same factors discussed above.

With respect to extent of individual responsibility, the OTP has developed its "most responsible persons" policy, whereby first and foremost those situated at the highest echelons of responsibility will be the ones singled out for prosecution, such as those

20 Similar aggravating factors are provided for in Rule 145 for the purposes of determining the appropriate sentence. For a wider discussion on gravity and the relevance of sentencing factors, see American University War Crimes Research Office, *The Gravity Threshold of the International Criminal Court* (March 2008), pp. 39-42.

21 Rule 145 (2) RPE; Art 8 (2) (b)(iii), Art 70.

persons holding leadership positions.[22] However, the OTP will also consider moving down the chain, for instance, if required for the successful prosecution of persons situated at the highest positions.[23] Who belongs to the category of "most responsible persons" is a question that is dealt with through thorough analysis of all available evidence, and not one that can be properly answered *ex ante*. In this sense, it must be stressed that the selection of cases is an evidence-driven process, also governed by the principle of objectivity.

Finally, it must be clarified that while the policy of the OTP is to focus on persons most responsible, the view of the OTP is that the legal threshold of admissibility is not as stringent as the policy threshold of "persons most responsible". Otherwise, the admissibility threshold would become a permanent legal barrier providing permanent *ex ante* impunity to entire classes of perpetrators, and enabling perpetrators to bring legal challenges demanding evidence showing that they are not only guilty but the most guilty.[24]

2.4. What crimes to prosecute?

In an effort to foster expeditious trials, the OTP will bring compact charges, focusing on a confined universe of incidents. The charges chosen will constitute, whenever possible, a representative sample of the most prominent forms of victimization in the field. However, because the OTP often works in situations of ongoing conflicts, it will frequently be necessary to take into account factors such as security of witnesses and ICC staff, protection of victims and access to available evidence. For example, if interviewing witnesses from one incident site would put those witnesses at risk, whereas witnesses from another site involving a comparable incident can be interviewed without such risk, the OTP may prefer the latter.

If necessary in the particular circumstances of the case, the OTP may follow a *sequential* approach, investigating specific cases within a situation one after another rather than all at once.

2.5. Briefly: When not to prosecute?

The initial factors that must be determined under Article 53 (2) concern the legal or factual basis to seek a warrant or a summons, and the admissibility of the case. If the OTP has satisfied itself that those factors are met, it is still to assess the "interests of justice", within the terms of Article 53 (2) (c). The OTP has recently made public a policy paper clarifying its approach to this concept.[25] The paper emphasizes four

22 See OTP, *Paper on some policy issues before the Office of the Prosecutor* (September 2003), pp. 6-7.

23 Ibid., p. 7.

24 For a wider discussion, see War Crimes Research Office, *supra* note 20, pp. 25-57, including an analysis of Pre-Trial Chamber I's stringent approach to the gravity threshold provided for in Article 17 (1) (d).

25 OTP, *Policy Paper on the Interests of Justice*, September 2007.

guiding principles: (i) that the exercise of discretion under Art. 53 (1) (c) and 53 (2) (c) is exceptional in nature and that there is a presumption in favor of investigation and prosecution, if all legal factors described in Art. 53 are met; (ii) that the criteria for the exercise of such discretion will be guided by the object and purpose of the Statute (the prevention of serious crimes of concern to the international community through ending impunity); (iii) that there is a difference between interests of justice and interests of peace, and that the latter falls within the mandate of institutions other than OTP; (iv) finally, that OTP is under a duty to notify the PTC of any decision not to investigate or prosecute in the interests of justice.[26] To date no such decision has been made in any of the existing situations.

2.6. Judicial review of the exercise of prosecutorial discretion

Whereas the fact that under specific circumstances OTP's exercise of discretion is subject to judicial review has never been the subject of any controversy, the trigger and scope of such review has been debated.[27] Two important decisions from Pre-Trial Chamber I have provided clarity as to the manner in which the judicial review mechanism enshrined in Article 53 (2) should be interpreted: the Chamber rejected invitations to interpret affirmative decisions from the OTP pertaining to the persons being prosecuted and the selected charges related to crimes within the DRC situation as tacit decisions not to investigate or not to prosecute other persons or other crimes. The Chamber noted that no negative decision under Article 53 (2) had been made in the DRC situation, and that on the contrary, the OTP was prosecuting a person at that time and further investigations in the DRC situation were ongoing.[28] In short, the Chamber refused to engage in an exercise of "judicial creation" of a non-existent Art. 53 (2) (c) decision, triggered by a third party's disagreement with the prosecutorial choices made by the OTP.

3. Conclusions

It is clear that when we speak of selection of cases within the universe of international crimes, we are referring to extremely complex choices. The Office of the Prosecutor will be faced with a number of dilemmas and will be forced to make difficult, probably unpopular but also unavoidable decisions. However, it should be clear that the ICC as a whole can only offer a measure of justice, and that there must be adequate responses developed by the international community to deal with those perpetrators and crimes that the ICC cannot tackle.[29] This is a natural consequence of the ICC as a Court of last resort, but also a distinctive feature of the emerging system of inter-

26 Ibid.

27 See, for instance, the exchange between the OTP and Pre-Trial Chamber II in December 2005-early January 2006, in particular ICC-02/04-01/05-68 (2 December 2005) and ICC-02/04-01/05-76 (11 January 2006).

28 See ICC-01/04-399 (26 September 2006) and ICC-01/04-373 (17 August 2007).

29 See OTP, Policy Paper, *supra* note 22, p. 3.

national criminal justice, which requires that national authorities, the international community and the Court work together in pursuing the common goal of putting an end to impunity for the most serious crimes of international concern.

Chapter 13 Developing and implementing an effective positive complementarity prosecution strategy

*Christopher Keith Hall**

The Office of the Prosecutor has faced numerous challenges not faced by other international criminal courts and it has begun to make a significant impact in the day-to-day practice on a wide range of issues. One area which has so far received little comment is its role in the system of complementarity.

1. Complementarity

As part of the grand bargain at Rome, all States voting for the adoption of the Rome Statute of the International Criminal Court (Rome Statute), and those ratifying it, agreed that they had a duty to investigate and prosecute genocide, crimes against humanity and war crimes.[1] Under the new principle of complementarity, concurrent jurisdiction the International Criminal Court (Court) over these crimes under international law was designed to be complementary to that of national courts. Complementarity takes two forms: passive and positive.

1.1. Passive complementarity

Under the most commonly known version, passive complementarity, the Court was simply to be a court of last resort when states failed to fulfil their duty to investigate and prosecute crimes genuinely. Of course, given the limited resources of the Court, such a concept meant that would only make a significant contribution to international justice if States by and large made a dramatic shift and demonstrated the political will to define genocide, crimes against humanity and war crimes as crimes under national law, incorporating principles of criminal responsibility and defences in accordance with the strictest requirements of national law, and then implemented that legislation vigorously.

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1 Rome Statute, Preamble.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 219-228.

1.2. Positive complementarity

However, as the Office of the Prosecutor itself immediately recognized, the Court was not to be simply a passive institution, simply waiting for the Security Council, States parties and Article 12 (3) States[2] or others to seize the Court, but it had its own responsibility to inspire States to fulfil their duties, not merely by example, but also by actively encouraging them to bring those responsible for crimes under international law to justice.[3] First, in situations under investigation, the Office of the Prosecutor would vigorously investigate and, where there was sufficient admissible evidence, prosecute not only the highest level suspects, but also, if necessary, to reach down lower.[4] In so doing, it might shame national authorities to do their bit by investigating and prosecuting all the other cases that were beyond the Court's current resources. Second, the Office of the Prosecutor would encourage states to ratify the Rome Statute and the Agreement on the Privileges and Immunities of the International Criminal Court (APIC) and to enact effective implementing legislation to give their police, prosecutors and investigating judges the necessary tools to end impunity.[5] The Office of the Prosecutor announced an ambitious external relations and outreach strategy

2 Article 12 (3) of the Rome Statute provides for non-States parties to recognize the Court's jurisdiction over particular crimes: "If the acceptance of a State which is not a Party to this Statute is required under para. 2 [dealing with crimes committed on the territory of a state party or by its nationals], the State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 [dealing with cooperation by states with the Court]." One state, the Côte d'Ivoire, has made such a declaration.

3 "The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are *brought to justice* by some other means." Office of the Prosecutor of the International Criminal Court, Some policy issues before the Office of the Prosecutor, September 2003 <www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf>, 3 (emphasis added).

4 "The strategy of focusing on those who bear the greatest responsibility for the crimes may leave an 'impunity gap' unless national authorities, the international community and the Court work together to ensure that all appropriate means for *bringing other perpetrators to justice* are used. In some cases the focus of an investigation by the Office of the Prosecutor *may go wider than high-ranking officers* if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case. For other offenders, alternative means for resolving the situation may be necessary, whether by international assistance in strengthening or rebuilding the national justice systems concerned, or by some other means. Urgent and high-level discussion is needed on methods to deal with the problem generally." Ibid. (emphasis added).

5 The Office of the Prosecutor recognized the importance of complementary legislation in its September 2003 policy paper, but did not indicate clearly that it would lobby states to enact effective legislation:

to encourage directly to investigate and to prosecute crimes under international law, including, in certain instances, with assistance from the Office.[6]

2. Where are we now?

What is the situation five years after entry into force of the Rome Statute and four years after the Office of the Prosecutor was established, bearing in mind that, like the two *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) and the Special Court for Sierra Leone, the Office was not fully operational for a year after the Prosecutor took office?

2.1. Pressing States to ratify and implement the Rome Statute

To start with the second way to implement positive complementarity, there has been a significant recent shift. For the first few years of the Court's existence, none of the organs of the Court went beyond cautious calls in speeches in visits around the world for non-States parties to consider ratifying the Rome Statute and APIC, but rarely, if ever, calling for States parties to enact effective implementing legislation.[7] However, after the Assembly of States Parties, in response to sustained pressure from non-gov-

> "The existence of the Court has already encouraged States to incorporate as domestic law the crimes within the jurisdiction of the Court. Even before the initiation of any investigation by the Court itself, the use of this legislation will be a major step in bringing to justice the perpetrators of atrocities." See September 2003 policy paper, 3.

6 In its policy statement adopted in September 2003, the Office said: "To the extent possible the Prosecutor will encourage States to initiate their own proceedings." Ibid., 2. In particular, it declared:

> "A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes. In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions and cultures. The Office will develop formal and informal networks of contacts to encourage States to undertake State action, using means appropriate in the particular circumstances of a given case. For instance, in certain situations, it might be possible and advisable to assist a State genuinely willing to investigate and prosecute by providing it with the information gathered by the Office from different public sources." Ibid., 5.

Since the conference, the Prosecutor has insisted to the President of the Central African Republic that criminal proceedings regarding present crimes "had to be initiated". Statement of Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, 18 March 2008, 6.

7 On 15 December 2003, Amnesty International urged the President, the Prosecutor and the Registrar to press states to enact effective implementing legislation. All three declined to do so. Since then, the President of the Court has stated: 'In order to maximize the capacity of States to contribute to putting an end to impunity and preventing future crimes may require the strengthening of national capacities to deal with crimes.' Judge Philippe Kirsch, President of the International Criminal Court, Address to the United Nations General Assembly, 9 October 2006.

ernmental organizations, established a working group on ratification and implementation and as the limitations of informal agreements with states became more and more evident, we have seen a welcome change in the past year with the Office of the Prosecutor starting to be more assertive about the need for States to provide effective cooperation, particularly with regard to arrests. It is to be hoped that the Office will go further and call for states that have not yet done so to ratify the Rome Statute and APIC, to enact effective implementing legislation and to ensure that there are effective law enforcement units in all peacekeeping operations with their own intelligence capabilities.[8]

2.2. What about the first prong of positive complementarity?

When it was established, the Office of the Prosecutor was faced with a variety of possible approaches with regard to selecting situations and suspects within those situations in its initial investigations and prosecutions. One of the possible approaches would have been to investigate and prosecute a number of suspects in number of variable size situations in different geographic regions to maximize the Court's impact.[9] Another, very different approach would have been to focus on only three very large situations. The Office of the Prosecutor chose the second. It solicited and obtained referrals of three situations by states parties, in each case where the government concerned hoped the Prosecutor would investigate and prosecute only political opponents, and it also received a referral of a situation by the Security Council, but it has not used its *proprio motu* powers to initiate investigations, subject to Pre-Trial Chamber approval. Whether the Office of the Prosecutor has received more cooperation because of such referrals than it would have obtained if it had investigated these situations itself by it remains to be seen. It is also not clear whether cooperation would continue if the members of the armed forces and their civilian superiors in these situations were the subject of arrest warants. As of October 2007, the Office of the Prosecutor had sought and obtained the issuance of arrest warrants for eight people in the first three situations under investigation out of the tens of thousands of persons who have committed hundreds of thousands of crimes against humanity and war crimes since 1 July 2002.

8 Such a step would be consistent with the important step that the Assembly of States Parties took shortly after the conference when it adopted a resolution approving an action plan to encourage states to implement the Rome Statute. Assembly of States Parties, Resolution ICC-ASP/6/Res.2, adopted at the 7th plenary meeting, on 14 December 2007, by consensus (http://www.icc-cpi.int/library/asp/ICC-ASP-6-20_Vol.I_Part_III_English.pdf).

9 C. K. Hall, *Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations*, 28 March 2003 <http://www.icc-cpi.int/library/organs/otp/hall.pdf>. (Amnesty International prosecution strategy proposal), 20.

2.2.1. The DRC

One of those persons, the leader of a rebel group in the eastern Democratic Republic of the Congo (DRC) who refused to sign a peace agreement with the central government and was detained by government security forces, was surrendered to the Court and is expected to face trial in the next few months.[10] Although the Office of the Prosecutor stated that it is now investigating another case in the Ituri region of the DRC and might investigate a third in the DRC, it has not given any indication that it is investigating crimes committed by members of the armed forces, including former rebels whose leaders are now part of the government, or their civilian superiors. Some national prosecutions have taken place in military courts, but some of these have been alleged to have been subject to political pressure that led to acquittals and they have been hampered by the failure to enact complementarity legislation defining crimes under international law as crimes in the penal code.[11]

2.2.2. Northern Uganda

As of October 2007, four senior leaders in a northern Uganda rebel group, who were able to escape arrest when the arrest warrants were prematurely unsealed, remain at large in the DRC within the area of operations of a UN peacekeeping mission and are frequently and openly visited by the press and senior UN negotiators in complete impunity.[12] The Office of the Prosecutor, which participated in a joint press conference with President Museveni when he announced the referral, originally indicated that it did not intend to prosecute any member of the Uganda government forces or their civilian superiors, on the ground that the numerous cases of murders and rapes, as well as the continuing crimes of forcible transfers of population, are not as grave as those committed by members of the LRA, which has led not only the four leaders, but also a number of independent observers, to criticize the Court as not impartial.[13]

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10 As of 29 April 2008, the trial in this case was scheduled to begin on 23 June 2008. See ICC Press release, 'The trial in the case of Thomas Lubanga Dyilo will commence on 23 June 2008', The Hague, 13 March 2008, ICC-CPI-20080313-PR297-ENG.

11 Since October 2007, three other rebel leaders in the DRC have been arrested and surrendered to the Court. See ICC Press release, Second arrest: Germain Katanga transferred into the custody of the ICC, The Hague, 18 October 2007, ICC-20071018-250-En; Press release, Statement by the Office of the Prosecutor following the transfer to The Hague of Mathieu Ngudjolo Chui, The Hague, 7 February 2008, ICC-OTP-20080207-PR285-ENG; Prosecutor v. Ntaganda, Warrant of arrest, ICC-01/04/06-2, 22 August 2006 (unsealed on 29 April 2008).

12 As of 29 April 2008, only three of the original five LRA suspects were still alive. One was killed during the fighting, Statement by the Chief Prosecutor Luis Moreno-Ocampo on the reported death of Raska Lukwiya, The Hague, 14 August 2006, ICC-OTP-20060814-151-En, and the other, Vincent Otti, is reported to have been killed in circumstances which remain unclear, 'Vincent Otti: Second-in-command of the Ugandan Lord's Resistance Army who, under leader Joseph Kony, waged a brutal insurgency', Times Online, 26 March 2008, at http://www.timesonline.co.uk/tol/global/article3628138.ece.

13 See, for example, A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', 21 *Ethics & International Affairs* 179, 188-189 (2007) ("Until the ICC makes its impartiality

The bill implementing the Rome Statute has not yet been enacted into law and there is little evidence of any political will to prosecute members of the UPDF, the government armed forces for crimes under international law.[14]

2.2.3. Sudan

More than 250,000 people have died and more than one million forcibly displaced in the past few years in the Darfur conflict. One Sudanese government militia member and one cabinet minister, but neither their superiors nor their subordinates, are the subject of arrest warrants.[15] A handful of prosecutions of members of government forces are reported to have occurred in the much criticized state security courts for relatively minor crimes.

2.2.4. Central African Republic

It is too early to say whether the Office of the Prosecutor will modify its policy in this situation.[16]

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evident in practice, and until it establishes its independence from the Ugandan government in more than just its rhetoric – for many, until it issues arrest warrants against the UPDF – its capacity to establish justice or conform to the rule of law in Uganda will be seriously impaired."). However, according to an authoritative source, since the conference the Office of the Prosecutor has sought further information from the Ugandan government regarding alleged crimes by members of the UPDF.

14 The Ugandan government and the LRA have signed several documents during the context of negotiations to end the conflict, which were still continuing as of 29 April 2008. These documents would committed Uganda to refusing to arrest and surrender the three remaining LRA suspects to the Court and, instead, give jurisdiction over these cases to a new special division of the High Court. However, President Museveni subsequently declared that these suspects would, instead of being tried in a national court, would be submitted to an alternative traditional procedure and avoid the possibility of imprisonment. See Amnesty International, *Uganda: Agreement and Annex on accountability and reconciliation falls short of a comprehensive plan to end impunity*, AI Index: AFR 59/001/2008, March 2008.

15 In his statement to the Security Council two months after the conference, the Prosecutor stated that the Office of the Prosecutor would open two new investigations regarding Darfur, both indicating dramatic shifts in previous prosecution policy. First, it 'will proceed to investigate who is bearing the greatest responsibility for ongoing attacks against civilians; who is maintaining Harun in a position to commit crimes; who is instructing him'. Second, it is investigating the attack on UN peacekeepers which took place on 29 October 2007 and other such attacks. Statement of Mr. Luis Moreno Ocampo to the United Nations Security Council pursuant to UNSCR 1593 (2005), 5 December 2007.

16 In March 2008, the Prosecutor stated that he hopes to apply for an arrest warrant regarding crimes committed in 2002 and 2003 before the end of 2008, but it is not clear whether these warrants will include individuals from all parties. Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Twelfth Diplomatic Briefing, 18 March 2008, 6.

3. Other international criminal courts

There is a marked contrast between the results of the Office of the Prosecutor so far and the results of the offices of the prosecutor of other international criminal courts, such as those of the ICTY, ICTR and the Special Court for Sierra Leone in their first five years. As discussed below, there are a number of possible reasons for this difference.

3.1. The start-up investigation and prosecution phase in other international criminal courts

In contrast to the practice of the Office of the Prosecutor, five years year after the ICTY was established, it had issued arrest warrants or summonses for 59 persons, 28 of who were on trial or awaiting trial; exhumed mass graves; issued numerous sealed warrants; obtained one plea of guilty (*Erdemovic*); had completed two trials (*Tadić* and *Dokmanovic*); was conducting trials in five cases (*Alexsovski*, *Blaskic, Čelebići*, *Furundizja* and *Kovacevic*); begun pre-trial work in eight cases (*Jelisc*, *Kordić*, *Krnorjelac*, *Krnorjelac*, *Kvočka*, *Kupreškić*, *Simić* and *Zigic*); and undertaken a major review of its investigation strategy.[17] Five years after the ICTR was established, it had issued indictments, together with arrest warrants, for at least 43 persons, most of whom had been arrested; obtained two guilty pleas (*Kambanda* and *Serushago*); completed two trials (*Akayesu* and *Kayishmea*), with judges deliberating judgments in two others (*Rutaganda* and *Musema*); and had 31 persons in detention awaiting trial.[18] Five years after the establishment of the Special Court for Sierra Leone, it had issued approximately a dozen arrest warrants; commenced three trials, one of which has been completed and is now on appeal; and was preparing for a fourth involving a former head of state.

3.2. What are the reasons for this difference?

When States consider the budget request of the Court in December at the Sixth Session of the Assembly of States Parties, they are may ask why there is such a difference in the results of the various international criminal courts. There are several possible reasons that have been advanced. One possibility is related to the small number of arrest warrants. The more people being sought the more likely that someone will be

17 Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, U.N. Doc. A/53/219, S/1998/737, 10 August 1998.

18 Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/54/315, S/1999/943, 7 September 1999 (fourth annual report).

caught. Second, the ICTY and ICTR used sealed indictments and arrest warrants to grab suspects before they could flee. The Office of the Prosecutor used sealed arrest warrants in the Uganda situation solely to ensure that victims and witnesses were protected and once this was done, asked for them to be unsealed, eliminating any chance to arrest any of the suspects who could have been invited to a conference or some other event on the territory of a state party which had enacted cooperation legislation where one or more could have been arrested with ease. According to a reliable report, at least one representative of a non-governmental organization made such a suggestion on two separate occasions, but this suggestion was not followed. One can speculate whether one or both of the accused of crimes in Darfur would now be in The Hague if a similar approach had been used in that situation. Third, as a result of intense public and private efforts right from the beginning by the ICTY, ICTR and Special Court for Sierra Leone Prosecutors, together with non-governmental organizations, states began to arrest accused. The Office of the Prosecutor of the International Criminal Court has recently begun taking a similar high-profile approach and one can only hope that it will soon begin to bear fruit.[19] It is to be hoped that the Office support the call for each peacekeeping operation to include a law enforcement unit with its own intelligence gathering capability able to arrest and surrender persons subject to Court arrest warrants and, together with the Presidency, whenever any State fails to comply with Court requests, thereby preventing the Court from exercising its functions and powers, refer this matter to the Assembly of States Parties or to the Security Council.

4. Two other aspects of prosecution strategy

Two other aspects of prosecution strategy related to selection of situations and suspects might be briefly noted.

4.1. Stopping corporate assistance to criminals

First, the Office of the Prosecutor initially indicated that executives of foreign corporations who facilitated the commission of crimes under international law in the territory of a State party could face prosecution for aiding, abetting or otherwise assisting

19 Two months after the conference, the Prosecutor asked 'the Security Council to send today a strong and unanimous message to the Government of the Sudan, requesting compliance with Resolution 1593, requesting the execution of the arrest warrants'. Statement on 5 December 2007, supra note 15. In March 2008, with regard to the Sudan, he called for states to take "a more consistent approach by diplomatic representations that requests for assistance and decisions of the Court have to be executed", and , with regard to Uganda, he urged the international community not "to negotiate away international justice", and, with regard to the DRC, to reaffirm that "the commitment to end impunity is not negotiable". Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Twelfth Diplomatic Briefing, 18 March 2008, 4.

such crimes under Article 25 of the Rome Statute.[20] However, certain powerful countries expressed concerns about this positive initiative, which could, if implemented, make a dramatic impact on the ability of State officials and armed groups to carry out such crimes. Although such prosecutions have taken place at the national level, it remains to be seen whether such prosecutions will ever take place in the Court.

4.2. Justice and peace

Second, in the first few years, the Office of the Prosecutor frequently indicated that it would not carry out prosecutions that could conceivably undermine negotiations to end conflicts or that might lead to a resumption of hostilities or might delay them, thus leaving the Court subject to threats by the perpetrators to continue the crimes or to resume them if they do not receive impunity. In any event, this is a step that under the Rome Statute can only be taken by the Security Council acting under Chapter VII of the Charter of the United Nations pursuant to controversial Article 16 of the Rome Statute. However, recently, the Prosecutor not only stated that peace and justice "can and must work together", but that when "the criminals ask for immunity under one form or another as a condition to stopping the violence" it is "blackmail".[21]

5. What has been the message sent by the Office of the Prosecutor to States about their obligations to investigate and prosecute crimes that it is not investigating and prosecuting?

Amnesty International urged the Office of the Prosecutor to adopt a global anti-impunity complementarity strategy designed to ensure joint international/national solutions to impunity.[22] Surprisingly, the Office of the Prosecutor has not been urging States to fulfil their obligations under the Rome Statute and other international law to end impunity, as one might have expected. Instead, the Office has clearly indicated on a number of occasions that it was not its concern and that it was entirely up to States to decide what to do with regard to any crimes that it was not investigating or prosecuting. This approach cannot have escaped Uganda's attention when drafting the Agreement and Annex providing for the bulk of the cases of war crimes and crimes against humanity to be dealt with by traditional alternatives to justice which are unable to impose prison sentences.

In one such recent statement, the Prosecutor explained that the Court

> "was created to investigate and prosecute the worst perpetrators, responsible for the worst crimes, those bearing the greatest responsibility, the organizers, the planners, the

20 This possibility was first raised indirectly in the September 2003 policy paper: "" September 2003 policy paper, 2-3.

21 Building a Future on Peace and Justice, Address by Mr Luis Moreno-Ocampo, Nuremberg, 24 to 25 June 2007 <www.icccpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_ English.pdf>.

22 Amnesty International prosecution strategy proposal, *supra* note 9, 24.

> commanders –; national proceedings and other accountability mechanisms remain essential for the purpose of achieving comprehensive solutions; they are not alternative but complementary processes…"[23]

Similarly,

> "in Uganda, the Court has issued arrest warrants against 4 individuals; but other national mechanisms can be useful for the other combatants, those who want to give up arms and rejoin their families, those who do not bear the greatest responsibility."[24]

This policy of leaving it to States to devise alternatives to justice, however, appears to be in direct conflict with the Preamble of the Rome Statute, in which the states parties affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", determined to put an end to impunity for the perpetrators of these crimes" and recalled that it "is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". No exceptions are listed.

6. Conclusion

As indicated in a number of the footnotes, since these remarks were delivered on 5 October 2007 at the conference, there have been a number of encouraging developments which suggests that the Office of the Prosecutor is beginning to take a more aggressive approach to investigating and prosecuting genocide, crimes against humanity and war crimes and in re-emphasizing positive complementarity as an essential component of the struggle for international justice. One can only hope that this approach will continue and that States will begin to take their own responsibilities more seriously.

23 Building a Future, *supra* note 20, 8.

24 Ibid.

Chapter 14 Prosecutorial discretion and gravity

*William A. Schabas**

1. Introduction

Gravity features as an important element in the selection of cases for trial before the International Criminal Court. By virtue of Article 53, the Prosecutor is to take into account 'the gravity of the crime' in deciding whether to initiate an investigation,[1] as well as in deciding not to proceed because there is not a sufficient basis for prosecution.[2] Pursuant to Article 17 (1) (d), the judges are authorised to decline to proceed in a case if it is not of 'sufficient gravity'. Because 'gravity' is one of the three components of the admissibility determination, along with complementarity and *ne bis in idem*, the Prosecutor will actually assess the issue long before the judges. Although not explicitly specified in Article 15, the Prosecutor will also consider gravity in assessing whether to initiate an investigation *proprio motu.* It is unclear whether the judges of the Pre-Trial Chamber are also to consider gravity in ruling whether to authorize the Prosecutor to proceed with an investigation. Article 15 (4) declares that they should do so if they consider that 'there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, … without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case'. This chapter considers the role that 'gravity' has played in prosecutorial policy over the first five years of activity of the International Criminal Court.

2. Initial statements ignore issue of gravity

Upon taking office, in July 2003 the Prosecutor issued a report on communications already received. It did not use the word 'gravity', nor did the concept appear to have

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1 Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Article 53 (1) (c).

2 Ibid., Article 53 (2) (c).

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 229-246.

any significance in initial determinations about whether and when to exercise his *proprio motu* authority to commence an investigation.[3] The document discussed consisted of three sections. The first explained why the Prosecutor would not act in situations over which the Court had no jurisdiction. The second considered situations over which the Court had jurisdiction, but focussed entirely on the issue of complementarity, as if this was synonymous with the issue of admissibility. The third explained why the Prosecutor had decided to concentrate on the Ituri, in the Democratic Republic of Congo, saying it was 'the most urgent situation to be followed'.[4] It discussed the '[a]bility of the government of the Democratic Republic of Congo to genuinely investigate and prosecute the crimes allegedly committed in Ituri',[5] but did not give any consideration to whether the situation was of 'sufficient gravity', either in an autonomous sense or by comparison with other situations that might also fall within his purview.

Shortly thereafter, in September 2003, the Prosecutor issued a nine-page paper on 'some policy issues' of importance to his work. The introductory sentence said that the paper defined 'a general strategy' for the Office of the Prosecutor. There was only one brief and essentially perfunctory reference to the issue of gravity:

> "Article 17, dealing with admissibility, adds to the complementarity grounds one related to the gravity of a case. It states that the Court (which includes the Office of the Prosecutor) shall determine that a case is inadmissible where '*the case is not of sufficient gravity to justify further action by the Court*'. The concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission".[6]

It was accompanied by a twelve-page 'Annex to the Policy Paper', described as offering further details on the 'process of analysis of referrals and communications up to the time when a decision is taken to proceed with an investigation'.[7] It used the word 'gravity' only once, in a paraphrase of Article 53 of the *Rome Statute*.[8]

In February 2004, the Prosecutor addressed the diplomatic corps in The Hague. He spoke about Article 53 of the Statute, specifically mentioning the interests of victims and the interests of justice, but altogether omitting to mention gravity.[9]

Taken together, these documents issued by the Office of the Prosecutor in the first year of its activity indicate that gravity was not viewed as an issue of significance

3 'Communications Received by the office of the Prosecutor of the ICC', 16 July 2003.

4 Ibid., p. 3.

5 Ibid., p. 4.

6 Paper on some policy issues before the Office of the Prosecutor, p. 7.

7 Annex to the "Paper on some policy issues before the Office of the Prosecutor, Referrals and Communications, p. 1.

8 Ibid., p. 3.

9 'Statement of the Prosecutor Luis Moreno Ocampo, to Diplomatic Corps', The Hague, Netherlands, 12 February 2004, p. 4.

in the selection of cases and an assessment of their admissibility.[10] This is consistent with the academic writing on the International Criminal Court up to that point, which virtually ignored the issue of gravity and dwelled almost entirely on complementarity as the decisive component of determinations of admissibility. For example, the authoritative two-volume commentary on the Rome Statute, edited by Antonio Cassese, Paola Gaeta and John Jones, is essentially silent on the issue. The word 'gravity' does not even appear in the index to the commentary, in striking contrast with the word 'complementarity', which takes the best part of a page in the index.[11] There is no reference to 'gravity' within the sub-index to admissibility.[12] The chapters in the commentary on admissibility consider the concept as if was synonymous with complementarity.[13]

3. Gravity becomes 'central' to case selection

By mid-2005, when the Prosecutor applied to the Pre-Trial Chamber for the first arrest warrants in the Situation in Uganda, the issue of gravity had become more prominent. In a public statement issued when the five Ugandan arrest warrants were made public, he said:

> "The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA".[14]

Several days later, he spoke to diplomats about criteria for case selection: The issue of gravity, which had not figured at all in the discourse of the Prosecutor a year or two earlier, was not prominent. According to the Prosecutor,

> "Among the most important of these criteria is gravity. We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed – as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look

10 Note that the Informal expert paper: The principle of complementarity in practice, issued by the Office of the Prosecutor in late 2007, described the gravity criterion of Article 17 as 'an important issue which could form the basis of a separate inquiry'.

11 A. Cassese, P. Gaeta & J. R.W.D. Jones, *The Rome Statute of the International Criminal Court, A Commentary*, Oxford: Oxford University Press, 2002, p. 1946.

12 Ibid., p. 1939.

13 Ibid., pp. 667-731.

14 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants', The Hague, 14 October 2005, pp. 2-3.

> at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor".[15]

He spoke specifically about the Ugandan warrants:

> "In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups – the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started with an investigation of the LRA".[16]

He also spoke somewhat more philosophically, providing a rationale for this new insistence upon gravity:

> "A case driven approach would imply that the Court should act in every situation involving crimes that appear to fall within our jurisdiction. As a result, the Court would take on multiple situations, including those of comparatively lesser gravity, and would thereby expand its reach, reducing the role of national states. Increasing demands for cooperation and intervention in less grave situations which may fail to reflect the concern of the international community as whole -might lead to ICC 'fatigue' and a diminishing of support".[17]

The Prosecutor continued:

> "Crimes within our jurisdiction are by definition grave crimes of international concern. But gravity in our Statute is not only a characteristic of the crime, but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world".[18]

Similar remarks were made in his address to the Assembly of States Parties, in November 2005:

> "In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord's Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA".[19]

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15 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs', New York, 24 October 2005, p. 6.

16 Ibid., p. 7.

17 Ibid., p. 8.

18 Ibid., pp. 8-9.

19 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November – 3 December 2005', The Hague, 28 November 2005, p. 2.

Turning to the Democratic Republic of Congo, the country he had focussed on in 2003 as being the most deserving of his attention, the Prosecutor said: 'In the Democratic Republic of the Congo (DRC) there have been more than 8,000 killings committed by numerous armed groups within the temporal jurisdiction of the Court. We are working in sequence, selecting cases on the basis of gravity.'[20]

The Prosecutor issued a public statement in February 2006 explaining his decision not to proceed on the basis of complaints filed concerning the behaviour of British troops in Iraq since the 2003 invasion. Even though Iraq is not a State party, the Prosecutor had jurisdiction over nationals of States parties, including those of the United Kingdom, in accordance with Article 12 of the Rome Statute. The decision was based upon the gravity threshold. The report contains the most elaborate discussion to date of the issue of gravity in documents emanating from the Office of the Prosecutor:

> "Even where there is a reasonable basis to believe that a crime has been committed, this is not sufficient for the initiation of an investigation by the International Criminal Court. The Statute then requires consideration of admissibility before the Court, in light of the gravity of the crimes and complementarity with national systems.
> While, in a general sense, any crime within the jurisdiction of the Court is 'grave', the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied. This assessment is necessary as the Court is faced with multiple situations involving hundreds or thousands of crimes and must select situations in accordance with the Article 53 criteria.
> For war crimes, a specific gravity threshold is set down in Article 8 (1), which states that "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". This threshold is not an element of the crime, and the words "in particular" suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements. According to the available information, it did not appear that any of the criteria of Article 8 (1) were satisfied.
> Even if one were to assume that Article 8 (1) had been satisfied, it would then be necessary to consider the general gravity requirement under Article 53 (1)(b). The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.

20 Ibid.

> Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.
> In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity".[21]

In June 2006, in his bi-annual report to the Security Council on the Darfur referral, he said: 'The gravity of the crimes is central to the process of case selection. 'The Office looks at factors such as the scale and nature of the crimes (in particular, high numbers of killings), the systematic character and impact of the crimes, as well as other aggravating factors.' [22]

A comprehensive statement on prosecutorial strategy was issued by the Office of the Prosecutor in September 2006, after more than three years of activity. Gravity was discussed at some length:

> "The Office also adopted a 'sequenced' approach to selection, whereby cases inside the situation are selected according to their gravity. Although any crime falling within the jurisdiction of the Court is a serious matter, the Statute clearly foresees and requires an additional consideration of 'gravity' whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court. In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes".[23]

This excerpt concludes with a footnote to the 'Draft Policy Paper on Selection Criteria', but no such document is listed on the website of the Office of the Prosecutor. The report continues, explaining that 'In principle, incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.'[24]

4. Complementarity in practice

Even if gravity was formally declared to be the 'central' criterion in the selection of cases, the practice of the Office of the Prosecutor suggests that it was invoked not so much as a justification for the selection of cases on which to proceed as a justification for refusing to undertake other cases. This is especially apparent when the failure of the Prosecutor to actually exercise his *proprio motu* powers in accordance with Article 15 of the Rome Statute is considered. Thus, for example, the Prosecutor decided to go no further with investigations in Iraq, justifying the decision on the grounds that there were substantially more victims in Uganda and the Democratic Republic

21 'Statement on communications concerning Iraq', The Hague, 9 February 2006, pp. 8-9.

22 'Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo to the UN Security Council pursuant to UNSCR 1593 (2005)', 14 June 2006, p. 2.

23 'The Office of the Prosecutor, Report on Prosecutorial Strategy', 14 September 2006, The Hague, p. 5.

24 Ibid., pp. 5-6.

of Congo, where situations were being investigated pursuant to State party referrals. He did not, however, compare the situation in Iraq, or for that matter the situations in the central African countries, with those elsewhere in the 105 States over which he has territorial jurisdiction. It may be possible to argue that the situations in northern Uganda and Ituri are the most grave of those within the jurisdiction of the Court, but no such demonstration appears in any of the public documents issued by the Office of the Prosecutor. In any event, the Prosecutor did not 'select' the situations in northern Uganda and the Democratic Republic of Congo. Rather, these were referred to him by the States themselves in accordance with Article 14 of the Statute. It is by virtue of this self-selection that they figure at the top of the Prosecutorial agenda, rather than any analysis that they manifest the greatest gravity. In practice, then, it has been States themselves that have selected the situations, if not the cases.

The importance of States in determining the priorities of the Office of the Prosecutor goes back to the earliest days of the institution, when it began to develop the theory of self-referral. In remarks when he was sworn into office, on 16 June 2003, Prosecutor Moreno Ocampo said that 'as a consequence of complementarity', the number of cases before the Court should not used as a measure of its efficiency. 'On the contrary', he insisted, 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'. Moreno Ocampo's remarks were very much in the spirit of the preamble of the Rome Statute, which recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', and which '[e]mphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

'As a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned' he wrote later.[25] Moreno Ocampo insisted:

> "The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses".[26]

Moreover, 'the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States'.[27]

The concept of complementarity, as formulated by the Prosecutor, seemed to imply an antagonistic relationship between national justice and the International Criminal Court. Initiatives by the Prosecutor would be a sign that the national system had failed to do its duty. This was certainly in line with the focus during the negotiations

25 'Paper on some policy issues before the Office of the Prosecutor', p. 2.

26 Ibid.

27 Ibid., p. 5.

leading to adoption of the Rome Statute. Yet from the beginning of the work of the International Criminal Court, there have been initiatives aimed at attracting cases for prosecution rather than insisting that States fulfil their obligations. They have been unthreatening to the States concerned, because they have targeted rebel groups rather than pro-government militias and others associated with the regimes concerned.

Even before Moreno-Ocampo himself had taken office, the Office of the Prosecutor had commissioned an expert study on what it termed 'complementarity in practice'. Several prominent authorities on international criminal law, both academics and practitioners, participated in preparing a report, which appeared later that year.[28] Using terms like 'partnership', 'dialogue with States' and 'burden-sharing', it affirmed the desirability of a benign and constructive relationship between national justice systems and the International Criminal Court. The expert report emphasised forms of cooperation and assistance. Amongst other things, it contemplated what was labelled 'uncontested admissibility'. The document set out a rather novel construction of the scope of the duty of States to bring perpetrators to justice:

> "Article 17 specifies the consequences for admissibility where a state is investigating or prosecuting, but does not expressly oblige states to act. However, paragraph 6 of the preamble refers to the "duty" of States to exercise criminal jurisdiction. While the preamble does not as such create legal obligations, the provisions of the Statute may be interpreted in the light of the preamble. The duty to "exercise criminal jurisdiction" should be read in a manner consistent with the customary obligation *aut dedere aut judicare*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution. However, as noted above, the reference to a duty also reflects the spirit of the Statute that States are intended to carry the main burden of investigating and prosecuting. This is necessary for the effective operation of the ICC. In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity".[29]

The experts had developed a theory by which a State respected its obligation to prosecute by failing to prosecute. Moreover, gravity had little or not place in this theoretical model. For reasons known only to themselves, States would decide not to prosecute certain cases. Political expediency would seem to be the operative criterion for States, rather than gravity. The Prosecutor would then obligingly step in to assist.

Although there had never been even the slightest suggestion, in the drafting history of the Statute, that a State might refer a case 'against itself', some early documents emerging from the Office of the Prosecutor had begun to hint at such a novel construction. In his September 2003 Policy Paper, the Prosecutor wrote:

28 'Informal expert paper: The principle of complementarity in practice'.

29 Ibid., p. 19, fn. 24.

> "Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses".[30]

Along somewhat the same lines, an expert consultation held by the Office of the Prosecutor in late 2003 said that '[t]here may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible'.[31] The expert paper did not expressly consider a State party referring a case 'against itself', but it did contemplate what it called 'uncontested admissibility': 'There may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.'[32]

Two scenarios were considered. In the first, the experts considered the case of a suspect who had fled to a third state: 'All interested parties may agree that the ICC has developed superior evidence, witnesses and expertise relating to that situation, making the ICC the more effective forum. Where the third State has not investigated, there is simply no obstacle to admissibility under Article 17, and no need to label the State as "unwilling" or "unable" before it can co-operate with the Court by surrendering the suspect'.[33] The second scenario envisaged a State 'incapacitated by mass crimes' or alternatively 'groups bitterly divided by conflict' who feared prosecution at each other's hands but would 'agree to leadership prosecution by a Court seen as neutral and impartial. In such cases, declining to exercise primary jurisdiction in order to facilitate international jurisdiction is not a sign of apathy or lack of commitment'. The experts were evidently troubled by the suggestion that such 'uncontested admissibility' might imply that States were shirking their duty to prosecute, which is affirmed in the preamble to the Statute and which the experts recalled was also a requirement under customary international law. They wrote:

> "In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a fail-

30 Annex to the 'Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications', September 2003.

31 'Informal expert paper: The principle of complementarity in practice', p. 3.

32 Ibid., p. 18. Also p. 20.

33 Ibid., p. 19.

> ure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity".[34]

The 'complementarity in practice' theory nourished a concept known as 'self-referrals'. By late 2003, the Prosecutor was approaching certain States in the throes of internal conflict and encouraged them to refer 'the situation' to the Court, in accordance with Article 14 of the Rome Statute. '[W]hile *proprio motu* power is a critical aspect of the Office's independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court', he said.[35] Because the States concerned were parties to the Rome Statute, the Prosecutor could well have launched investigations using his *proprio motu* powers, in accordance with Article 15, but he chose to proceed otherwise. It has since been held, by Pre-Trial Chamber I, that self-referral 'appears consistent with the ultimate purpose of the complementarity regime'.[36]

The Government of Uganda was the first. It referred the situation in northern Uganda to the International Criminal Court on 16 December 2003.[37] The letter of referral apparently made reference to the 'situation concerning the Lord's Resistance Army in northern and western Uganda'.[38] The press release issued by the Office of the Prosecutor at the time spoke of 'locating and arresting the LRA leadership', and made it quite clear that it was the rebel Lord's Resistance Army rather than the official Ugandan People's Defence Forces that were targeted,[39] although the Prosecutor later responded to Uganda indicating his interpretation that 'the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the [Lord's Resistance Army]'.[40] On 29 January 2004, the Prosecutor made a public announcement of the referral. The Uganda referral resulted in issuance of five arrest warrants later in 2004, directed against leaders of the Lord's Re-

34 Ibid., p. 19, fn. 24.

35 Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003-June 2006), 12 September 2006, p. 7.

36 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, ICC-01/04-01/06-8, para. 35.

37 For the background to the conflict, see M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 International Criminal Law Review 5.

38 Pre-Trial Chamber II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, ICC-02/04-01/05, para. 3.

39 ICC, Press Release, '*President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*', ICC-20040129-44-En, 29 January 2004.

40 Pre-Trial Chamber II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, ICC-02/04-01/05, para. 4. Note that he made no similar objection when the Security Council attempted to exclude certain individuals from the scope of the referral concerning Situation in Darfur: UN Doc. S/RES/1593 (2005), para. 6.

sistance Army.[41] In authorising the arrest warrants, the Pre-Trial Chamber assigned to the case invoked a letter of 28 May 2004 from the Government of Uganda stating it had been 'unable to arrest … persons who may bear the greatest responsibility' for the relevant crimes; that 'the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility' for those crimes; and that the Government of Uganda 'has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible'.[42] Uganda was acknowledging that it had been 'unable' to arrest the individuals concerned, and seemed to be conceding that it was 'unwilling' to prosecute them. The issue of gravity did not arise. It only became significant later in 2004, when the first arrest warrants were made public and the Prosecutor found himself challenged by non-governmental organizations wanting to know why Ugandan officials and soldiers were not also being charged.[43] He responded by attempting to explain that the rebel crimes were more serious than any committed by pro-government forces.

In February 2004, the Prosecutor announced that he had been discussing a cooperative arrangement with the Democratic Republic of Congo:

> "We have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility for crimes committed on or after 1 July 2002. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals".[44]

He reported that the government had sent him a letter agreeing with the proposal.[45] It is not clear whether the Prosecutor agreed that the division of labour involved the International Criminal Court addressing atrocities committed by anti-government rebel forces, and not crimes whose responsibility lay with the government itself. Four years have passed since these discussions, and the Prosecutor has only shown interest in prosecuting rebel leaders.

41 Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-53; Warrant of Arrest for Vincent Otti, 8 July 2005, ICC-02/04-54; Warrant of Arrest for Raska Lukwaya, 8 July 2005, ICC-02/04-55; Warrant of Arrest for Okot Odhiambo, 8 July 2005, ICC-02/04-56; Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-57.

42 Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, para. 37.

43 Amnesty International, '*Uganda: First ever arrest warrants by International Criminal Court – a first step towards addressing impunity*', 14 October 2005, AI Index: AFR 59/008/2005; Human Rights Watch, 'ICC Takes Decisive Step for Justice in Uganda', 14 October 2005.

44 'Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps', The Hague, Netherlands, 12 February 2004, p. 4.

45 Ibid.

On 3 March 2004, the Democratic Republic of Congo followed Uganda's example and referred the situation in the Ituri region to the Court. In its letter of referral, the DRC said that '…les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale'. Like Uganda, Congo was in effect waiving admissibility although, unlike Uganda, without indicating whether this was because it was unwilling or because it was unable to proceed. In July 2003, the Prosecutor had indicated that the Ituri region of the Democratic Republic of Congo was his first priority. At the time, he had said it would be a likely target for the first exercise of his *proprio motu* powers, in accordance with Article 15 of the Rome Statute.[46] But this became superfluous with the 'self-referral' by the Democratic Republic of Congo.

Early in 2006, the Prosecutor identified an individual, Thomas Lubanga, who was already in custody in the Congo awaiting prosecution before national courts on charges of genocide and crimes against humanity. The Prosecutor obtained an arrest warrant against Lubanga for charges concerning enlistment of child soldiers, for which he was not charged in the Democratic Republic of Congo,[47] and the suspect was quickly brought to The Hague. Given that France has excluded itself from the jurisdiction of the Court with respect to war crimes, pursuant to Article 124, it was ironic that Lubanga's transfer was effected by a French military airplane. Charges against Lubanga were confirmed in January 2007,[48] and his trial is scheduled to begin on 31 March 2008. Two other paramilitary leaders have been taken into custody and charged with war crimes and crimes against humanity.

It is difficult to reconcile the prosecutorial discourse about gravity with the decision to proceed against Lubanga. The arrest took place within days of issuance of the statement in which the Prosecutor said wilful killing of civilians by British troops in Iraq was not sufficiently serious enough to warrant further investigation. He contrasted this with the 'thousands' of death in the Democratic Republic of Congo, yet then proceeded in a case of recruiting child soldiers in which allegations of homicide were not even made. The Prosecutor was comparing apples with oranges.

At the time, the Pre-Trial Chamber that issued the *Lubanga* arrest warrant produced an interesting decision in which it developed the issue of gravity. Noting that the gravity threshold was mandatory, it said that if it were to decide that a case was not of sufficient gravity then it would have no alternative but to reject it as inadmissible. Pre-Trial Chamber I noted that the gravity threshold was 'in addition to the drafters' careful selection of the crimes included in Article 6 to 8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the

46 'Communications Received by the Office of the Prosecutor of the ICC', pids.009.2003-EN, 16 July 2003, pp. 2-3.

47 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006.

48 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06), Décision sur la confirmation des charges, 29 January 2007.

Court to "the most serious crimes of international concern"'.[49] As a result, 'the relevant conduct must present particular features which render it especially grave'.[50] However – and the distinction is fundamental – the Pre-Trial Chamber had nothing to compare with the gravity of Lubanga's alleged crimes. It was not asked, for example, to decide whether recruitment of child soldiers was more or less serious than wilful killing of civilians. It was not asked to compare the overall situation in Ituri with that prevailing in Iraq, or Colombia, or Afghanistan, or other territories within the sights of the Prosecutor.

The Pre-Trial Chamber said that an important component of the gravity analysis involved: 'the social alarm such conduct may have caused in the international community'.[51] In the specifics of the *Lubanga* case, it said the 'social alarm' component of the gravity test was particularly relevant, 'due to the social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen'.[52] In support of this affirmation, the Chamber cited a United Nations report, and two of the indictments at the Special Court for Sierra Leone charging enlistment of child soldiers.[53] The Pre-Trial Chamber did not examine the 'social alarm' in the international community created by the invasion of Iraq, and by the atrocities committed by British troops and their allies, by the abuse of prisoners, and by the hundreds of thousands of deaths resulting from the invasion. It seems certain that there have been more deaths in Iraq following the British invasion of 2003 than those in the Democratic Republic of Congo and Uganda combined. But of course these matters were not considered by the Pre-Trial Chamber in determining the gravity of the child soldier issue. In reality, the Pre-Trial Chamber assessed gravity in a vacuum. Unlike the Prosecutor, it wasn't even comparing apples and oranges. It was comparing apples with nothing.

One interesting comparison was never considered by the Pre-Trial Chamber. It never examined the relative gravity of the offence for which Lubanga was in custody in the Democratic Republic of Congo at the time and the crime with which he was charged before the International Criminal Court. Lubanga was being prosecuted in Congo for genocide and crimes against humanity. He was not being prosecuted for recruitment of child soldiers, the offence contemplated by the Court's arrest warrant. Proceedings in Congo were not based upon the policy or practice of enlisting,

49 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 41.

50 Ibid., para. 45.

51 Ibid., para. 46.

52 Ibid.; also paras. 65-66

53 See also Human Security Report 2005, pp. 113-116. The Report calls Sub-Saharan African the epicentre of the phenomenon of child soldiers, although it also says that 'the number of armed conflicts has been declining for more than a decade. And when wars end, soldiers – including child soldiers – are usually demobilised. So it is more likely that the number of child soldiers serving around the world has declined rather than increased in recent years.'

conscripting and active use of children under the age of fifteen in armed conflict.[54] As a result, wrote the Pre-Trial Chamber, 'the DRC cannot be considered to be acting in relation to the specific case before the Court…'[55] This was discussed in the context of complementarity, rather than gravity. But if gravity is germane to the Court's choices about whether to proceed in a given case, where domestic prosecution is in fact underway, as was the case in the Democratic Republic of Congo, it not pertinent to weigh the relative gravity of the domestic crimes against those of the international tribunal? To ask the question is to answer it.

Commenting on the *Lubanga* arrest warrant in a press statement, Prosecutor Moreno Ocampo said '[f]orcing children to be killers jeopardises the future of mankind.'[56] But arguably, the justice system of the Democratic Republic of Congo was doing a better job than the Court itself, because it was addressing crimes of greater gravity. Certainly genocide and crimes against humanity might also be said to 'jeopardise the future of mankind'. There is no attempt within the Statute itself to rank crimes based on gravity, and it might be claimed, as judges have done at the International Criminal Tribunal for the former Yugoslavia,[57] that there is no objective distinction between war crimes, crimes against humanity and genocide in terms of seriousness.

It would appear that the International Criminal Court has removed Thomas Lubanga from jeopardy before the criminal tribunals of his own country for crimes that are more serious than those for which he is being prosecuted in The Hague. To be fair to the Prosecutor, his position was that the courts of the Democratic Republic of Congo were not prosecuting adequately. Although it rejected the Prosecutor's submission on this point, Pre-Trial Chamber I 'note[d] the Prosecution's allegations that the DRC authorities are not pursuing the investigations against Mr. Thomas Lubanga Dyilo.'[58] But perhaps the Prosecutor would agree that if the Congolese justice system is working, then it would be better for Lubanga to stand trial at home for genocide and crimes against humanity than to stand trial in The Hague for recruitment of child soldiers. As for Lubanga himself, he must be delighted to find himself in The Hague facing prosecution for relatively less important offences concerning child soldiers rather than genocide and crimes against humanity.

54 Ibid. para. 38.

55 Ibid., para. 39.

56 'Statement by Luis Moreno-Ocampo, Press Conference in relation with the surrender to the Court of Mr. Thomas Lubanga Dyilo', 18 March 2006.

57 ICTY, *Prosecutor* v. *Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 247; ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 January 2000, para. 69.

58 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 36, fn. 32.

5. Senior leaders

Although the Prosecutor did not refer to the issue of gravity in his early policy statements, in 2003 and 2004, he did address the matter indirectly, to the extent that he said prosecutions would be directed at 'leaders who bear most responsibility for the crimes',[59] or 'the leaders who bear the greatest responsibility'[60] Eventually, the focus on leadership would be invoked as an attempt to address 'gravity', but in the early days of the Office of the Prosecutor, the motivation was entirely different. The paper on 'Complementarity in Practice' explained that 'the ICC and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Alternatively, groups bitterly divided by conflict may oppose prosecutions at each other's hands (fearing biased proceedings) and yet agree to leadership prosecution by a Court seen as neutral and impartial.'[61] In other words, leaders would be the focus of prosecutorial attention not because of some heightened level of gravity associated with their role, but rather because it would be politically expedient.

In its important ruling on admissibility, Pre-Trial Chamber I first made the link between the gravity threshold and a focus on senior leaders. The Chamber said that the gravity threshold was intended to ensure that the Court pursued cases only against 'the most senior leaders' in any given situation under investigation.[62] It said that this factor was comprised of three elements. The first is the position played by the accused person. The second is the role played by that person, 'when the State entities, organizations or armed groups to which they belong commit systematic or large-scale crimes'. The third is the role played by such State entities, organizations or armed groups in the overall commission of crimes. According to the Chamber, because of the position such individuals play they are also 'the ones who can most effectively prevent or stop the commission of those crimes'.[63] The Chamber explained that the gravity threshold was 'a key tool provided by the drafters to maximize the Court's deterrent effect. As a result, the Chamber must conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention'.[64]

The Chamber further justified its emphasis on senior leaders with reference to current practice at the *ad hoc* United Nations international criminal tribunals. It noted Security Council Resolution 1534, which mandates the 'completion strategy' of the *ad hoc* tribunals. The Resolution calls for them to 'concentrate on the most senior leaders suspected of being responsible'. Reference was also made to Rule 28 (A) of

59 'Paper on some policy issues before the Office of the Prosecutor', p. 3; also, p. 7.

60 'Statement of the Prosecutor Luis Moreno Ocampo, to Diplomatic Corps', The Hague, Netherlands, 12 February 2004, p. 4

61 'Informal expert paper: The principle of complementarity in practice', p. 19.

62 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 50.

63 Ibid., paras. 51-53.

64 Ibid., para. 48.

the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, which authorises the Bureau to block the approval of indictments that do not meet the 'senior leaders' standard, and to Rule 11 *bis*, which establishes 'the gravity of the crimes charged and the level of responsibility of the accused' as the standard to be imposed in transferring cases from the international to the national courts.[65] Rulings by the *ad hoc* tribunals pursuant to Rule 11 *bis* may provide useful guidance to the International Criminal Court in applying the concept of gravity to admissibility decisions.[66] The Pre-Trial Chamber compared the *ad hoc* tribunals, with their limited jurisdiction over one crisis situation, to the International Criminal Court, with its broad personal, temporal and territorial jurisdiction. 'In the Chamber's view, it is in this context that one realises the key role of the additional gravity threshold set out in Article 17 (1) (d) of the Statute in ensuring the effectiveness of the Court in carrying out its deterrent function and maximising the deterrent effect of its activities', the Pre-Trial Chamber concluded.[67]

In November 2007, the Prosecutor said he had been approached by States and 'stakeholders' with the suggestion that arrest warrants targeting 'lower level perpetrators' were more likely to succeed than those aimed at ministers and powerful militia leaders. He answered that 'the Prosecutorial policy, in accordance with the Statute, will seek to investigate and prosecute those most responsible for the most serious crimes of concern to the international community, based on the criminal evidence we collect and subject only to the judicial review of the Chambers'.[68]

Within the Democratic Republic of Congo, the proposition, which was upheld by the Pre-Trial Chamber, that prosecution of a leader like Thomas Lubanga is inherently more serious than that of a foot soldier hardly seems controversial. The International Criminal Tribunal for the former Yugoslavia indulged in prosecutions of low-level perpetrators in its first years, but these cases stand out as the exception rather than the rule. From Nuremberg and Tokyo to Freetown and Arusha, it seems clear that international criminal tribunals have virtually always focused on senior leaders. But a focus on leaders can only provide a partial answer to the gravity issue, however, because it does not assist in any way in distinguishing between 'situations' as opposed to cases. Both the paramilitaries in the Democratic Republic of Congo and the regular British troops in Iraq have leaders. Something else must be involved in assessing which of the two is graver.

65 Ibid., paras. 55-58.

66 See, e.g., *Prosecutor* v. *Ademi* et al., Case No. IT-04-78-PT, Decision on Referral of Case Under Rule 11 *bis,* 2 September 2004, para. 28; *Prosecutor* v. *Stanković,* Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis,* 17 May 2005, para. 19; *Prosecutor* v. *Janković,* Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005, para. 19.

67 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 60.

68 'Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Eleventh Diplomatic Briefing of the International Criminal Court', The Hague, 10 October 2007, p. 5.

6. Quantity or quality?

Differences between the analysis of gravity by the Pre-Trial Chamber, in *Lubanga*, and by the Office of the Prosecutor in its various public statements, may be explained by the fact that they are addressing somewhat different issues. The Pre-Trial Chamber was examining the gravity of the crime that was charged, and the significance of the accused within the criminal activity overall. The Prosecutor, on the other hand, has been looking at the gravity of the situation. He did not refuse to proceed in Iraq because the British leaders were not important, or because wilful killing of civilians is not a source of 'social alarm'. Rather, his analysis hinged essentially on the fact that there were thousands of deaths in central Africa, whereas British forces were charged with responsibility for war crimes occasioning loss of life in only ten or twenty cases in Iraq.

The methodology of the comparison seems flawed. The Prosecutor could not have been comparing the total number of deaths in Iraq with the total in the Democratic Republic of Congo or Uganda, because he would then have concluded that Iraq was more serious. Nor could he have been comparing the total number of deaths resulting from the crimes attributed to Lubanga with those blamed on the British troops in Iraq, because Lubanga was not charged with killing anybody. Thus, the quantitative analysis of gravity, which has a certain persuasive authority, appears to get totally muddled in imprecise comparisons. In the Situation in Uganda, however, the Prosecutor compared the different combatant groups in a civil war, concluding that those responsible for more killing should be the focus of prosecution in application of the criterion of 'gravity'.

The fundamentally quantitative approach to gravity suggested by the Prosecutor in the Lord's Resistance Army arrest warrants and the Iraq situation also seems to neglect an important dimension of the crimes. Even assuming that the Ugandan People's Defence Forces have killed significantly fewer innocent civilians than the Lord's Resistance Army, is not the fact that the crimes are attributable to the State germane to the gravity of the case? After all, the only genuine problem of impunity with respect to the Lord's Resistance Army perpetrators has been the inability of the Ugandan authorities to apprehend them. With respect to the government forces, on the other hand, we are confronted with the classic impunity paradigm: individuals acting on behalf of a State that shelters them from its own courts. But in a domestic justice setting involving ordinary crime, would we countenance a national prosecutor who ignored clandestine police death squads on the grounds that gangsters were killing more people than the rogue officials? We need not totally dismiss the relevance of the relative numbers of victims in order to appreciate the need to consider other factors, such as the fact that crimes are committed by individuals acting on behalf of the State as contributing to the objective gravity of the crime.

A somewhat similar analysis might be applied to the situation in Iraq. Even if it is admitted that wilful killing attributable to British forces only concerns fifteen or twenty victims, surely the fact that this results from an aggressive war that has resulted in the deaths of hundreds of thousands of Iraqi civilians is germane to the gravity determination. Even if aggression may not yet be prosecuted by the Court,

Article 5 (1) of the Rome Statute declares it to be one of 'the most serious crimes of concern to the international community as a whole'. Moreover, the preamble to the Rome Statute reminds us that 'all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. Is aggressive war not, at the very least, an aggravating factor of relevance to the assessment of gravity?

7. Conclusions

The issue of gravity in the selection of situations and cases was insignificant in the initial discussions about prosecutorial strategy, when the International Criminal Court first began to operate. This was entirely consistent with the *travaux préparatoires* of the Rome Statute, and with subsequent commentary, which essentially ignored the subject. Only when the Prosecutor began attempting to justify his choice of situations did the concept take on importance. The Prosecutor adopted a qualitative analysis, justifying his decision not to proceed with investigations in certain cases, such as Iraq, because there were more victims elsewhere, especially in central Africa. Within situations, he accounted for a focus on rebel groups rather than government-sponsored militias and forces because they were said to be responsible for larger numbers of killings. Subsequently, Pre-Trial Chamber I developed an analysis of gravity that highlighted two other factors, 'social alarm' and leadership. It did not attribute any importance to the quantitative dimension of the issue. The Prosecutor and the Pre-Trial Chamber were not necessarily looking at the same things.

Greater rigour and more sophisticated analysis is required if the gravity criterion is to play a decisive role in the selection of both situations and cases. The Prosecutor's focus on the quantitative dimension ignores important qualitative factors which must surely be considered in such determinations. In any event, that the debate is considerably more complex seems implicit in the Prosecutor's first case, because Thomas Lubanga is not charged with killing anyone. Pre-Trial Chamber I developed its own novel approach to gravity, although it cannot be without significance that this has not been endorsed in decisions of other judges. In the cases of the other two suspects into custody, a different Pre-Trial Chamber did not even consider the issue of gravity in its preliminary assessment of admissibility.[69] With respect to 'gravity', five years of activity by the Office of the Prosecutor and the Chambers have generated more heat than light.

69 Pre-Trial Chamber I, *Prosecutor* v. *Chui*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-02/07, paras. 17-20; *Prosecutor* v. *Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, ICC-01/04-01/07, paras. 17-21.

Chapter 15 Judicial review of prosecutorial discretion: Five years on

*Carsten Stahn**

1. Introduction

In domestic criminal proceedings, judicial review of prosecutorial discretion[1] is an everyday reality. The types and modalities of review differ from country to country.[2] Discretion extends to various types of decisions, such as the decision whether or not to investigate or prosecute, the selection of charges, the timing of charges and the determination of the forum of adjudication. Adversarial systems are typically more reluctant towards review than systems which adhere to the principle of mandatory prosecution.[3] However, prosecutorial decisions can typically be challenged by various

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1 According to the US Law Library, "prosecutorial discretion" entails the "power to choose whether or not to bring criminal charges, and what charges to bring, in cases where the evidence would justify charges". See American Law and Legal Information: Crime and Justice, at http://law.jrank.org/pages/1870/Prosecution-Prosecutorial-Discretion.html. Joseph, defines it more narrowly as the "power held by an agency […] charged with the enforcement of the law to exercise selectivity in the choice of occasions for the law's enforcement". See R. Joseph, 'Reviewability of Prosecutorial Discretion: Failure to Prosecute', (1975) 75 *Columbia Law Review*, 130.

2 See e.g. K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); W. Lafave, 'The Prosecutor's Discretion in the United States' (1970) 18 *American Journal of Comparative Law*, 532–548; K. J. Melilli, 'Prosecutorial Discretion in an Adversary System', (992) *Brigham Young University Law Review* 669-704; P. Krug, 'Prosecutorial Discretion and its Limits, (2002) 50 American Journal of Comparative Law, 643-664; J. Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England', (2006) 26 *Oxford Journal of Legal Studies* 775-803.

3 In *Newman v. United States*, a D.C. Circuit Court held that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made or whether to dismiss a proceeding once brought". D.C. Circuit, 282 F2d, 479 (1967), at 480.

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actors (e.g. the defendant or victims) before a domestic judge.[4] Established grounds of challenge include selective or vindictive prosecution.[5] Many systems provide for judicial review or a private right of public enforcement in certain cases of prosecutorial inaction (e.g. decision not to prosecute or withdrawal of charges).[6]

International criminal courts are almost a different species.[7] They involve highly political cases, but accountability structures are typically often less developed. Since these courts emanate from international decision-making bodies, the focus is often on political control. There is a genuine trust in procedures and decision-making authorities. Control and checks and balances are often reserved to political entities who created the respective institutions (e.g. the Security Council in the case of the *ad hoc* tribunals, the Assembly of States Parties in the context of the International Criminal Court (ICC)).

Judicial control of prosecutorial discretion has not been at the top of the radar screen. It is almost automatically assumed that international prosecutors act sensibly and responsibly. Prosecutors represent the "good side", the moral consciousness, which help enforce compliance with desirable norms of behaviour. Moreover, they usually tend to downplay the political dimensions of their decisions. They are forced to make highly sensitive and political decisions in the context of the investigation and prosecution of international crimes. But they prefer to label their courses of action by reference to the application and enforcement of the law.

These decisions are driven by pragmatism and strategic choices which are often not very transparent or necessarily coherent. The decision-making process is mostly internal and subject to limited scrutiny. Checks and balances are introduced *via* informal, rather than formal mechanisms of accountability and control. Control is ex-

4 In England Wales, for instance, prosecutorial decisions are subject to judicial review in case *of ultra vires* or irrational action. See generally M. Burton, 'Reviewing Crown Prosecution Service Decisions Not To Prosecute', (2001) *Criminal Law Review* 374-384.

5 See e.g. Krug, *supra* note 2, at 648-649.

6 See below, sub. 2.1. U.S. courts are traditionally more reserved towards private prosecution arguing that victims may not be sufficiently detached from the case to conduct a trial as a fair and objective agent of justice.

7 For a discussion prosecutorial discretion in international criminal justice, see A. M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 *American Journal of International* Law 510; H. Olásolo, The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?, (2003) 3 *International Criminal Law Review* 87; M. R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', (2004) 2 JICJ 71; G.-J. Knoops, 'Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective', (2004) 15 *Criminal Law Forum* 365; D. Ntesereko, 'Prosecutorial Discretion before National Courts and International Tribunals', (2005) *JICJ* 124; H. B. Jallow, 'Prosecutorial Discretion and International Criminal Justice', (2005) *JICJ* 145; L. Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', (2005) *JICJ* 162; A. Greenawalt, 'Justice Without Politics? Political Discretion and the International Criminal Court', (2007) 39 *NYU Journal of International Law and Politics*, 583.

ercised *ex post* and in a generic fashion, i.e. in the relation to the activity or strategy of the Prosecutor as a whole, rather than in relation to individual decisions.

How does the ICC fit into this picture? In the context of the Statute, the preservation of prosecutorial independence enjoyed some prominence in the negotiating history. Drafters of the Statute were keen to protect the Prosecutor from external supervision. This is reflected in Article 42 of the Statute which states that the Office of the Prosecutor (OTP) "shall act independently" and "not seek or act on instructions from any external source".[8] Prosecutorial activity shall thus, in principle, remain free of the presumed wishes of external sources.

This independence has been coupled with a significant degree of prosecutorial discretion. Like his counterparts in other international jurisdictions, the Prosecutor of the ICC enjoys wide autonomy regarding the selection of cases and the framing of the charges. The Prosecutor is not duty-bound to investigate and prosecute all crimes within the jurisdiction of the Court[9], but must focus its investigation and prosecution. This requires the prosecution to make choices relating to the selection of regions, incidents, groups and persons forming the object of investigation and prosecution as well as limiting of counts and charges.[10] The Statute provides only limited guidance in this respect and leaves considerable leeway for interpretation and prosecutorial policy.

Moreover, there is a recognizable asymmetry between prosecutorial duties and judicial control under the Statute. Certain duties, such as the obligation of the Prosecutor "to establish the truth" and "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility"[11] are not backed by a corresponding power of review of judges. The status of the Prosecutor

8 See Article 42 (1) of the Statute.

9 This is reflected in Article 53 of the ICC Statute. It states: "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". This provision has been interpreted by OTP as entailing a "presumption in favour of investigation or prosecution wherever the criteria established in Article 53 (1) (a) and (b) […] have been met". See OTP, Policy Paper in the Interests of Justice, September 2007, at 1. However, the wording leaves in reality wide room for decision-making, since it leaves many fundamental questions unanswered. See OTP, Informal Expert Paper, The Principle of Complementarity in Practice (2003), at 9, note 10: "The object of the investigation will often, but not always, be more concrete and confined than a "situation" which a State or the Security Council may refer to the Court (Articles 13 to 14). This means that an analytical process must take place in the OTP between the referral of a situation and the decision whether to commence one or more investigations (also underlined by the factors set forth in Article 53 (1)). Once the investigation is initiated, the object of the investigation will be further concretized within the abovementioned parameters. The more specific case or cases would normally be the focus of subsequent admissibility determinations and challenges under Article 19 (2)".

10 See OTP Draft Paper, Criteria for Selection of Situations and Cases, June 2006.

11 See Article 54 (1).

differs thus clearly from that of an administrative agency, acting under strict judicial supervision.[12]

However, prosecutorial discretion is subject to general constraints under the Rome Statute. The Statute follows a multi-layered model of accountability. It combines professional responsibility[13] (according to which Prosecutors may be held accountable for discretionary decisions based on professional misconduct) with elements of judicial review.[14] The Prosecution enjoys autonomy from the judiciary in institutional terms. The Prosecutor and the Deputy Prosecutor are ultimately responsible to the Assembly of States[15] and act under their budgetary scrutiny. But specific decisions and actions are subject to judicial scrutiny.

Article 1 ("most serious crimes of international concern"), Article 17 (e.g. "gravity" of the "case", "admissibility"), Article 19 ("jurisdiction") and Article 53 establish basic statutory parameters for the selections of situations and cases that are open to judicial review. Some acts, such as the withdrawal of arrests warrants[16] or of confirmed charges[17] require judicial approval. In addition, certain forms of prosecutorial inaction are subject to review. The power not to act can in many instances bear greater significance than the authority to act,[18] in particular in the context of institutions such as the ICC, which enjoy wide territorial, personal and temporal jurisdiction The Statute limits this discretion. Decision not to investigate or prosecute "in the interests of justice" are subject to *proprio motu* review by the Pre-Trial Chamber.[19] Decisions not to proceed with an investigation or prosecution under Article 53 (1) and (2) may be submitted to review of the Chamber by way of request of "the State making a referral" or the Security Council.[20]

This system has come into operation in the first five years. This chapter examines lessons from the first practice. It argues that some of the established assumptions

12 For an analysis of administrative law approaches towards prosecutorial discretion, see L. Griffin, 'The Prudent Prosecutor', (2000) *Georgetown Journal of Legal Ethics* 259, 291-292.

13 See more generally on this categorization, Krug, *supra* note 2, at 653.

14 For a differentiation between models of "strict judicial supervision" and "administrative law models" in the context of prosecutorial discretion, see ibid, at 653.

15 See Article 46 (2) of the Statute.

16 See Article 58 (4) of the Statute ("The warrant of arrest shall remain in effect unless otherwise *ordered* by the Court"). Emphasis added.

17 See Article 61 (9) of the Statute. In case of a withdrawal prior to the confirmation hearing, the Prosecutor must notify the Pre-Trial Chamber "of the reasons for the withdrawal". See Article 61 (4).

18 See also Davis, *supra* note, 2, at 22 ("The power to do nothing, or almost nothing, or something less than might be done, seems to be the omnipresent power. Every regulatory agency has a statutory assignment to carry out a program enacted by the legislative body, and the agency always can be more active or less active, more effective or less effective").

19 See Article 53 (3) (b).

20 See Article 53 (3) (a).

concerning the exercise of judicial review of prosecutorial discretion require reconsideration and critical reflection.

The classical mechanisms of review contemplated by the drafter of the Statute have largely remained dead letter in the first practice. In some areas, there has been a tendency to minimize formal supervision of prosecutorial discretion and to foster accountability through informal, internal and self-controlled models of supervision. Judicial review has only played a minor role in those instances in which it is expressly provided for. Article 53, in particular, has been treated as a Pandora's box by both the Prosecutor and Chambers.[21] Scrutiny has essentially remained focused on political control (e.g. reports to the Assembly of States Parties and the Security Council) and informal accountability (e.g. consultation of State Parties and NGOs on prosecutorial policy). The Prosecutor has made significant efforts to enhance transparency and coherence through the adoption of regulations and the articulation of policy-guidelines. These guidelines, however, are predominantly geared towards internal application by OTP and not meant to be targeted towards judicial review.[22] This has shifted the focus from formalism and external scrutiny to self-regulation and internal review.

In other areas, by contrast, judges have been very ambitious in their efforts to exercise control over prosecutorial activity. They have given particularly creative interpretations to concepts such as "gravity"[23] and "legal characterization of the facts"[24] which were not necessarily in the minds of the drafters of the Statute and come close to judicial policy-making.[25]

This practice may be explained by some of the intricacies and experiments of the first practice. This contribution invites some re-thinking. It argues that greater efforts are needed in order to strike a proper balance between prosecutorial discretion and review under the Statute. It suggests that broader transparency and accountability are not only necessary to enhance the legitimacy of prosecutorial decision-making, but compatible with the very concept of prosecutorial independence.

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21 See below 4.2.2.

22 See e.g. the OTP Policy Paper on the Interests of Justice, dated September 2007. The document contains a judicial disclaimer which states: "This is a policy document of the Office of the Prosecutor and, as such, it does not give rise to rights in litigation and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court". Ibid, p. 1.

23 See Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the Prosecutor's Application for a warrant of arrest, 10 February 2006, paras. 42-61.

24 See Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the Prosecutor's Application for a warrant of arrest, 10 February 2006, para. 16; Prosecutor v. Lubanga, Decision on the Confirmation of Charges, 29 January 2007, para. 204. See on this issue also K. Ambos & D. Miller, 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective', (2007) 7 *International Criminal Law Review* 335; C. Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55, (2005) 18 *Criminal Law Forum* 1.

25 See generally J. Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication', (2006) *Columbia Journal of Transnational Law* 377.

2. Conceptual background

Prosecutorial discretion is a necessity in international criminal tribunals like the ICC. Due to the sheer number and nature of international crimes and the limited resources of international courts and tribunals, international prosecutors are typically not required to investigate and prosecute any and every suspect in case of sufficient evidence (mandatory prosecution).[26] They have to be selective in their selection of cases and charges.[27] They are forced to make choices as to the allocation of the proper forum of proceedings since they share jurisdiction with domestic authorities. Moreover, they have to narrow the scope of the investigation and focus prosecution. This requires a certain flexibility regarding the choice of action, i.e. the decision whether or not to act ("*Entschliessungsermessen*"),[28] and regarding the type of action required ("*Handlungsermessen*"), i.e. whom to prosecute, when to prosecute, how to sequence cases.

However, discretionary powers are not arbitrary or unchecked powers. The very concept of discretion is based upon the assumption that there are rules and limitation which define the boundaries of discretion.[29] Some of the rationales and modalities governing the exercise of discretion in the area of international criminal justice require further consideration.[30]

2.1. Rationales of prosecutorial discretion

Prosecutorial discretion is usually justified by a bundle of different considerations.[31] Reasons advanced in defence of prosecutorial discretion at the domestic level in-

26 See ICTY, Appeals Chamber, *Prosecutor v. Delalić*, 20 February 2001, para. 602: "In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments". This statement is supported by the wording of Article 18 (1) of the ICTY Statute. See for a similar argument with respect to domestic jurisdiction, Joseph, *supra* note 2, at 144 ("[I]t would be impractical or impossible for prosecutions to be brought in all known cases of violations of the pertinent law. Judicial compulsion of prosecution of all known violators might create equality in prosecution, but the resulting prosecutions would be less effective").

27 See also OTP, Draft Criteria for Selection of Situations and Cases, June 2006, at 10 ("The goal of the OTP is not to establish a complete historical record; this is not a role for which an international criminal court is well suited").

28 Note that Article 15 uses enabling language concerning *proprio motu* investigations, stating that the "Prosecutor may initiate investigations".

29 See also R. Dworkin, *Taking Rights Seriously* (1977), at 31 (comparing discretion to a "hole in a doughnut").

30 For proposals to strengthen review, see Knoops, *supra* note 7, at 385-390.

31 See Brubacher, *supra* note 7, at 75-77.

clude: protection of executive authority under the separation of powers doctrine[32], the need for prosecutorial secrecy[33] and deference to prosecutorial expertise and pragmatism.[34]

In the context of the ICC, one of the main reasons to defend prosecutorial discretion has been the need for independence.[35] It has been argued that discretion is necessary to preserve the impartiality of investigations and prosecutions and to insulate the Prosecutor from external supervision and interference. This argument has considerable force with regard to influence by external actors. The Office of the Prosecutor operates under constant pressure from states, political actors (e.g. the Security Council) and NGOs. Discretion empowers the Office and provides it with some autonomy to decide when to act and when not to act. Such powers help the Prosecutor to withstand pressure and temper political interference by various extraneous actors in the investigation and prosecution of crimes.[36] Discretionary powers and charging autonomy thereby contribute to the impartial operation of criminal justice.

However, there is another dimension to this problem. While independence from external actors is an operational prerequisite, discretionary choices must be exercised with some transparency, rigour and coherence. Otherwise, they are likely to incite political interference and may actually compromise the perception of objectivity and impartiality. Discretion is thus much more difficult to justify internally, i.e. *within* the internal institutional architecture of the ICC. It must operate within a system of checks and balances.

It is useful to draw some comparisons to domestic systems. In domestic legal systems, prosecutorial discretion is usually balanced by institutional accountability. In common law systems, the prosecution is typically part of the executive branch of power. The executive nature of authority is used to limit judicial review, but coupled with elaborated forms of accountability. In the U.S. for instance, chief district prosecutors in most states are directly elected at the county level, while chief prosecutors at the federal level are appointed by the President, subject to confirmation by the Senate.[37] They are thus either directly democratically accountable or responsible to democratically elected executive officials. In England and Wales, the prosecutorial service operates under the supervision of parliament and the Attorney General. The Attorney General is a member of Parliament[38] and advisor to the Government who carries political accountability for the work of the Crown Prosecution before Parlia-

32 In the U.S., the executive nature of prosecutorial authority is frequently invoked by courts to justify discretion. See Krug, *supra* note 2, at 645-646.

33 See e.g, Joseph, *supra* note 1, at 140-141.

34 Id., at 144.

35 See Brubacher, *supra* note 7, at 76.

36 Id., at 76.

37 See Greenawalt, *supra* note 7, at 657.

38 The Attorney-General is appointed by the Queen upon proposal by the Prime Minister.

ment. The Director of Public Prosecutions prepares an annual report on the work and use of powers by the service which is made public.[39]

In civil law systems, prosecutorial discretion is usually more limited and subject to wider judicial review.[40] In France, investigating magistrates are charged with the investigation of crimes.[41] In Italy, Spain or Germany, prosecutors are not entitled to refuse to prosecute certain offences if there is enough evidence to proceed.[42] Prosecutorial discretion is restricted by different forms of external review. In many jurisdictions, victims have to be notified of a prosecutor's decision not to file charges and may challenge such a decision before a Court, if is it based on an alleged lack of sufficient evidence.[43] This remedy is designed to reduce the risk of arbitrary decision-making. Courts may mandate the Prosecutor to proceed in case of a successful action. In some countries, criminal charges may even be enforced by private prosecution. Models differ from country to country. In France, victims are entitled to bring a private action ("*action civile*") before the investigating magistrate or the criminal court which is deemed to initiate a "regular" prosecution.[44] In Germany, victims may launch a private criminal prosecution with respect to minor offences (e.g. trespass, simple assault, damage to property),[45] which may be taken over by the public prosecutor in the public interest.[46] One of the most liberal regimes is Spain which allows private prosecution not only by victims, but upon complaint of a citizen.[47]

In the context of the ICC, these institutional forms of accountability are less developed. ICC Prosecutors lack forms of democratic legitimacy that are typical of common law jurisdictions.[48] They are not part or subject to domestic systems of justice, nor comparable to an executive agency under domestic jurisdiction in terms of accountability. The Prosecutor and the Deputy Prosecutor are selected by a political body. They are elected on the basis of an absolute majority vote of the members of the Assembly of States Parties.[49] Other members of the office are appointed internally by the Court. The Assembly of States Parties exercises general political control over the

39 See A. Ashworth & M. Redmayne, *The Criminal Process* (2005), 175.

40 In the 19th century, many European jurisdictions adopted rules on mandatory prosecution, in order to absolve the Prosecution from political interests of the government and to enhance the equal application of the law.

41 For a survey, see Valérie Dervieux, The French System, in M. Delmas-Marty & J. R. Spencer, *European Criminal Procedures* (2005) 218, at 236-237.

42 See e.g. Article 50 of the Italian Code of Criminal Procedure and Articles 152 (2) and 160 of the German Code of Criminal Procedure.

43 See Articles 408 – 410 of the Italian Code of Criminal Procedure and Articles 170 – 175 of the German Code of Criminal Procedure.

44 See Articles 1 (2) and 418 of the French Code of Criminal Procedure. See also Dervieux, *supra* note 41, at 226.

45 See Article 374 of the German Code of Criminal Procedure.

46 See Articles 378 and 377 of the German Code of Criminal Procedure.

47 See Article 125 of the Spanish Constitution.

48 See Greenawalt, *supra* note 7, at 657.

49 See Article 42 (4) of the Rome Statute.

activity of the OTP as a whole. However, institutional safeguards are limited. Due to the international composition of the Office and the temporary mandates of elected and appointed officials, internal checks and balances are more difficult to operate. Ethical and internal bureaucratic standards are less likely to serve as a filter of control internally, because prosecutors operate within the framework of an independent international entity and outside the realm of their own their domestic jurisdiction.

Certain prosecutorial decisions may be challenged by a variety of actors, including the defence, states and victims. However, the powers of judicial review are limited. Some decisions, such as a decision not to initiate investigations *proprio motu* under Article 15 due to a lack of reasonable basis, are neither subject to private enforcement nor expressly covered by judicial review.[50] Other decisions are open to review, but subject to limited judicial sanction. In crucial areas, such as the selection of charges or review of inaction, Judges are allowed to exercise scrutiny, but are not meant to replace prosecutorial judgment for reasons of institutional independence. This means that they can control or limit the effect of prosecutorial decisions, sometimes even on their motion (e.g. Article 53 (3) (b)), without however, being entitled to order a positive decision or specific course of action (e.g., Article 53 (3) (a),[51] Article 53 (3) (b),[52] Article 61 (7) (c)[53]).

This limited internal institutional accountability of prosecutorial discretion requires a different justification than external independence. It cannot be defended by the aim to insulate the Prosecutor from undue political interference. Internal accountability might even serve protect the Prosecutor from claims of biased or partisan investigation or prosecution. The rationale for defending prosecutorial discretion lies rather in the division of roles between judges and the Prosecutor in international criminal proceedings and the limits of judicial review.

However, there are certain misunderstandings about the role of prosecutors and the judiciary. In the context of the negotiations of the ICC, prosecutorial discretion was mainly justified by the complexity of choice and the nature of prosecutorial decision-making.

Former ICTY Chief Prosecutor Louise Arbour, for instance, justified the case for "maximum prosecutorial discretion" in the Preparatory Committee on the Establishment of an International Criminal Court on the basis of efficiency and complexity.[54] Based on the experience of the *ad hoc* tribunals, she noted "that there is more to fear

50 See Article 15 (6) of the Statute which states that the Prosecutor "shall inform those who provided the information" if he or she concludes that there is no reasonable basis for investigation following preliminary examination.

51 The Chamber "may request the Prosecutor to reconsider that decision".

52 The provision states that the decision not to act "shall be effective only if confirmed by the Pre-Trial Chamber".

53 The Chamber may "request the Prosecutor to consider: (i) Providing further evidence […] (ii) Amending a charge […]".

54 See Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997, at http://www.un.org/icty/pressreal/STA971208.htm. See on this complexity argument also R. Goldstone & N. Fritz,

from an impotent than from an overreaching Prosecutor".[55] She defended discretion on the basis of a comparison between domestic and international prosecutors, noting that:

> "[t]he main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution. […] In the international context, particularly in a system based on complementarity with State jurisdiction, the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. […] [T]he real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones".[56]

She added that "an appropriate process of vigorous internal indictment review, such as [that] in place at the two Tribunals, confirmation by a competent judge, and the inevitable acquittal that would result from an unfounded prosecution, should alleviate any fear that an overzealous or politically-driven Prosecutor could abuse his or her powers"[57]

This logic is questionable. It is paradoxical to argue that prosecutors require more discretion in international criminal proceedings than in domestic proceedings, *because* the former are more selective in nature. The complexity of choice does not necessarily justify the absence or a lesser degree of objective scrutiny of prosecutorial discretion. The need for selectivity might actually enhance the case for transparency and scrutiny. Since international criminal proceedings are usually targeted at the leadership level and high-ranking officials and thus more likely to raise fears about politically influenced decisions, greater efforts might be required to discard doubts as to the impartiality of prosecutions and to allow control of prosecutorial discretion, in order to reduce these fears.[58]

The most compelling argument in favour of prosecutorial discretion in the initiation of investigation, the choice of perpetrators and prosecutorial strategy is not the quantity and nature of crimes, but the political ramifications of indictments and selection. Prosecutorial discretion may be defended on the ground that it involves certain political choices which the Office of the Prosecutor is best placed to make in light of its presence on the ground and its close ties to domestic and international authorities.

However, the political nature of decision-making and trust in the independent professional judgment of international prosecutors do not necessarily rule out judicial

'In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers, (2000) 13 *Leiden Journal of International Law* 655, 657.

55 Ibid.

56 Ibid.

57 Ibid.

58 See also Knoops, *supra* note 7, at 387.

scrutiny.[59] Charging policy and decisions of criminal policy are not *per se* non-justiciable. It is necessary to examine the scope of discretion and the degree of judicial intervention in its specific context. In many situations, the crucial challenge is how to define the interplay between the scope of discretion and the standard of review.

There is a spectrum of propositions. In some areas, strong judicial deference is warranted. Courts are generally reluctant to review or micro-manage prosecutorial choices, which interfere with their role as neutral and impartial arbiters or which reach the limits of their expertise.[60] Prosecutors are typically in better position than courts to manage and evaluate the strength of their case and to assess the allocation of resources and enforcement priorities. Pragmatic, strategic or procedural considerations (i.e. the role of the Prosecutor as "*dominis litis*" over parts of the proceedings) may thus warrant a wide margin of prosecutorial discretion and limited judicial review.

In other areas stronger judicial interference may be justified. The prime example is control over the equal application of the law. The ICTY Appeals Chamber found that the equality of persons before the law constitutes a general principle of law.[61] In exercising prosecutorial discretion in the investigation and charges, the Prosecutor is thus bound to comply with the principle of equality before the law and the requirement of non-discrimination, which are open to judicial review.[62]

In again other areas, judicial review may not be mandatory, but in the interest of the Prosecution. The selection of situations and cases before the ICC involves discretionary factors which go beyond the mandatory evidentiary (e.g. Article 15, Article 53, Article 58) and jurisdictional thresholds (Article 11 and 12) and the statutory requirements of gravity (Article 17 (1) (d), Article 53) and complementarity (Article 17) The selection of situations encompasses elements of prosecutorial discretion[63] which are not clearly regulated by the Statute.[64] Further discretion is exercised in the choice of admissible cases that warrant prosecution.[65] It may be in the interest of the Prose-

59 For a more sceptical view, see Greenawalt, *supra* note 7, at 659 ("[T]he judicial model is probably a worse solution because it threatens to convert policy questions into immutable norms that are less subject to evolution or reconsideration").

60 For an account of U.S. jurisprudence, see Joseph, *supra* note 2, at 144-145.

61 See ICTY, Appeals Chamber, *Prosecutor v. Delalić*, 20 February 2001, para. 611.

62 See also Appeals Chamber, *Prosecutor v. Akayesu*, 1 June 2001, paras. 94-96.

63 For a survey, see War Crimes Research Office, *The Gravity Threshold of the International Criminal Court*, March 2008, at 53-54.

64 See OTP, Draft Paper, Criteria for Selection of Situations and Cases, at 5 and the discussion below 3.2.1.

65 See OTP, Draft Paper, Criteria for Selection of Situations and Cases, at 12 ("Not every case meeting the admissibility threshold of the Statute will be the subject of prosecution; it is necessary to select the cases most warranting prosecution. Among those cases meeting the admissibility thresholds, the OTP will consider factors such as the policy of focusing on persons most responsible for the most serious crimes as well as maximizing the contribution to prevention of crime").

cution to seek judicial approval of such choices in the early stages of proceedings, in order to avoid procedural challenges at a later stage or a waste of resources.

It is therefore over-simplistic to justify prosecutorial discretion by the rationales of independence and necessity of choice.[66] Discretion protects independence, but lends itself to abuse if it is concentrated in the hands of a hierarchically organized office. Just as in the case of domestic criminal systems, the investigation and prosecution of crimes requires a balance between the institutional independence of the Prosecution and its accountability as an agent of justice. This balance has not been addressed in a satisfactory manner at the international level.[67]

2.2. Restraints on prosecutorial discretion

It would be misguided to construe prosecutorial accountability on the basis of the domestic analogy. There are certain obvious differences between international and the domestic justice in the control over the exercise of discretion.

2.2.1. Contextual parameters

International prosecutors are typically removed from constraints of democratic accountability and the checks and balances operating within a specific domestic constituency or society. This is not necessarily a deficit,[68] but to some extent inherent in the exercise of international justice. In many instances, international prosecutors are considered to be objective and impartial agents and well equipped to assess whether prosecution is warranted because they operate outside the realm of the domestic separation of power.

However, alternative constraints ensure checks and balances at the international level.[69] Accountability is typically modelled after features and frameworks that are common in the institutional law of international organizations. This creates a certain paradox. It implies that the accountability of international courts and tribunals is based on models of institutional balance and political control, rather than strict judicial scrutiny.

This tendency is reflected in the ICC Statute. It accommodates a diversity of models, which vary in nature, form and substance. The ICC Prosecutor is mainly accountable towards the Assembly of States Parties. This accountability is complemented by various other checks and balances.[70] These modalities are innovative in terms of international criminal procedure, but not always as transparent and efficient as one might hope.

66 See, however, Brubacher, *supra* note 7, at 75-76.

67 See also Côté, supra note 7, at 186.

68 Greenawalt argues that the "ICC […] suffers from the same 'democratic deficit' that is typical of many international institutions". See Greenawalt, *supra* note 7, at 657.

69 See also Danner, *supra* note 7, at 535.

70 For a survey, id., at 524-534.

2.2.2. Models of accountability

One may formally distinguish four models of accountability: political accountability, process-based checks and balances, (self-)regulation and judicial review.

2.2.2.1. Political control

The Prosecutor operates under the general scrutiny of the Assembly of States Parties. The Assembly is a political body, composed of one representative by each Member State.[71] It is mandated to provide "management oversight" to the Prosecutor.[72] This involves mainly political scrutiny, but encompasses also certain forms of formal accountability.

The main type of formal supervision is election and professional responsibility. The Assembly is charged with the election of the Prosecutor and the Deputy Prosecutor.[73] For reasons of institutional independence, the Assembly is further entrusted with the removal of office and disciplinary measures against these two elected officials. These powers appear to be strong in formal terms, but have a rather limited impact in practice. The trigger for removal from office is tied to professional duty and based on a high threshold ("serious misconduct and serious breach of duty").[74] It requires not only a finding that these requirements are met, but an absolute majority vote in favour of removal.[75] Such a result is rather difficult to obtain in light of the different blocks and interest groups within the Assembly.[76]

The Assembly also exercises budgetary control over prosecutorial action. It controls the budget of the Court,[77] which includes the budget of the Office of the Prosecutor. This control has an impact on prosecutorial activity as a whole. The Office of the Prosecutor must seek approval for the creation of core posts and the situation and case-related budget of investigations and prosecutions. This requirement offers the Assembly considerable control over prosecutorial activity. The Assembly cannot determine specific prosecutorial choices or the selection of individual situations and cases by the Prosecutor. Prosecutorial autonomy is safeguarded by a contingency fund which allows the opening of new situations and cases in unforeseen circumstances. But budgetary control shapes the scope of prosecutorial action. It enables the Assembly to influence the total number of investigations and prosecutions undertaken by the Office of the Prosecutor.

The control exercised by the Assembly differs from judicial scrutiny. It is essentially political in nature. The Assembly is not an expert body, but a representative forum composed of diplomats from all Member States. Like other representative bodies of international organizations, it is unlikely to interfere in judicial activities or specific

71 See Article 112 (1) of the Statute.

72 See Article 112 (2) of the Statute.

73 See Article 42 (4) of the Statute.

74 See Rule 124.

75 See Article 43 (2) of the Statute.

76 See also Danner, *supra* note 7, at 524.

77 See Article 112 (2) (c) of the Statute.

aspects of criminal policy.[78] It exercises scrutiny in a generalized manner, but is not meant to not embark on micro-management or review of individual prosecutorial decisions.

2.2.2.2. Process-based checks and balances

Individual prosecutorial decisions are subject to other checks and balances.[79] Prosecutorial choices and actions have direct ramifications for a plurality of actors, most importantly states and victims. Their interests have been taken into account in the accountability structure of the Statute. The Prosecutor is not directly accountable towards these actors, but subject to certain obligation and duties which may constrain the exercise of discretion. These checks and balances are process-based, rather than result-based. This means that the respective entities cannot necessarily reverse the outcome of prosecutorial decisions on their own motion, but may influence their process and impact.

Prosecutorial choices are heavily influenced by duties vis-à-vis states. States must be notified of various prosecutorial decisions prior to trial. The Prosecutor is bound to notify all States parties under Article 18 of the commencement of an investigation on the basis of a referral or *proprio motu* proceedings.[80] Following this notification, States may force the Prosecutor to defer an investigation based on admissibility grounds.[81] Later, states may challenge the "admissibility of a case" and thereby confine the scope of prosecution.[82] Similar safeguards apply in the reverse scenario, i.e. a decision of the Prosecutor not to proceed. In this instance, the State making a referral must be informed of this inaction and may challenge the decision of the Prosecutor not to proceed with an investigation or prosecution.[83] These remedies (including the mere threat of their exercise) place constraints on prosecutorial strategy and the operation of discretion.

The role of victims in ICC proceedings has a similar effect.[84] It places process-based checks and balances on prosecutorial choices and decision-making. The Statute specifies that interests of victims must be taken into account in the investigation

78 See also Danner, *supra* note 7, at 525 ("The ASP […] will have little impact on a Prosecutor who is simply ineffective or demonstrates poor judgment").

79 These constraints are a result of the multi-layered structure of the Rome Statute which establishes a system of justice rather than a network of multilateral obligations. See generally W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *Criminal Law Forum* 59.

80 See Article 18 (1) of the Statute.

81 See Article 18 (2) of the Statute.

82 See Article 19 (2) of the Statute.

83 See Article 53 (3) (a).

84 See generally the contribution by Vasiliev, below Ch. 33. See also C. Stahn, H. Olásolo & K. Gibson, ' Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *JICJ* 219.

and prosecution of crimes[85] and in considerations relating to the interests of justice.[86] Victims must be notified of various actions, ranging from the conclusion not to proceed from preliminary examination to investigation under Article 15[87] to a "decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to Article 53".[88] Moreover, they may participate under certain conditions in pre-trial, trial[89] or appeals proceedings.[90] This participation provides additional perspectives or counter-views to prosecutorial policies and choices in ICC proceedings, which may ultimately lead to a reversal of prosecutorial decisions.

Prosecutorial activity is further subject to observation and constraints by NGOs.[91] NGOs act as information-providers under Article 15 (2) and have a right to be notified of the outcome of prosecutorial analysis.[92] They may intervene in proceedings. They may, in particular, request to provide observations on prosecutorial decisions as *amicus curiae* under Rule 103. Most importantly, they secure much of the groundwork and civil society support that is necessary in order to facilitate successful investigations and prosecutions. NGOs play thus an essential role in the work of the Court. Their views and concerns may have greater impact on prosecutorial choice and behaviour than formal constraints on discretion.[93] But they must at the same time be treated with some caution. The voices of NGOs are often driven by non-transparent policy agendas and particular interests. Their involvement may thus give rise to a risk of politicization.[94]

2.2.2.3. (Self-)regulation

Regulation is the third form of accountability which has considerable importance in the context of the ICC. Regulatory models have a well established tradition in domes-

85 See Article 54 (1) (b) and Article 68 (1).

86 See Article 53 (1) and (2) (c).

87 See Article 15 (6).

88 See Rule 92 (2).

89 For a survey, see Trial Chamber I, Prosecutor v. Lubanga, Decision on Victim's Participation, 18 January 2008.

90 See e.g. Article 68 (3) and Rule 93.

91 For a more detailed analysis, see Danner, *supra* note 7, at 532-534.

92 See Article 15 (6).

93 For NGO commentary on prosecutorial strategy, see OTP, Second public hearing of the Office of the Prosecutor, The Hague, 25 and 26 September 2006, New York, 17 and 18 October 2006, at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html.

94 See also the example of Request submitted by the Women's Initiatives for Gender Justice pursuant to rule 103 (1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae, 10 November 2006, discussed below 4.2.2.2.

tic jurisdictions. In many common law[95] or civil law systems,[96] States have adopted guidelines on the exercise of prosecutorial discretion in order to enhance the transparency and coherence of prosecutorial decision-making process.[97] In jurisdictions, where prosecution is tied to demonstration of a public interest, statutory guidelines often define the notion and contours of the concept of public interest.[98] In other jurisdictions (e.g. countries with mandatory prosecution), they provide broader normative or procedural guidance for prosecutorial action.[99]

The status of these guidelines varies. In some systems, these guidelines are merely meant to be standards for internal application and review of prosecutorial policies (the so-called bureaucratic model).[100] In other systems, they may have external effect and might even be considered in the context of judicial review (so-called administrative model).[101]

In the context of international criminal justice, this practice has so far enjoyed limited prominence. The *ad hoc* tribunals have been reluctant to issue or commit themselves to public guidelines outlining criteria for the exercise of prosecutorial discretion.[102] They have preferred to substantiate and explain prosecutorial choices on a case-by case basis, i.e. in response to specific judicial challenges, rather than in a generalised fashion.[103] This practice has been heavily criticized, in particular, in the aftermath of the decision not to initiate investigations relating to the NATO bombing campaign against the Former Federal Republic of Yugoslavia.[104]

95 See e.g. the U.S. Principles of Federal Prosecution, the Canadian Federal Prosecution Service Deskbook, the Code for Crown Prosecutors in England and Wales or the Australian Prosecution Policy of the Commonwealth.

96 In Belgium, the Minister of Justice may order directives of criminal policy. See B. Pesquié. The Belgian System, in M. Delmas-Marty & J. R. Spencer, *European Criminal Procedures* (2005), 81, at 91. In Germany, the prosecutorial discrection is restricted by guidelines ("Richtlinien für das Strafverfahren und das Bußgeldverfahren").

97 The adoption of guidelines on the exercise of prosecutorial discretion is recommended by the UN. See para. 17 of the UN Guidelines on the Role of Prosecutors: "In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution". See Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at http://www.unhchr.ch/html/menu3/b/h_comp45.htm.

98 Examples are Canada, South Africa or Scotland.

99 See e.g. the German prosecutorial guidelines for criminal proceedings.

100 See Krug, *supra* note 2, at 654.

101 Id. at 653.

102 Charging and indictment guidelines have been outlined in an internal document. See Côté, *supra* note 7, at 172, note 46.

103 Id., at 171-172.

104 See Danner, *supra* note 7, at 540; Côté, *supra* note 7, at 172.

The framework of the Statute provides incentives to deviate from this practice and to introduce guidelines for prosecutorial policy. Various provisions of the Statute and the Rules foster transparent decision-making. Article 53 (1) (c) and (2) (c) provide an express list of criteria to be considered in the context of the "interests of justice". Article 53 and Rule 105 (3) and (5) enhance the need for transparency. They oblige the Prosecutor to motivate decisions not initiate an investigation or not to prosecute under article 53, by providing reasons for his conclusion. Fundamental notions and concepts, such as gravity of the case, gravity of the crime, admissibility or the meaning of "most serious crimes" have been left unspecified by the Statute, although they are of fundamental importance for the relationship between the ICC and domestic jurisdictions. Clarification on these issues is in the interest of the Prosecutor and needed, in order to facilitate the effective discharge of powers and duties of the office.

The Statute provides a statutory basis for (self-)regulation. Article 42 (2) vests the Prosecutor with "full authority over the management and administration of the Office". This mandate appears to imply a title to determine office policies by way of regulation and communication.

It does not come as a surprise that the Prosecutor has made extensive use of this authority. One of the first steps of the Office has been to develop draft regulations on the management of communications.[105] The draft regulations were complemented by policy papers on issues such as complementarity,[106] the interests of justice[107] and the selection of situations and cases,[108] as well as a Report on Prosecutorial Strategy.[109]

These documents are policy documents, which have been drafted after external consultation and expert input. They are not meant to have judicial effect. In fact, some of them contain an express disclaimer, stating that they shall "not give rise to rights in litigation" and are "subject to revision based on experience and in the light of legal determinations by the Chambers of the Court".[110] But they set out understandings, or even interpretations of certain notions and provisions of the Statute, which make prosecutorial processes more transparent.[111] They also ensure some consisten-

105 See OTP, Annex to the Policy Paper: Referrals and Communications, at http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

106 See OTP, Paper on some Policy Issues before the Office of the Prosecutor, at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

107 See OTP, Policy Paper on the Interests of Justice, at http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf.

108 See OTP, Draft Paper, Criteria for Selection of Situations and Cases, copy on file with the author.

109 See OTP, Report on Prosecutorial Strategy, 14 September 2006, at http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf.

110 See the introduction to the OTP policy papers on interests of justice and selections of situations and cases.

111 In the Draft Paper on Criteria for Selection of Situations and Cases, the OTP set out its understanding of the four overarching principles of selection: independence, impartiality, objectivity and non-discrimination (pp.1-3). In the policy paper on Interests of Justice, the OTP stressed the "exceptional nature" of the provisions on interests of justice and

cy in internal application. In this sense, they fulfil some of the functions of *ex ante* guidelines for exercise of prosecutorial discretion.

2.2.2.4. Judicial review

Judicial review is the strongest form of formal prosecutorial accountability over individualized decision-making. It allows a judge to assess or reverse individual prosecutorial choices, either *proprio motu* or based on a challenge by a participant.[112] Judicial review plays an important role in the context of ICC proceedings. Many aspects and criteria of prosecutorial discretion have been regulated. The Rome Statute vests the judges with an active role in proceedings.[113] Judges are entrusted with express oversight powers over specific prosecutorial activities at the pre-trial stage,[114] such as unique investigative opportunities,[115] the authorization of specific investigative steps in failed states[116] or the taking of testimony.[117] The Pre-Trial Chamber exercises scrutiny over prosecutorial choices and charging autonomy at two critical junctures of pre-trial proceedings: the arrest warrant stage[118] and the confirmation of charges.[119] It is mandated to review the commencement of investigations in the context of *proprio motu* proceedings under Article 15.[120] Negative decisions, i.e. decisions not to investigate or prosecute, have been made subject to duties of notification and motivation, and have been opened to judicial review, when taken "in the interests of justice". A similar picture prevails at the trial stage. ICC trial procedure is governed by "managed adversarialism".[121] The role of the Prosecutor as the master of proceedings is mitigated by the managerial powers of judges.[122]

Although powers of judicial review are in some respects more pronounced in the context of ICC procedure than in other tribunals, there is a considerable degree of

clarified that "a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort" (p. 7).

112 Judicial review may take different forms. In some cases, it merely entails the right to examine and assess prosecutorial decisions. In other cases, this right is supplemented by the power to annul such decisions or to replace prosecutorial choices.

113 For a survey, see C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603.

114 See generally O. Fourmy, Powers of the Pre-Trial Chambers, in A. Cassese, P. Gaeta & J. Jones, *Rome Statute of the International Criminal Court,* Vol. II (2002), Vol. II, 1207-1230; M. Marchesiello, Proceedings before the Pre-Trial Chambers, in ibid, 1231-1246.

115 See Article 56 (3).

116 See Article 57 (3) (d).

117 See Rule 47 (2).

118 See Article 58 (1) and (6).

119 See Article 61 (5) to (7).

120 See Article 15 (3) and (4) and Rule 50.

121 See also P. Carmichael Keen, 'Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals', (2004) 17 *Leiden Journal of International Law* 767.

122 See e.g. Article 64 (6), (8) and (9).

confusion.[123] Many of the triggers and modalities of review are ambiguous or open to interpretation. This uncertainty blurs the limits of prosecutorial accountability.

3. The legal framework of judicial review

The statutory framework of the Court is full of imperfections. The drafters of the Statute have made significant efforts to strengthen the transparency and justification of prosecutorial decision-making in the context of the ICC. But many of the key factors governing the exercise of prosecutorial discretion are unclear or underdeveloped. This is partly a result of a state-centered and simplified vision of prosecutorial discretion.

3.1. Foundations

The trend towards enhanced accountability in the Rome Statute was mainly driven by a basic factor: fears about an overactive Prosecutor. Accountability structures were developed in response to concerns by those States which shared reservations against the prospect of an omnipotent and unchecked Prosecutor. Delegations feared that the Prosecutor might open politically motivated investigations by virtue of his *proprio motu* powers.[124] The very question as to whether the Prosecutor should enjoy such powers was only resolved in the late days of the Rome Conference. Checks and balances were introduced to mitigate risks emanating from this accumulation of power and the fear of activism.

3.1.1. Institutional control

It was essentially the idea of Pre-Trial Chamber control which managed to overcome objections by those delegations which were hesitant to accept *proprio motu* powers.[125] The Pre-Trial Chamber was created as the institutional response to the establishment of an independent Prosecutor. It was vested with various powers of control to temper prosecutorial activism.[126]

The drafters of the Statute introduced a special filter with regard to proceedings under article 15.[127] The Chamber was charged with independent judicial control over investigative powers, namely to determine whether there is a reasonable basis for the investigation of a situation following preliminary examination.

123 See below 3.2.

124 See P. Kirsch & D. Robinson, Initiation of Proceedings by the Prosecutor, in Cassese, Geata & Jones, *Rome Statute of the International Criminal Court*, Vol. I (2002), at 658-661.

125 See also W. Schabas, *Introduction to the International Criminal Court* (2007), at 161.

126 Note that there is no full parallelism between prosecutorial authority and judicial review. The Pre-Trial Chamber operates on the basis of enumerated powers. See Article 57 (3).

127 The powers of the Pre-Trial Chamber differ in this respect from proceedings initiated by state or Security Council referrals.

This safeguard is supplemented by various other modalities of review. The Pre-Trial Chamber was conceived as a filter for trial. It was tasked to examine the quality and disclosure of evidence and to determine the focus of the case for trial. The allegations and supporting material of the Prosecution are subject to double scrutiny. They are tested at two stages: at the arrest warrant stage on the basis of a "reasonable grounds" test[128] and at higher threshold ("substantial grounds") at the confirmation hearing stage.[129] The Chamber is responsible to monitor the discharge of disclosure obligations, including the disclosure of exculpatory evidence.[130] It is also vested with powers of review relating to evidentiary matters[131] and measures concerning to the status and protection of parties and participants, such as interim release of the defendant,[132] protection of victims and witnesses[133] and recognition of the status of victims in pre-trial proceedings.[134] The powers provide checks on the daily exercise of prosecutorial discretion.

3.1.2. Normative factors

Prosecutorial activism was further limited by certain express legal requirements governing the exercise of charging autonomy. The Statute considerably extended the number of factors that the Prosecutor needs to take into account by virtue of the law, when making decisions relating to the investigation and prosecution of crimes.[135] This feature becomes apparent by a simple comparison of Article 18 of the ICTY Statute ("Investigation and preparation of indictment") and Articles 17 and 53 of the ICC Statute.

Article 18 of the ICTY Statute reads:

> "1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and nongovernmental organisations. The Prosecutor shall assess the information received or obtained and *decide whether there is sufficient basis to proceed*".[136]

This provision fails to specify which criteria the Prosecutor needs to take into account when deciding to proceed. The Statute, by contrast, enumerates a full list of criteria, ranging from jurisdiction (Article 53 (1) (a) and gravity (Article 17 (1) (d) to

128 See Article 58 (2).

129 See Article 61 (5).

130 See Article 67 (2). This provision states that "[i]n case of doubt as to the application of this paragraph, the Court shall decide".

131 E.g. preservation of evidence in the context of special investigative opportunities (Article 56 (3) or under Article 57.

132 Article 59 (4) and 60.

133 See Article 57 (3) (c).

134 See Rule 89.

135 These factors serve *inter alia* to protect the primacy of domestic jurisdiction.

136 Emphasis added.

admissibility (Article 53 (1) (b)) and the "interests of justice". These criteria are not discretionary, but mandatory.[137] This means they have to be taken into in consideration internally in the context of every investigation and prosecution. They may be challenged by other actors (e.g. states, the defendant) and are open to judicial scrutiny.[138] The Prosecutor is thus forced to address these issues when seeking prosecution.

3.2. Ambiguities

Although the Statute has reduced the formal scope of discretion and extended avenues for judicial review, it has not quite managed to establish a balance between discretion and accountability. The problem of prosecutorial inaction has been neglected by the architects of the Statute. Moreover, many of the factors and requirements governing the selection of situations and cases have in fact remained unresolved. This uncertainty tends to privilege discretion over accountability.

3.2.1. Selection of situations and cases

The statutory provisions fail to provide a coherent normative framework for the selection of situations and cases by the Prosecutor.[139] The criteria outlined in the Statute contain various loopholes and open, in fact, a wide scope of interpretation to the Prosecutor, since they do not provide much guidance on the substantive content of the criteria governing the decision whether or not to initiate an investigation or to proceed with a prosecution. This uncertainty has provided an opportunity to the Prosecutor to shape the meaning of the concepts and to develop prosecutorial discretion outside the realm of legal thresholds.

The concept of gravity[140] is a good example. Gravity is of crucial importance for the exercise of prosecutorial powers, but gained relatively limited attention in the negotiation history. It was initially contemplated as an admissibility filter allowing the Court to dismiss cases which are *prima facie* of insufficient concern to an international jurisdiction.[141] Few attention, however, was devoted to the distinction between "situations" and "cases" and the question how gravity would affect the actual choices of the Prosecutor.

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137 See Article 17 (the Court "shall" determine) and Article 53 (1) (the Prosecutor "shall consider whether").

138 See e.g. Article 58 (2), 17 and 19 (1) ("The Court shall satisfy itself that it has jurisdiction in any case brought before it" and "may, on its own motion determine the admissibility of a case in accordance with Article 17").

139 For a discussion, see also the contribution by Guariglia in Chapter 12 of this volume.

140 For an assessment, see the contribution by Schabas in Ch. 14 of this volume. See also R. Murphy, 'Gravity Issues and the International Criminal Court, (2006) 17 *Criminal Law Forum*, 281-315; W. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) 19 *Criminal Law Forum* 5-33; M. El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court', 19 *Criminal Law Forum* 35-57.

141 See Article 35 (c) of the 1994 Draft of the International Law Commission, . *Yearbook of the International Law Commission, 1994*, vol. II (Part Two).

The Statute offers no answer on the key question what makes a "situation" grave enough to warrant investigation? In fact, there is an internal contradiction in the Statute. Article 53 (1) obliges the Prosecutor to consider the gravity of the "case" at the stage of initiating an investigation. This is a mission impossible. Investigations are related to a situation.[142] There is not yet a formal "case" when the Prosecutor decides whether to initiate an investigation. The OTP was therefore bound to improvise, in order to give a meaning to gravity. It decided to operate on the basis of a hypothesis. It adopted the policy of considering "the situation in a generalized manner, taking into account the likely set of cases that would arise from investigation of the situation"[143] The Office developed a set of gravity criteria for selection of situations on its own motion. It determined that "factors relevant in assessing gravity include: a) the scale of crimes; b) the nature of crimes; c) the manner of commission of crimes; d) the impact of crimes".[144] Nevertheless, it left considerable space for flexibility, by leaving the balancing and weight of the individual criteria open to its independent assessment.[145] Moreover, it set out additional discretionary criteria for the selection of regions[146] and incidents[147] outside the mandatory gravity threshold under Article 17 (1) (d) and Article 53 (1).

The Office adopted a similar approach with respect to the treatment of gravity in the selection of cases, i.e. the selection of groups and persons. The gravity requirement under the Statute overlaps in this respect with the limitation of the jurisdiction of the Court to the "most serious crimes".[148] The meaning of this notion and its relationship to gravity has been left open by the drafters of the Statute. The OTP used this loophole to develop policy principles on the basis of its charging discretion, rather than the mandatory gravity requirement. Following consideration of the practice of other national and international jurisdictions, the Office adopted the policy of "selecting persons most responsible for most serious crimes".[149] It also specified that selection would focus on groups that "are responsible for the gravest crimes as well as the potential preventative impact of investigation".[150] Both clarifications were

142 See OTP, Draft Criteria for Selection of situations and cases, p. 1 ("Investigation is conducted into a situation, culminating in the identification of cases for prosecution").

143 Ibid, p. 5, note 7.

144 Ibid, at 5.

145 Ibid, at 5 ("The OTP position is that these factors should be considered jointly: no fixed weight should be assigned to the criteria, but rather a judgment will have to be reached on the facts and circumstances of each situation").

146 Ibid, at 12 ("Prioritization is based primarily on gravity of the crimes and potential preventative impact of the investigation, as well as security considerations").

147 Ibid, at 12 ("In principle, incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimization").

148 See the preamble, Article 1 and 5 of the Statute.

149 See OTP, Draft Criteria for Selection of situations and cases, p. 13.

150 Ibid, at 12-13.

justified by virtue of prosecutorial discretion, i.e. as policy choices outside the "legal threshold",[151] in light of the need to preserve flexibility.

The insufficient differentiation between "situations" and "cases" under the Statute has caused further difficulties relating to the application of complementarity requirements with respect to "situations". The wording of Article 53 (1) (b) requires the OTP technically to apply standards governing the admissibility of the "case" under Article 17 in the context of the decision to investigate a situation. The requirements of Article 17 are ill-suited to address admissibility concerns (i.e. considerations of unwillingness or inability) at the situational stage since they are related to proceedings involving perpetrators and crimes. The Office of the Prosecutor has therefore been compelled to broaden the parameters of Article 17 and to introduce more generic admissibility assessments in its analysis, in order to comply with its mandate. It has to determine whether there are actual proceedings in relation to the broader regions and incidents under consideration and whether such proceedings relate to the potential categories of crime and nature of persons (e.g. most responsible) that are likely to form the object of ICC investigations.[152] This may require difficult inability and unwillingness assessments concerning the aptitude of a domestic system as a whole[153] and pose dilemmas of choice in circumstances where the potential suspects are likely to be investigated or prosecuted domestically for different crimes or different incidents (e.g. similar crimes committed in a different massacre).

The OTP has given a narrow interpretation to the notion of "interests of justice". It has emphasized the "sui generis" character of this notion and has distinguished "interests of justice" from "interests of peace".[154] It has further stressed that it will apply Article 53 (1) (c) and (2) (c) only in exceptional circumstances in order to justify a decision not to proceed with a situation or case which would otherwise qualify for selection by the Prosecutor.[155] This restraint, however, is mitigated by the rather wide scope of choice assumed at the prior selection of situations and cases.

The Office made it clear that it considers other criteria than those listed in Article 17 or Article 53, when selecting situations and cases. Following a logic of positive complementarity, it has welcomed the "possibility of encouraging national systems to take action" as a matter of "policy", even in circumstances where ICC proceedings are admissible as "a legal matter.[156] It has also acknowledged that decisions to investigate

151 Ibid, at 13.

152 Ibid, at 7.

153 Ibid, at 8 ("The degree of specificity required in this phase must reflect that the OTP does not have investigative powers, and that the analysis is comparatively general since it looks at the situation as a whole").

154 See OTP, Policy Paper on the Interests of Justice, at 8 ("The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security").

155 Ibid, at 1 and 3.

156 See OTP, Draft Criteria for Selection of situations and cases, p. 7, note 10.

or prosecute are shaped by a number of extra-legal factors, such as the "availability of evidence"[157], "questions of security of victims, witnesses and staff"[158] or the intent to maximize "the contribution to prevention of crime".[159]

There is thus a certain imbalance between statutory regulation and practice. The introductory wording of Article 53 (1) ("The Prosecutor shall, […] initiate an investigation, unless") appears to suggest that the Prosecutor, is in principle, bound to initiate an investigation. The criteria in Articles 17 and 53 (1) (a) to (c), however, and the corresponding ambiguities and gaps of the Statute, have in fact left leeway for a rather wide degree of discretion in practice.[160] Many of the key factors guiding the selection of situations and cases were developed outside the box of legality requirements and thus moved from the domain of review to the area of prosecutorial policy.[161]

3.2.2. Control over prosecutorial inaction

The drafters of the Statute have further struggled to strike a clear balance between prosecutorial authority and judicial review in the area of control of prosecutorial inaction. The question of inaction was only at the back of the mind of the drafters of the Statute, since they were more preoccupied with the fear of an (over-)active prosecutor. The conditions and modalities of review received therefore less attention than needed. They were essentially left open to further clarification, due to diverging conceptions among delegations about the role of the Prosecutor and the feasibility of challenge and review of inaction before judges.

3.2.2.1. The decision not to prosecute

The most evident shortcoming of the Statute is that does not clarify what is meant by a decision not to prosecute. Article 53 (2) uses the term "not a sufficient basis for a prosecution". But it does not identify the relevant object of prosecution. The wording leaves room for, at least, four possible interpretations.

Prosecutorial inaction may possibly relate to (i) a decision not to prosecute a specific individual; (ii) a decision not to prosecute a certain group of persons in a given situation; (iii) a decision not to prosecute certain crimes; or (iv) a decision not to prosecute at all, i.e. the absence of any cases in the situation under investigation.

The distinction has significant implications for the exercise of judicial review. If a decision not to prosecute means a decision not to prosecute a specific individual (proposition (i)), the Prosecutor is subject to a very intensive scrutiny akin or exceeding the scope of review under domestic systems. Article 53 would open the door for

157 Ibid, at 8.

158 Ibid.

159 Ibid, at 12.

160 See also R. Cryer, H. Friman, D. Robinson & E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2007), 366.

161 *Proprio motu* review by the Chamber is limited to decisions taken "solely" on the basis of the "interests of justice". This means that the Prosecutor may actually escape judicial review, if he bases decisions not to investigate or prosecute on (broadly defined) gravity considerations.

review of a large number of individualized and sensitive decisions. Powers of review might, for instance, extend to any decision of the Prosecutor not to prosecute potential "insider witnesses" who cooperate with the Prosecution to absolve themselves from prosecution.

The option of judicial scrutiny is, however, reduced to a bare minimum, if a decision not to prosecute covers only scenarios of complete absence of prosecution (proposition (iv)). Given the limited resources of the Court and the careful selection of situations and cases by the OTP,[162] it is very unlikely that the Prosecutor would first select a situation for investigation and then decide not to prosecute a single case in the entire situation. Article 53 review would thus remain a very rare exception.

Propositions (ii) and (iii) are more nuanced. They grant judges generic powers to exercise scrutiny over selective prosecution, without involving them in any periodic review of individualized choices not to prosecute.[163] This position takes into account the specific nature and typology of international criminal justice. It enables Judges to address challenges of one-sided investigation or selective charging in the context of broader prosecutorial strategy choices, i.e. the closure of the investigation or its limitation to specific historical incidents or crime patterns.

These interpretational choices go evidently to the very heart of the understanding of Article 53 and the relationship between prosecutorial discretion and judicial review. But they have been left unanswered by the drafters of the Statute. It is thus essentially the task of the Judges to define the boundaries between prosecutorial discretion and judicial accountability in this area.

3.2.2.2. Modalities of judicial review

The definitional problems of Article 53 coincide with a broader transparency dilemma. Many aspects of prosecutorial decision-making are not publicly recorded. Since the Pre-Trial Chamber has no independent investigative powers at its disposal, lack of information is an obstacle to review.[164] Article 53 makes supervision formally made dependent on prior notification of a decision by the Prosecutor. Both, the power of the author of a referral to request a review under article 53 (3) (a) and *proprio motu* control by the Chamber are closely tied to its notification by the Prosecutor. This causes significant operational difficulties.[165]

Review under Article 53 (3) is based on a vicious cycle. How can a State request review if it is not informed of any decision by the Prosecutor in the first place? Furthermore, how can a Chamber meaningfully exercise *proprio motu* powers of review over inaction under article 53, if the determination as to whether or not a decision not to prosecute has been taken is dependent on the initiative of the Prosecutor? In many instances, the Chamber simply lacks knowledge of whether any decisions were taken

162 See above 3.2.1.

163 See also the discussion below under 4.2.

164 For a survey of domestic practice, see Joseph, *supra* note 1, at 139.

165 For a discussion, see also Schabas, *supra* note 125, at 247-248.

by the Prosecutor at all, prior to notification by the latter. This means that the option of review remains largely academic in the absence of prosecutorial notification.

Further ambiguities arise in the context of Article 15. The Statute and the Rules fail to clarify whether a Chamber may exercise judicial review if the Prosecutor does not even seek authorization to initiate an investigation under Article 15. Article 15 (6) simply mandates the Prosecutor to notify information-providers of inaction after preliminary examination, but fails to attribute a role to the Chamber.[166] This appears to imply that a Chamber has thus virtually no power of control and no information on the activities of the Prosecutor, unless a request for authorization under Article 15 is made.[167] As a result, few actors inside or outside the Court know whether, when and for what reasons the Prosecutor in fact declined to proceed under Article 15, if no information is provided publicly.

The Chamber has attempted to address some of these transparency dilemmas by adopting Regulation 48. This regulation authorizes the Pre-Trial Chamber to "request the Prosecutor to provide specific or additional information or documents in his or her possession [...] that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53 (3) (b)". This power has, however, been fiercely contested by the Office of the Prosecutor.[168] It has therefore been used with moderation by Judges and failed to solve the logical problem created by Article 53.

4. Experiences of the first practice

The first activities of the Court have been marked by divergent institutional interests between the Prosecutor and Chambers. The scope and limits of prosecutorial discretion have been litigated since the start of proceedings.

Prosecutorial decisions were guided by a natural instinct to preserve autonomy and discretion. Judicial review was welcomed, in particular instances, in which it induced the judges to assume a share of the burden of responsibility (e.g. withdrawal of warrants of arrest[169]), but contested in circumstances where it curtailed discretion.

Judicial practice oscillated between judicial activism and deference. Judges enjoyed limited opportunity to exercise the formal types of review of prosecutorial discretion provided under the Statute, since they faced difficulties to obtain relevant informa-

166 This provision reads: "If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information".

167 Schabas argues that such a decision is "not subject to any form of judicial review" in light of Article 15 (6) and Rule 49 which provide only for a duty of notification of the Prosecutor. See Schabas, *supra* note 125, at 245.

168 See e.g. OTP Submission Providing Information on the Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, para.8.

169 For further analysis, see the contribution by El Zeidy in Ch. 6 of this volume.

tion. But they have exercised intense forms of scrutiny over mandatory requirements in the context of prosecutorial motions and applications.

4.1. Avoidance of formal review

Most of the original statutory checks on prosecutorial discretion have remained dead letter in the first five years.

The procedure for the authorization of an investigation under Article 15 (3) has not come into operation, since the OTP adopted the policy of "inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court".[170] The reliance on self-referrals made it unnecessary to seek approval of the Pre-Trial Chamber under Article 15.[171]

The opening of an investigation in relation to communications regarding the situation in Iraq was declined on the basis of gravity considerations.[172] This meant that there was no option for judicial review under Article 53. Moreover, the Office refrained more generally from invoking the concept of "interests of justice",[173] in line with its narrow interpretation articulated in the 2006 policy paper. It repeatedly stated its position that it has "not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice".[174]

The question of the scope of judicial review of prosecutorial was thus mostly addressed in the context of procedural decisions and motions.

4.2. Judicial practice

Judicial practice has been in search of a proper balance between control and deference. Judges were ambitious to assert their powers in response to prosecutorial motions at various stages of the proceedings (warrant of arrest, confirmation hearing). But they have been reluctant to exercise strong scrutiny over prosecutorial inaction.

4.2.1. Control over the selection of cases

The most famous example of judicial activism is Pre-Trial Chamber I's decision on the issuance of a warrant of arrest in the Lubanga case. In this context, the Pre-Trial Chamber used the Prosecutor's application for a warrant of arrest to exercise judicial control over leadership criteria in the selection of cases. The Chamber relied on the mandatory gravity requirement under Article 17 (1) (d) in order to shape the selec-

170 See OTP, Report on the activities performed during the first three years (June 2003-June 2006).

171 See on this issue also the contribution by Kleffner in Ch. 5 of this volume.

172 See OTP, Communication on Iraq (2006).

173 The Office considered this concept in the context of the investigations in the situations of the DRC, Uganda and Darfur. See OTP, Policy Paper on the Interests of Justice, at 4.

174 Ibid.

tion of cases.[175] It adopted a teleological interpretation of gravity, which was designed to focus the criminal policy of the Court on leadership accountability since the very start of proceedings.

The Chamber stressed that the gravity requirement under Article 17 (1) (d) shall "ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation".[176] It specified that "the relevant conduct must present particular features which render it especially grave".[177] The Chamber developed criteria for leadership accountability, in order to distinguish the meaning the gravity requirement under Article 17 (1) (d) from the threshold in the contextual elements and the limitation of the Court's jurisdiction to "most serious crimes". It held: "If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both contextual and specific elements)".[178]

The Chamber then articulated a three-prong test for gravity. It stated:

i) that the "conduct must be either systematic (pattern of incidents) or large-scale" and that "due consideration must be given to the social alarm such conduct may have caused in the international community" (i.e. the type of conduct, not necessarily the actual alleged facts themselves);[179]
ii) that the relevant person must fall within the "category of most senior leaders of the situation under investigation" in light of his/her position in the State entity, organization or armed group;[180] and
iii) that the role of the respective State entity, organization or armed group in the overall commission of crimes must be sufficiently important in the relevant situation.[181]

The Chamber tried to justify its approach by reference to the alleged deterrent effect of this policy[182] as well as the exercise of judicial scrutiny over "the gravity of the crimes charged and the level of responsibility of the accused" in the context of Rule 28 and Rule 11 *bis*.[183] But the approach of the Chamber suffered from three fundamental shortcomings.

The decision was based on a creative interpretation of Article 17 (1) (d). The origin of the three-prong test and the legal basis of its individual elements under the ICC

175 See Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, 10 February 2006.

176 Ibid., para. 50.

177 Ibid., para. 45.

178 Ibid., para. 46.

179 Ibid., para. 63.

180 Ibid., para. 63.

181 Ibid., para. 63.

182 Ibid., para. 48.

183 Ibid., paras. 56 and 57.

Statute were not developed in full detail. The Chamber failed to clarify the source and legal basis of the individual prongs in light of the applicable sources of law under Article 21.

Secondly, the decision incorporated elements into the gravity test, which are usually considered to form part of prosecutorial discretion. The decision formulated strict leadership criteria for the selection of cases, which curtailed the timing and selection of perpetrators by the Office the Prosecutor. The Office has adopted a broader approach towards leadership accountability, which comprises (i) "commanders and other superiors if their effective subordinates are involved in the crimes", (ii) "those playing a major causal role in the crimes" and (iii) "notorious perpetrators who distinguish themselves by their direct responsibility for particularly serious crimes".[184] It noted that it may be necessary "to go wider than high-ranking officials if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case".[185] The Chamber deprived the Prosecutor of this flexibility *ab initio*. It clarified that its three leadership criteria are "not discretionary for the Prosecution because they are a core component of the gravity threshold provided for in article 17 (1) (d) of the Statute".[186] This made it difficult, if not impossible for the Prosecution to generate evidence to build a case through the investigation and prosecution of mid-level perpetrators.

Finally, the Chamber did not explain very well its policy rationale for the use of the three-prong test in the context of the ICC Statute, i.e. the link between the leadership accountability and deterrence. The decision might have been misunderstood as an incentive to provide "ex ante impunity to entire classes of perpetrators"[187] or to enable "perpetrators to bring legal challenges demanding evidence showing that they are not only guilty but the most guilty".[188]

The Chamber may thus have gone a little bit too far in its effort to shape the criminal policy of the Court.

4.2.2. Control over prosecutorial inaction

This approach contrasts with the degree of judicial deference manifested in the area of control of prosecutorial inaction. The Pre-Trial Chamber has taken a rather cautious stance on the exercise of judicial review in this area. The issue came up in the form of, at least, three different variations: (i) control over the timing of the initiation of the investigation; (ii) conception of the role of the Chamber and (iii) assessment of decisions not to prosecute. These scenarios illustrated the dilemmas of Article 53, i.e. the obstacles to review caused by the lack of transparency of prosecutorial action and the limited sharing of information with the judiciary.

184 See OTP, Draft Criteria for Selection of Situations and Cases, at 13.

185 Ibid.

186 See Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, 10 February 2006, para. 62.

187 See OTP, Draft Criteria for Selection of Situations and Cases, at 13.

188 Ibid.

The Chamber adopted a rather reserved approach towards judicial review. It failed to engage in substantive review at the early stage of proceedings, i.e. before the formal closure of the investigation. Judges largely discarded the option of individualized control over prosecutorial inaction.[189] They refrained from questioning the motives of prosecutorial inaction and failed to infer any definitive prosecutorial decision (i.e. decision not to investigate or prosecute) from the circumstances of inaction. Issues of prosecutorial accountability were thus only partially addressed.

4.2.2.1. Control over the decision not to initiate an investigation

The situation in the Central African Republic (CAR) provided an opportunity to clarify the limits of the temporal scope of prosecutorial discretion. The Pre-Trial Chamber was seized with a request to exercise of judicial scrutiny over the timing of the initiation of the investigation. The CAR requested the Chamber to seek information from the Prosecutor as to "alleged failure to decide, within a reasonable time, whether or not to initiate an investigation pursuant to rules 105 (1) and 105 (4) of the Rules of Procedure and Evidence".[190] The Office of the Prosecutor contested the power of the Pre-Trial Chamber to request this information at this stage. It argued that the Chamber's supervisory role under Article 53 (3) applies only to review under Articles 53 (1) and (2), that no decision had been taken yet and that "accordingly, there is no exercise of prosecutorial discretion susceptible to judicial review.[191]

The Chamber did not embark on any substantive review under Article 53 at this stage. It noted that the preliminary examination of a situation "must be completed within a reasonable time from the reception of a referral".[192] But it did imply from prosecutorial inaction that a specific decision had been taken by the Prosecutor. It merely requested the Prosecutor to inform the author of the referral "on the current status of the preliminary examination of the situation in the Central African Republic".[193] The problems of Article 53 were thus left unresolved.

4.2.2.2. The role of the Chamber

Pre-Trial Chamber I reiterated this cautious approach towards judicial review in the context of a motion by the Women's Initiatives for Gender (the Women's Initiatives). In this situation, the appellants applied for leave to submit observations under Rule

189 See proposition (i) under 3.2.2.1.

190 See PTC III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, at 3.

191 See OTP, Prosecution's Report Pursuant to Pre-Trial Chamber Ill's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006, para. 1.

192 PTC III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, at 4.

193 Ibid. This reasoning may be defended in light of the fact that a duty to inform exists both in the case of a negative decision (decision not to investigate – Rule 105 (1)) and in case of a positive decision of the Prosecutor (decision to commence an investigation – Article 18 (1)).

103 to submit observations on the "role of the Pre-Trial Chamber in supervising prosecutorial discretion" in light of the limited number of charges brought against Thomas Lubanga Dyilo.[194] The Women's Initiatives argued in favour of a wide conception of Article 53, based on the practice of domestic jurisdictions.[195] They submitted that the "Pre-Trial Chamber has an inherent duty to satisfy itself that that the Prosecutor is exercising his or her discretion correctly, even when deciding not to prosecute a particular person, or not to prosecute a person *for particular crimes*".[196]

The Chamber rejected this interpretation. It decided not to rely on the concept of inherent powers in order to exercise control over individual prosecutorial decisions taken in the course of an ongoing investigation. The Chamber noted:

> "In the situation at hand, […] investigations in the Situation in the DRC are ongoing and the Prosecutor has not taken any decision not to investigate or prosecute. The Chamber therefore deems this issue as not appropriate at the present stage of the proceedings".[197]

The Chamber thereby essentially postponed its consideration of Article 53 review. It reserved its power to exercise generic scrutiny at a later point, e.g. at the closure of the investigation.

4.2.2.3. Review of a decision not to prosecute

On two other occasions, the Pre-Trial Chamber failed to imply a decision on prosecutorial inaction from the circumstances of the respective situation.

In December 2005, Pre-Trial Chamber II convened a status conference on the investigation in relation to the situation when reports emerged that the Prosecutor would "not continue investigating past crimes".[198] The status conference was designed to seek further information from the Prosecutor on the status of the investigation. The Chamber adopted the view that it was entitled to seek information from the Prosecutor at this stage under Regulation 48, in order to inquire whether the Prosecutor had taken any decision not to prosecute further crimes.[199] The Chamber argued this process was a step prior to the exercise of review under Article 53 (3) (b) proper, namely a means to assess whether its *proprio motu* powers of review are applicable. The Prosecutor challenged this reasoning, but clarified in anticipation of the status conference that no definition decision had been taken.[200] The Chamber trusted this judgment.

194 See ICC, Request submitted pursuant to rule 103 (1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae, 10 November 2006, para. 8.

195 Ibid, para. 13.

196 Ibid.

197 Ibid., para. 5.

198 See PTC II, Decision to Convene a Status Conference on the Situation in Uganda in relation to the application of Article 53, 2 December 2005, para. 7.

199 Ibid. para. 14.

200 See OTP Submission Providing Information on the Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, para. 8.

A similar request was made by victims in the context of the Situation in the Democratic Republic of Congo. The Representative of victims of the situation submitted a motion to the Chamber in which he argued that the "Prosecutors decision to temporarily suspend the investigation" might constitute "an implicit decision not to prosecute".[201] He requested the Chamber to seek information from the Prosecutor to review "his tacit decision not to prosecute".[202]

Pre-Trial Chamber I denied this request in substance. The Chamber repeated its previous line of argument. It found that the Prosecutor had not taken any decision not to prosecute and noted that the "request is not appropriate at the present stage".[203]

This illustrates that Judges had a strong tendency prefer deference over judicial activism in the area of prosecutorial inaction.

5. Lessons

What lessons can be drawn from these developments? The first jurisprudence suggests that the Court is still struggling to reconcile prosecutorial discretion with accountability. External accountability and interests of States have been widely taken into account in the architecture of the Statute. The institutional dimensions of accountability, however, i.e. the balance between prosecutorial discretion and judicial review, have only gained attention in context of the Court's emerging practice.

There is a need for greater accountability. It has become apparent that the political control exercised by the Assembly of States Parties alone is not sufficient to mitigate prosecutorial authority. This type of accountability is based on professional responsibility. It is too limited in scope (since it is related to prosecutorial performance as a whole) and too undifferentiated in its sanction (since it is focused on removal from office or disciplinary measures).

A double effort is needed, in order to refine the balance between prosecutorial autonomy and accountability: broader transparency of prosecutorial choices and greater normative clarification by Judges.

The first practice practice has shown that it is necessary to improve transparency. The involvement of different actors in proceedings (e.g. states, victims) has introduced an additional layer of publicity and need of justification of prosecutorial practices into ICC proceedings. But transparency has remained problematic. Judicial consideration and decision-making have been hampered by a lack of prosecutorial record and information-sharing. Judges were often left in dark about prosecutorial decisions. They were unable to determine the proper moment for review of prosecutorial strategies or the grounds of inaction since they lacked information concerning the focus and targets of investigation. This has generated a certain institutional mistrust and a large amount of litigation, with often few tangible results.

201 See PTC I, Decision on the Requests of the Legal Representatives for Victims VPRS1 to VPRS 6 regarding "Prosecutor's Information on further Investigation", 26 September 2007, at 2.

202 Ibid.

203 Ibid, at 5.

It has further become clear that statutory ambiguity may raise accountability concerns. The Statute and the Rules are particularly vague in the area of selections of situations and cases and review of prosecutorial inaction. The OTP has used grey zones in the law to expand the scope of prosecutorial discretion. Judicial review was acknowledged where convenient, and disregarded where inconvenient. Greater judicial clarification may be necessary to enhance the consistency of prosecutorial practice and prevent arbitrary decision-making.

Transparency and judicial scrutiny do not necessarily conflict with the concept of prosecutorial independence. The jurisprudence the area of Article 53 has shown that one may have a certain trust in judicial deference. Judges are often neither interested nor inclined to micro-manage prosecutorial action, due to their lack of investigative expertise or their unwillingness to make political choices. Greater judicial involvement is thus not automatically a threat or detriment to discretion. Quite on the contrary: it may reduce inter-institutional mistrust and enhance the legitimacy of prosecutorial choices.

IV The ICC and Its Applicable Law

General

Chapter 16 Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC

*Gilbert Bitti**

1. Introduction

The Rome Statute of the International Criminal Court (ICC),[1] adopted on 17 July 1998 (Rome Statute),[2] contains an interesting Article 21 which provides:

> *"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 its 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,

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1 Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

2 The Statute entered into force on 1 July 2002.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 285-304.

> race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

There are three things which are interesting about Article 21 of the Rome Statute: its existence, the specificity of its content and the hierarchy it establishes.

Indeed, there is no article on applicable law in (i) the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 ("Nuremberg Tribunal"),[3] (ii) the Charter of the International Military Tribunal for the Far East in its original version of 19 January 1946 or its amended version of 26 April 1946 ("Tokyo Tribunal"),[4] or (iii) the Statutes of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR), adopted by the Security Council of the United Nations ("UN") respectively on 27 May 1993[5] and 8 November 1994.[6]

The same is true for the more recent "mixed" or "internationalized" tribunals; indeed, neither the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (SCSL), nor the Statute of the Court annexed to the said Agreement contain an article on applicable law.[7] The same applies to both the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC or "Khmer Rouge Tribunal") for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea in its amended version dated 27 October 2004 and the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed on 6 June 2003 at Phnom Penh.[8] Finally, there is no article on applicable law in the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon ("Lebanon Tribunal") annexed

3 See Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 -1 October 1946, published at Nuremberg, Germany, 1947, volume I, Official Documents, at 10.

4 See J. Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authoritative Commentary and Comprehensive Guide*, A collection of 124 volumes, Volume 2 (1998).

5 SC Resolution 827 (1993).

6 SC Resolution 955 (1994).

7 The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and its Annex containing the Special Court Statute done at Freetown on 16 January 2002 are available at http://www.sc-sl.org/documents.html.

8 All legal texts relating to the ECCC are available at http://www.eccc.gov.kh.

to Resolution 1757 (2007) adopted on 30 May 2007 by the Security Council of the United Nations, although the Statute of the Special Tribunal for Lebanon (which is also attached to Resolution 1757 (2007)) contains a Section I entitled "Jurisdiction and applicable law". Article 2 within that section deals with "Applicable criminal law", but refers only to the applicability (subject to the provisions of the Statute) of some provisions of the Lebanese Criminal Code and articles 6 and 7 of the Lebanese Law of 11 January 1958 on "increasing the penalties for sedition, civil war and interfaith struggle".

The authors of the Rome Statute have been far more ambitious or simply cautious. This is understandable since the ICC is a permanent court with a far-reaching jurisdiction. More interestingly, they did not follow the sources of international law described in Article 38 of Statute of the International Court of Justice (ICJ).

Such an article was already included in the successive drafts presented by the International Law Commission (ILC) in 1993[9] and 1994.[10] However, at that time there was a justification for such an inclusion: indeed, in those drafts the jurisdiction of the future International Criminal Court was not to be restricted to the "core crimes" to which the Court's jurisdiction is restricted today, i.e., genocide, crimes against humanity and war crimes. Indeed, in addition to those crimes, the ILC had proposed to include in the jurisdiction of the Court, together with the "core crimes", the so-called "treaty-crimes". Those crimes were mainly related to terrorism and drug trafficking.

It is interesting to observe that, at that time, the ILC draft article on applicable law was limited to what is today paragraph 1 of Article 21 of the Rome Statute and no reference to "internationally recognized human rights" was introduced. Unlike the present Article 21 of the Rome Statute, the ILC draft articles did not seem to establish a hierarchy between the different sources of law, following the precedent of Article 38 of the ICJ Statute which contains a list of the sources of international law without establishing a hierarchy between them.

Therefore, it is striking that the negotiations[11] have introduced a hierarchy between the different sources of law, or one should better say: a multiplicity of hierarchies. There is a hierarchy between the different formal sources of law described in Article 21 (1), combined with a hierarchy between formal sources of law and the material

9 Document A/48/10: Report of the International Law Commission on the work of its forty-fifth session (3 may-23 July 1993), at 111. The text of article 28, entitled "Applicable law", read as follows: "The Court shall apply: (a) this Statute; (b) applicable treaties and the rules and principles of general international law; (c) as a subsidiary source, any applicable rule of national law".

10 Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994; General Assembly, Official Records, Forty-ninth Session, Supplement N°10 (A/49/10), at 103. The text of article 33, entitled "Applicable law", read as follows: "The Court shall apply: (a) this Statute; (b) applicable treaties and the principles and rules of general international law; and (c) to the extent applicable, any rule of national law".

11 In this respect, see the proposals contained in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals), General Assembly, Official Records, Fifty-first Session, Supplement N° 22A (A/51/22), at 104.

source of law[12] described in Article 21 (3), namely "internationally recognized human rights", together with a hierarchy between the different sources of law described in Article 21 (1) (a). To make things more complex, Article 21 refers both to internal sources of law, which could be referred to also as the "proper law of the ICC",[13] and external sources of law.

2. Internal sources of law

The internal sources of law are comprised of two very different bodies of law: legal texts on the one hand, which the Court has to apply and which are based on a very delicate hierarchy, and the jurisprudence of the ICC itself, which is a non-binding source of law.

2.1. The applicable legal texts and their hierarchy

In accordance with Article 21 (1) (a), the Court shall apply in the first place the Statute, Elements of Crimes and its Rules of Procedure and Evidence.[14]

The Elements of Crimes[15] do certainly constitute a particular text in the trilogy contained in paragraph 1 (a). In order to understand their exact status before the International Criminal Court, one has to refer to Article 9 of the Rome Statute where it is explained that the Elements of Crimes (although they must be applied by the Court) are not binding upon it, but are meant to be of assistance to the Court in the interpretation and application of Articles 6, 7 and 8. Indeed, the way in which the Elements of Crimes have been drafted and adopted by the Assembly of States Parties differs evidently from the drafting of the Statute and the Rules of Procedure and Evidence, especially through the presence of extensive footnotes in the text. The exact relationship between the Elements of Crimes and the Statute has not been elaborated in the jurisprudence of the Court although the Pre-Trial Chambers have made reference to them.[16]

12 On the distinction between formal sources of law and material sources of law in Article 21, see A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (2002), Volume II, at 1051.

13 Ibid.

14 Rules of Procedure and Evidence, adopted by the Assembly of States Parties to the Rome Statute, in accordance with article 51 of the Rome Statute, at its first session in New-York, 3-10 September 2002, Official Records, ICC-ASP/1/3 (Part II-A).

15 Elements of Crimes, adopted by the Assembly of States Parties, in accordance with article 9 of the Rome Statute, at its first session in New-York, 3-10 September 2002, Official Records, ICC-ASP/1/3 (Part II-B). See also the contribution by O. Triffterer in Ch. 21 of this volume.

16 Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on the Confirmation of the Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras 205 and 240; Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") *and Ali Muhammad Al Abd-Al-Rahman* ("Ali Kushayb"), Decision on the Prosecution Application under

Article 21 should provide an exhaustive list of sources of applicable law before the Court: in other words, all legal arguments presented by participants before the Court and all decisions of the Court should be based on the sources of law stipulated in that article.

Indeed, Regulation 23 of the Regulations of the Court, which describes the content of documents presented to the Court by participants in proceedings, obliges the latter to state, "as far as practicable, (…) (d) all relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon".

The pivotal issue of the applicable law relied upon by the participants in the proceedings proved to be controversial since the very start of the jurisprudence of the Court. From the beginning, however, the Chambers of the ICC affirmed the supremacy of the Statute and the Rules of Procedure and Evidence.

Already in a decision issued on 9 March 2005,[17] Pre-Trial Chamber I declined to consider the submissions made by the Prosecutor on the basis that "the Prosecutor's concerns in relation to the convening of the status conference should have been raised in accordance with the procedural mechanism provided for in the Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court".

The Chamber reminded the Prosecutor that the only procedural remedy was the one provided for in the Rome Statute, namely a request for leave to appeal under Article 82 (1) (d) of the Statute and concluded therefore that there was no procedural basis for the filing of a so-called "Prosecutor's position". Indeed, the Prosecutor had tried to present his "position", in fact his opposition, following a decision issued by Pre-Trial Chamber I convening a status conference with the Prosecutor concerning the investigation in the situation of the Democratic Republic of the Congo. There was no legal basis in the Statute or the Rules of Procedure and Evidence allowing the Prosecutor, or any other participant, to present such a document to a Chamber, a document which was in fact a statement by the Prosecutor presenting his disagreement in relation to a decision taken by the Chamber.

This happened again before Pre-Trial Chamber II,[18] assigned with the situation of Uganda, which followed the decision issued by Pre-Trial Chamber I:

> "13. The Chamber wished to point out in this context that neither the Statute nor the Rules of Procedure and Evidence allow participants to communicate positions on chamber decisions to the Chamber and to have them filed as part of the record of the proceedings. Participants in proceedings before the Court must comply with the procedures provided for in the Statute and the Rules when making submissions to the Chamber.

Article 58 (7) of the Statute, 27 April 2007, ICC-02/05-01/07-1, paras 29 and 43. All decisions by the ICC Chambers are available at http://www.icc-cpi.int/cases.html.

17 Pre-Trial Chamber I, Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, 9 March 2005, ICC-01/04-11.

18 Pre-Trial Chamber II, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes From the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, 28 October 2005, ICC-02/04-01/05-60.

> They cannot freely choose the form in which they present their views to the Chamber. Compliance with procedural requirement is necessary, in order to preserve the integrity and transparency of Court proceedings. A "position" is not a procedural remedy under the Statute. If the Prosecutor wished to make submissions to the Chamber, which shall be part of the official Court record, such submissions must be presented in the form of a proper judicial motion".

However, there is a hierarchy within the hierarchy and the Statute prevails over the Rules of Procedure and Evidence in accordance with Article 51 (5), of the Rome Statute. In addition, the States Parties, when adopting the Rules of Procedure and Evidence decided to attach the following explanatory note:

> "The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided in Article 51, in particular, paragraphs 4 and 5.
> In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.
> The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings".

As a consequence of this hierarchy strongly underlined by the Assembly of States Parties to the Rome Statute, Pre-Trial Chamber I, in its decision taken on 17 January 2006,[19] decided that:

> "47. With regard to the Prosecutor's argument pertaining to rule 92 of the Rules of Procedure and Evidence, the Chamber must point out that, pursuant to article 51, paragraph 5 of the Statute, the Rules of Procedure and Evidence is an instrument that is subordinate to the Statute. It follows that a provision of the Rules cannot be interpreted in such a way as to narrow the scope of an article of the Statute."

At this point in time, there is no decision of the International Criminal Court setting aside a rule because of its inconsistency with the Statute. Problems of compatibility between these two fundamental texts may, however, arise in the future. During the negotiations of the Rules of Procedure and Evidence, many States which were not satisfied with some provisions of the Statute, tried to reach, through the Rules of

19 Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr.

Procedure and Evidence, what they referred to as an "appropriate application of the Statute".

In addition, the Statute and the Rules of Procedure and Evidence, as first sources of law before the ICC, refer to other texts which play a very important role in the jurisprudence of the Court, such as the Regulations of the Court,[20] the Regulations of the Registry,[21] the Code of Professional Conduct for Counsel[22] and the Regulations of the Trust Fund for Victims.[23] Those texts indicate clearly that the Regulations of the Registry are subject to the Regulations of the Court,[24] which are in turn subject to the Rules of Procedure and Evidence,[25] which are subject to the Rome Statute as explained above. The legal system established by the Rome Statute is therefore already a beautiful pyramid, composed of at least four different layers which represent a sum of 702 articles, rules and regulations. This means of course (as noted by the Appeals Chamber of the ICC[26]) that the Regulations of the Court, for example, are subject to the Rome Statute. The same applies obviously to the Regulations of the Registry, which are at the bottom of the pyramid.

The Code of Professional Conduct for Counsel does not indicate its exact position within this complex hierarchy. It does, however, affirm its primacy towards national law in its Article 4:

> "Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel when practicing before the Court".

20 Regulations of the Court, adopted by the Judges of the International Criminal Court on 26 May 2004 in accordance with Article 52 of the Rome Statute, and as amended on 14 June and 14 November 2007, ICC-BD/01-02-07, available at http://www.icc-cpi.int/about/Official_Journal.html.

21 Regulations of the Registry, approved by the Presidency in accordance with rule 14 of the Rules of Procedure and Evidence, entered into force on 6 March 2006 and first revised on 25 September 2006, ICC-BD/03-01-06-Rev.1, available at http://www.icc-cpi.int/about/Official_Journal.html.

22 Code of Professional Conduct for Counsel adopted by the Assembly of States Parties to the Rome Statute in accordance with rule 8 of the Rules of Procedure and Evidence on 2 December 2005, ICC-ASP/4/Res.1, available at http://www.icc-cpi.int/about/Official_Journal.html.

23 Regulations of the Trust Fund for Victims adopted by the Assembly of States Parties to the Rome Statute in accordance with article 79 of the Rome Statute, on 3 December 2005, ICC-ASP/4/res.3, available at http://www.icc-cpi.int/about/Official_Journal.html.

24 See Regulations of the Registry, Regulation 1.

25 See Regulations of the Court, Regulation 1.

26 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, para. 43.

Unlike the Regulations of the Court or the Regulations of the Registry, the text of the Regulations of the Trust Fund for Victims does not contain any reference concerning its placement in the above-mentioned pyramid.

2.2. The case law of the ICC

According to Article 21 (2) of the Rome Statute, the ICC may apply its own case law, but is not bound to do so. The paragraph does not make any difference between jurisprudence of the pre-trial, trial or appeals chambers of the Court.

Existing case law was applied very soon in the jurisprudence of the ICC. On 28 October 2005,[27] Pre-Trial Chamber II, noting article 21, paragraph 2, of the Rome Statute, made reference to a decision issued by Pre-Trial Chamber I on 9 March 2005 concerning the necessity for the participants to abide by procedural remedies provided for in the Statute.

On 31 March 2006, Pre-Trial Chamber I[28] decided to follow the principles established by Pre-Trial Chamber II concerning the interpretation of article 82 (1) (d) of the Rome Statute:

> "18. Article 21 (2) of the Statute allows the Court to apply principles and rules of law as interpreted in its previous decisions. Accordingly, in the opinion of the Chamber, the principles set out in the Decision of Pre-Trial Chamber II should be applied here."

On recent occasions, Pre-Trial Chamber I, has made reference to its own case law, the case law of Pre-Trial Chamber II and the case law of the Appeals Chamber, without giving a superior weight to the case law of the Appeals Chamber.[29]

The same Pre-Trial Chamber has referred to its own case law[30] affirming that it was consistent with the case law of the Appeals Chamber, although no explanation concerning the need for such a consistency was provided:

> "Considering further that, according to the case law of this Chamber (i) the analysis of whether victims' personal interests are affected under article 68 (3) of the Statute is to be conducted in relation to "stages of the proceedings", and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings; (ii) the investigation of a situation and the pre-trial phase of a case are stages of the proceed-

27 See above *supra* note 18.

28 Pre-Trial Chamber I, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tEN.

29 Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, 9 April 2008, ICC-01/04-01/07-384.

30 Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008, ICC-01/04-01/07-357.

> ings in relation to which the analysis of whether victims' personal interests are affected under article 68 (3) of the Statute is to be conducted; and (iii) this interpretation is consistent with the Decision of the Appeals Chamber of 13 June 2007".

In the same decision, Pre-Trial Chamber I mandated the participants in the proceedings to take into consideration its own case law when making observations. Of course, in accordance with Article 21 (2), if the Court is not bound by its case law, it is difficult to argue that the participants should be bound by it. Therefore, the use of "should" in the decision:

> "Considering that, in order to determine the set of procedural rights attached to the status of victim at the pre-trial stage of the present case, the Single Judge considers necessary to obtain the observations of the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui and of those granted the procedural status of victim in the present decision; and that the previous case law of the Chamber on this matter in the case of The Prosecutor v. Thomas Lubanga Dyilo should be taken into consideration in making such observations".

Article 21 (2) leaves a lot of discretion to the ICC concerning the use of its case law and it seems that Chambers of the ICC have used such discretion: indeed, some Chambers have heavily relied on their own case law; the case law of the Appeals Chamber does not seem to be placed on a higher level than the case law of other Chambers of the Court, which seems to be in line with the wording of Article 21 (2) which refers to the Court and does not give a particular weight to the jurisprudence of the Appeals Chamber. This will certainly produce some instability in the jurisprudence of the ICC for the next decades as Chambers are not bound by their previous case law and the modification of their composition, taking into consideration the fact that judges shall hold office for a term of nine years and are not eligible for re-election,[31] may provoke important changes in the jurisprudence in all Chambers of the ICC, including the Appeals Chamber. As a matter of fact, the present Appeals Chamber will dramatically change its composition in March 2009 as 3 out of 5 Judges are leaving the Court at that time.

However, it may be interesting for a Court whose Statute is so difficult to amend[32] and may remain substantially unchanged for a long time, to have more flexibility as far as the evolution of the case law is concerned.

3. External sources of law

Article 21 of the Rome Statute refers to two very different bodies of external sources of international law. Article 21 (1) (b) and (c) refer to different formal sources of law as subsidiary sources of law to be applied by the Court. Article 21 (3) refers to a material

31 See Article 36, paragraph 9 (a) of the Rome Statute.

32 See Article 121 of the Rome Statute.

source of law, namely "internationally recognized human rights", which seem to enjoy a superior status before the Court.

3.1. Subsidiary sources of law

Article 21 (1) refers to two different formal sources of law: the applicable treaties and principles and rules of international law, mentioned in paragraph 1 (b) on the one hand, and the general principles of law, mentioned in paragraph 1 (c) on the other hand.

Those two sources of law are, however, subsidiary to the internal sources mentioned in paragraph 1 (a), namely the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. They are also precisely ranked: paragraph 1 (b) is a second source of law whereas paragraph 1(c) is a third source of law.[33]

Indeed, in accordance with Article 21 (1) (b), the Court shall apply, 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. No hierarchy is indicated between the "applicable treaties" and the "principles and rules of international law".

And failing that, the Court shall apply 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.

The Appeals Chamber has, however, ruled that the application of these second or third sources of law is subject to the same condition: the existence of a gap in the Statute.[34]

The first decision in this respect is in fact the first decision issued by the ICC Appeals Chamber which shows that the issue of applicable law has been crucial for the development of the ICC jurisprudence from the very beginning. Much remains to be decided in this respect.

On 24 April 2006, the Prosecutor presented to the Appeals Chamber an application entitled "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal". The application was extraordinary, indeed. Nothing in the Statute provides for the possibility to appeal a decision denying leave to appeal. According to the Prosecutor, this was simply a lacuna in the law established by the Statute and the Rules of Procedure and Evidence, which could remedied by resorting to the general principles of law referred to in Article 21 (1) (c) of the Statute.

33 Appeals Chamber, Situation, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 34.

34 Ibid.

The existence of a gap in the Statute was analysed by the Appeals Chamber in its decision issued on 13 July 2006[35] concerning the Prosecutor's application for extraordinary review. In order to do so, the Appeals Chamber had to interpret the Statute and in doing so stated the obvious which is that the Rome Statute is a treaty and that its interpretation is to be governed by the Vienna Convention on the Law of Treaties, more specifically, Articles 31 and 32 of that convention.

The Appeals Chamber, analysing the text of Article 82 (1) (d) of the Rome Statute and more generally the entire Part 8 of the Statute dealing with appeal and revision, decided that the Rome Statute defines exhaustively the right to appeal against decisions of Pre-Trial and Trial Chambers and that there is no gap in the regime of interlocutory appeals established by the Statute. This was, according to the Appeals Chamber, confirmed by the *travaux préparatoires* and by the fact that a proposal by a State to provide for an appeal against a refusal of leave to appeal was rejected. The Appeals Chamber then concluded:

> "The inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor is inexistent".[36]

Therefore, a gap in the Statute may be defined as an "objective" which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules of Procedure and Evidence, thus obliging the judge to resort to the second or third source of law – in that order – to give effect to that objective. In short, the subsidiary sources of law described in Article 21 (1) (b) or (c) cannot be used just to add other procedural remedies to the Statute and the Rules of Procedure and Evidence. In this sense, we see continuity in the jurisprudence of the ICC concerning the respect of the Statute and the Rules of Procedure and Evidence, as was already decided by both Pre-Trial Chamber I and Pre-Trial Chamber II in their above mentioned decisions issued in March and October 2005 concerning the "Prosecutor's positions".

It is likely that the interpretation of the different Chambers of the Court is going to restrict the application of both Article 21 (1) (b) and (c), and will as a consequence give full effect to the superiority of the Statute and the Rules of Procedure and Evidence regarding the procedural framework of the International Criminal Court – a result certainly intended by the States when drafting the Rome Statute and the Rules of Procedure and Evidence.

In fact, requiring the existence of a gap in the Statute or the Rules of Procedure and Evidence before the application of Article 21 (1) (b) or (c) simply restricts the

35 See Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 33-42.

36 Ibid., para. 39.

capacity of the sources of law to add to the procedural features of the Statute and the Rules of Procedure and Evidence; therefore, the decision by the Appeals Chamber is a clear affirmation that the external sources of law described in Article 21 (1) (b) and (c) are subsidiary sources of law and not additional sources of law. They will only be applied when a gap arises in the application of the Statute or the Rules of Procedure and Evidence which has to be filled by subsidiary sources in order to give effect to the provisions of the Statute or the Rules of Procedure and Evidence.

Of course, this means that the application of sources of law before the International Criminal Court is going to be much less flexible than it has been before the ICTY or the ICTR. But this is certainly the result that States intended when they drafted a very precise Statute of 128 articles and very precise Rules of Procedure and Evidence comprised of 225 rules.

However, even if there is a gap in the Statute or the Rules of Procedure and Evidence, it may not be easy to find a "principle or rule of international law" or "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 the Statute and with international law and internationally recognized norms and standards". What is to be understood by "applicable treaties and principles and rules of international law" under Article 21 (1) (b), has not been addressed by the Appeals Chamber in its decision of 14 December 2006[37] because there was no noticeable gap in the Statute or Rules of Procedure and Evidence.

The most exciting issue in relation to Article 21 (1) (b) has been the relevance of the jurisprudence of the *ad hoc* tribunals in the context of ICC proceedings. This topic is an ongoing and vivid matter of discussion before the ICC since participants have tended to refer to the jurisprudence of both *ad hoc* tribunals constantly in their submissions to the ICC. The jurisprudence of these tribunals, however, is not as such part of the applicable law under Article 21 of the Rome Statute, although the proceedings and jurisprudence of these tribunals have had a considerable degree of attraction for participants in ICC proceedings. The popularity of the jurisprudence of the *ad hoc* tribunals may be explained by two reasons: it is more easy to rely on a system which has been working for almost fifteen years instead of contributing to the development of a new system, which appears both more complex and more controversial because it combines elements of the civil law and the common law traditions (as opposed to the *ad hoc* tribunals which were initially essentially relying on the common law tradition); secondly, many people have been recruited by the ICC who have worked at the *ad hoc* tribunals for years and have become acquainted with their practices. These persons are naturally inclined to import rules of the system of the *ad hoc* tribunals to the ICC. The application of the jurisprudence and practices of the *ad hoc* tribunals before the ICC is thus both a sociological and a legal problem.

Indeed, if the ICC was only meant to follow the Statute, Rules of Procedure and Evidence and jurisprudence of the *ad hoc* tribunals, it would be difficult to justify why States have negotiated the Statute and Rules of Procedure and Evidence of the ICC

37 See *supra* note 33, para. 34.

for so many years although they could have just referred to the Statute and Rules of the *ad hoc* tribunals. Obviously, States wanted to establish a different system for the ICC; in addition, one may notice that, contrary to the Statute of the SCSL, the Rome Statute makes no reference to the jurisprudence of the *ad hoc* tribunals.[38]

This important issue was first dealt with by Pre-Trial Chamber II in its decision issued on 28 October 2005, which answered to the argument concerning the relevance of the jurisprudence of the *ad hoc* tribunals for the ICC in the following way:

> "19. As to the relevance of the case law of the ad hoc tribunals, the matter must be assessed against the provisions governing the law applicable before the Court. Article 21, paragraph 1, of the Statute mandates the Court to apply its Statute, Elements of Crimes and Rules of Procedure and Evidence "in the first place" and only "in the second place" and "where appropriate", "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts". Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such "applicable law", before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the court's procedural framework remedies other than those enshrined in the Statute."[39]

This problem was once again addressed in a decision issued by Pre-Trial Chamber I on 8 November 2006.[40] In this decision, the Prosecutor asserted that "the practice of witness proofing as defined by the Prosecutor was widely accepted practice in international criminal law", thus referring, albeit implicitly, to Article 21 (1) (b).

To support his submission, the Prosecutor mentioned two decisions of the International Criminal Tribunal for the Former Yugoslavia and one decision of the Special Court for Sierra Leone. In fact, according to the Chamber, only one of the three decisions mentioned by the Prosecutor expressly authorized the practice of witness proofing and therefore the Chamber concluded that the prosecution assertion that the practice of witness proofing was a widely accepted practice in international criminal law was unsupported.

The question which should have been answered first is to what extent "practices in international criminal law" may be seen as "principles and rules of international

38 By contrast, see Article 20 (3) of the Statute of the SCSL which states: "The Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda".

39 See Pre-Trial Chamber II, *Prosecutor v. Kony et al.,* Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, ICC-02/04-01/05-60, PTC II, 28 October 2005, para. 19. See also below the analysis by V. Nerlich, Ch. 17.

40 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, II-01/04-01/06-679, paras 28-34.

law" under Article 21 (1) (b) of the Rome Statute. Moreover, it remains to be seen if Chambers of the International Criminal Court will accept a concept of "practices in international criminal law" at all.

Indeed, it seems doubtful whether the concept of "international criminal practice" exists in reality. "International criminal proceedings" are widely fragmented as a result of the unprecedented development of "internationalized" or "mixed" criminal tribunals which follow very different approaches as far as criminal procedural law is concerned. For example, if one takes a closer look at the issue of the participation of victims in criminal proceedings, one may already observe at least three different types of approaches: (i) the practice of the ICTY, the ICTR and the SCSL is closely based on the common law model which traditionally does not provide at all for the participation of victims in the proceedings; (ii) the Khmer Rouge Tribunal[41] follows the civil law model which allows victims to participate in the proceedings as full parties; and, finally (iii), somewhere between those two approaches, are the ICC[42] and the Lebanon Tribunal[43] which allow for the participation of victims in proceedings but with a somewhat undefined status. "International criminal practice" has become as diverse as national criminal practice. International criminal practice is thus at the moment, and certainly for a long time, a "mirage" in international law.

This is reflected in the position of Trial Chamber I,[44] which was confronted with the issue of witness proofing at the request of the Prosecutor of the ICC. The Trial Chamber I noted:

> "43. Turning to the practices of international criminal tribunals and courts, the prosecution submitted that the practice of witness proofing is here permissible, endorsed and well established. The Trial Chamber notes, as has been established by recent jurisprudence from the International Criminal Tribunals of the former Yugoslavia and Rwanda, that witness proofing, in the sense advocated by the prosecution in the present case, is being commonly utilized at the ad hoc Tribunals.
> 44. However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this

41 See Internal Rules for the Extraordinary Chambers in the Courts of Cambodia, adopted on 12 June 2007, especially rule 23 on "Civil Party Action by Victims". See also Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, in the Case 002/19-09-2007-ECCC/OCIJ (PTC01), Nuon Chea.

42 See Articles 15 (3), 19 (3) and 68 (3) of the Rome Statute and Rules 50, 59 and 89 to 93 of the Rules of Procedure and Evidence.

43 Article 17 of the Statute of the Special Tribunal for Lebanon is a copy of Article 68 (3) of the ICC Statute.

44 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007.

> would not, ipso facto, prevent all procedural issues from scrutiny under Article 21 (1) (b), the Chamber does not consider the procedural rules and jurisprudence of the *ad hoc* Tribunals to be automatically applicable to the ICC without detailed analysis.
> 45. The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and the Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence of the ad hoc tribunals, the Chamber is not persuaded that the application of the ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate".

If ICC Chambers have been cautious with regard to the rules and jurisprudence of *the ad hoc* tribunals as far as procedural law is concerned, a slighty picture prevails in the area of substantive criminal law. Pre-Trial Chamber I found that neither the Statute nor the Elements of Crimes provide for a definition of an international armed conflict.[45] In reaching a conclusion on this issue, the Chamber relied on the jurisprudence of the ICTY Appeals Chamber on the basis of Article 21 (1) (b) in order to determine the definition of an international armed conflict was. The same was done in respect of the definition of an armed conflict not of an international character.[46] The same methodology was also used to determine the necessary nexus between the armed conflict and the alleged war crimes concerned.[47] But Pre-Trial I refused to adopt the jurisprudence of the ICTY on modes of liability, especially the concept of "joint criminal enterprise", taking into consideration the specific wording of article 25 (3) of the Rome Statute.[48]

What is to be understood by "general principles of law" under Article 21 (1) (c)? In its decision dated 13 July 2006,[49] the Appeals Chamber did not try to provide an interpretation of all the conditions set up by this paragraph. In his elaborate application to the Appeals Chamber, the Prosecutor sought to demonstrate that there was a general principle of law to the effect that any decision of a first instance court could be appealed, especially a decision disallowing an appeal to a higher court. The

45 See Pre-Trial Chamber I, *supra* note 16, paras. 205-211. For an analysis, see also the contribution by S. Sivakumaran in Ch. 20 of this volume.

46 Ibid., para. 233.

47 Ibid., para. 287.

48 Ibid., paras 322-341. See on this point also the contributions by S. Wirth and H. Olasolo in Ch. 18 amd 19 of this volume.

49 See *supra* note 35.

Prosecutor referred to 14 countries from the civil law system, 4 countries from the common law system and 3 countries from the Islamic law system.

In its decision, the Appeals Chamber did not define what is to be understood by "general principles of law derived by the Court from national laws of legal systems of the world". It may be difficult to ever find such a principle in the field of criminal procedural law as the laws vary considerably from one country to the other even in the same legal system.

But even if such a principle existed, it would be difficult to apply it before an international criminal court since the structure of courts in a State is fundamentally different from the structure of an international court. The Appeals Chamber dismissed the Prosecutor's submission in its decision issued on 13 July 2006 on the basis that "nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal".

This issue was raised again in the context of witness proofing. The Prosecutor invoked Article 21 (1) (c) in order to establish the existence of a general principle of law concerning the practice of witness proofing. Trial Chamber I rejected this argument on the ground that Prosecutor had only referred countries from the common law tradition in his submission. The Chamber noted:

> "However, the Trial Chamber does not consider that a general principle of law allowing the substantive preparation of witnesses prior to testimony can be derived from national legal systems worldwide, pursuant to Article 21 (1) (c) of the Statute. Although this practice is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution's submission with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system."[50]

This finding shoes once again that the external sources mentioned in Article 21 (1) (b) and (c) of the Rome Statute will be of limited use before the ICC. The most important source of law (in addition to the Statute and Rules of Procedure and Evidence) is likely to be Article 21 (3) of the Statute, i. e., "internationally recognized human rights".

3.2. "Internationally recognized human rights" as source of law before the ICC

Long before the first jurisprudence of the ICC, some authors have pointed out the consequences which Article 21 (3) may have on the application of the Statute:

> "While the original intention behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a

50 See Trial Chamber I, *supra* note 44, at 41.

> standard against which all the law applied by the court should be tested. This is a sweeping language, which, as drafted, could apply to all three categories in Article 21."[51]

Article 21 (3) raises two interesting issues. The first question is what is to be understood by "internationally recognized human rights"; the second one concerns the role of "internationally recognized human rights", i. e. the meaning of "application and interpretation".

3.2.1. What are "internationally recognized human rights"?

The Statute does not provide any definition concerning the scope of this source of law. This provision may encompass a quite broad category of rights especially if compared with the language used in Article 7 (1) (h) of the Rome Statute which uses the expression "grounds that are universally recognized as impermissible under international law"; thus, "internationally recognized human rights" represent arguably a broader category of human rights which do not have to reach the level "universal recognition".[52] Of course, the interesting question then arises: is regional recognition sufficient?

It seems that the jurisprudence of the Court has given a broad meaning to "internationally recognized human rights". It has relied heavily on the jurisprudence of regional courts such as the European Court of Human Rights and the Inter American Court of Human Rights, and also on resolutions adopted by the United Nations General Assembly.

Indeed, when defining "harm suffered" in Rule 85 of the Rules of Procedure and Evidence in the context of the participation of victims, Pre-Trial Chamber I[53] referred to the "Declaration of Basic Principles of Justice For Victims of Crime and Abuse of Power" adopted by the United Nations General Assembly on 29 November 1985 and to the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law" ("Basic Principles") adopted by the United Nations General Assembly on 16 December 2005. Likewise, Trial Chamber I[54] referred to the UN "Basic Principles" adopted in December 2005 as authoritative source for the definition of victims.

But it is certainly the jurisprudence of the European Court of Human Rights which has been referred to most; and, to a lesser extent, also the jurisprudence of the Inter-American Court of Human Rights.

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51 See M. Arsanjani, 'The Rome Statute of the International Criminal Court', (1999) 93 *American Journal of International Law*, at 22.

52 G. Edwards, 'International Human Rights Challenges to the New International Criminal Court: the Search and Seizure Right to Privacy', (2001) 26 *Yale Journal of International Law*, at 323.

53 See Pre-Trial Chamber I, *supra* note 28, para. 115.

54 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, para. 35.

Pre-Trial Chamber I made reference to the case law of both courts in relation to the right to liberty:

> "11. In the Chamber's view, the review which article 58 (1) of the Statute requires tat the Chamber undertake consistent with the fact that, apart from other collateral consequences of being the subject of a case before the Court, the fundamental right of the relevant person to his liberty is at stake. Accordingly, the Chamber emphasizes that it will not take any decision limiting such a right on the basis of applications where key factual allegations are fully unsupported.
> 12. As required by Article 21 (3) of the Statute, the Chamber considers this to be the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5 (1) (c) of the European Convention of Human Rights and the interpretation of the Inter American Court of Human Rights in respect of the fundamental right of any person to liberty under article 70f the American Convention on Human Rights".[55]

To give another example, the ICC Appeals Chamber referred to the case law of the European Court of Human Rights to underline the importance of sufficient reasoning in judicial decisions and to allow the use of anonymous witnesses in the context of the confirmation of the charges.[56]

3.2.2. The meaning of "interpretation and application"

The Court must ensure that the interpretation and application of the law described in Article 21 of the Rome Statute is consistent with internationally recognized human rights, thus subordinating all formal sources of law described in Article 21, including the Statute and the Rules of Procedure and Evidence to internationally recognized human rights.

ICC Chambers have shared different interpretations of the notions "interpretation and application".

Pre-Trial Chamber I has read "interpretation and application" to mean only "interpretation", thus adopting a restrictive reading of Article 21 (3).

In a decision issued on 10 March, Pre-Trial Chamber I[57] stated the following:

> "Considering that, as this Chamber has repeatedly stated, the Chamber, in determining the contours of the statutory framework provided for in the Statute, the Rules and

55 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, Annex I to decision issued on 24 February 2006, ICC-01/04-01/06-8-Corr.

56 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, paras 20 and 50.

57 Pre-Trial Chamber I, *Prosecutor v. Germain Katanga*, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, ICC-01/04-01/07-257.

> Regulations, must, in addition to applying the general principle of interpretation set out in article 21 (3) of the Statute, look at the general principles of interpretation as set out in article 31 (1) of the Vienna Convention on the Law of Treaties, according to which 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'".

However, in international law, a distinction must be made between the rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and the material source of law, such as the one stipulated in article 21, paragraph 3, which refers to internationally recognized human rights.

The ICC Appeals Chamber has underlined the importance of the fact that, pursuant to article 21 of the Rome Statute, the applicable law must not only be interpreted, but also be applied in accordance with internationally recognized human rights. It held:

> "37. Breach of the right to freedom by illegal arrest or detention confers a right to compensation to the victim (see article 85 (1) of the Statute. Does the victim have any other remedy for or protection against breaches of his/her basic rights? The answer depends on the interpretation of article 21 (3) of the Statute, its compass and ambit. Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it including the exercise of jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights".[58]

It appears therefore that "application" is something different from "interpretation". It implies that a certain result must be reached, whether it is or not explicitly or implicitly provided for in the law applicable in accordance with Article 21, and that such a result must be in conformity with internationally recognized human rights.

This means: for the application of subsidiary sources of law such as those described in Article 21 (1) (b) or (c), a certain objective must be found in the Statute or the Rules of Procedure and Evidence, as primary sources of law, which is not given effect by those sources;[59] in the context of Article 21 (3), however, the objective is to be found in internationally recognized human rights; hence, the application of the Statute, Rules of Procedure and Evidence and other subsidiary sources of law set out in article 21 (1) will always have to produce a result compatible with internationally recognized human rights, even if such an objective does not appear from the application of the Statute, Rules of Procedure and Evidence or subsidiary sources of law provided in Article 21 (1), as interpreted in accordance with the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties adopted on 23 May 1969.

58 See Appeals Chamber, *supra* note 33, para. 37.

59 See above concerning the "subsidiary sources of law" before the ICC.

4. Conclusion

This interpretation supports the conclusion that internationally recognized human rights may constitute an additional source of law. They might, for instance, provide additional procedural remedies to participants in the proceedings which were not foreseen in the Statute or the Rules of Procedure and Evidence. This will certainly be very useful for persons prosecuted before the ICC and victims participating in the proceedings before the ICC. For example, one procedural remedy may be the obligation of the ICC to renounce to exercise its jurisdiction in case of a fundamental violation of the human rights of the person prosecuted. Such a remedy is not provided for in the Statute or the Rules of Procedure and Evidence,[60] which appear to limit the right of the victim of such a violation to the right to receive compensation in accordance with Article 85 of the Rome Statute.

According to a more controversial interpretation of Article 21 (3), this provision might serve as a basis to set aside an article of the Statute which is in contradiction with internationally recognized human rights.[61]

In future practice, the time may come where the Court will have to review the compatibility of certain articles of the Statute with internationally recognized human rights. One of these controversial articles is Article 16 which allows a political body, the Security Council of the United Nations, to interfere with prosecutions conducted by a judicial body, the ICC. Such interference would certainly be in breach of article 6 of the European Convention of Human Rights which establishes the requirement of an independent tribunal. It remains to be seen whether the ICC will in fact set aside a Chapter VII resolution of the Security Council requesting the Court not to proceed with a prosecution under Article 16. However, it is difficult to deny that such an intervention in an ongoing case before the ICC would be incompatible with internationally recognized human rights.

60 See Appeals Chamber, *supra* note 58, at paragraph 38, with reference to the *Teixeira de Castro v. Portugal* before the European Court of Human Rights concerning entrapment by undercover agents.

61 See G. Hafner & C. Binder, 'The Interpretation of Article 21 (3) ICC Statute, Opinion Reviewed', (2004) 9 *Austrian Review of International and European Law*, at 163. The authors maintain that Article 21 (3) of the Rome Statute cannot be used to set aside an article from the Statute.

Chapter 17 The status of ICTY and ICTR precedent in proceedings before the ICC

*Volker Nerlich**

1. Introduction

In his foreword to Archbold International Criminal Courts, Justice Richard Goldstone, the first prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), remarked that the judges and the first prosecutor of the International Criminal Court (ICC, or Court) are in a fortunate position because they can build on the precedent of the ICTY and of the International Criminal Tribunal for Rwanda (ICTR).[1] And indeed, in the proceedings before the ICC thus far, both the filings of the participants[2] and the decisions of the Chambers[3] often contain references to the

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1 R. Goldstone, 'Foreword', in R. Dixon et al. *Archbold International Criminal Courts* (2003), vii.

2 See, for example, Prosecution's Response to Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Situation in the Democratic Republic of Congo, ICC-01/04-316, 5 December 2006, at paras 13 et seq.; *Prosecutor v. Lubanga Dyilo,* Defence submissions on the scope of the right to appeal within the meaning of Article 82 (1) (b) of the Statute, ICC-01/04-01/06-812, 7 February 2007, paras. 28 et seq.; Prosecution's submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06-952, 12 September 2007, paras. 18 et seq.; Defence Submission on the Subjects that Require Early Determination: Trial Date, Languages to be Used in the Proceedings, Disclosure and E-court Protocol, ICC-01/04-01/06-960-tENG, 24 September 2007, para. 25.

3 See, for example, *Prosecutor v. Kony et al.*, Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, PTC II, 19 August 2005, paras. 16 et seq.; *Prosecutor v. Lubanga Dyilo,* Decision on the Final System of Disclosure and the Establishment of a Time Table, ICC-01/04-01/06-102, PTC I, 15 May 2006, para. 14; Decision Establishing General Principles Governing Applications to Re-

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jurisprudence of the two *ad hoc* tribunals of the United Nations. Given the impact that decisions of international courts have had on the development of international criminal law,[4] this reliance on precedent from the *ad hoc* tribunals does not come as a surprise, in particular because the tribunals are the immediate predecessors of the Court. Their mere existence has had a tremendous impact on the drafting of the Rome Statute[5] and of the subsidiary legal instruments of the ICC,[6] notably the Court's

strict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr, PTC I, 19 May 2006, fn. 9 and 10; Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, PTC I, para. 19, fn. 18; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', ICC-01/04-01/06-776, AC, 14 December 2006, para. 20; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824, AC, 13 February 2007, paras. 122 et seq.

4 See G. Werle, *Principles of International Criminal Law* (2005), mn. 148.

5 Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF.183/9; available at <www.icc-cpi.int> (last visited on 20 January 2008).

6 See, for example, in relation to the drafting of the Rome Statute, Women's Caucus for Gender Justice in the International Criminal Court, 'Additional Recommendations & Commentary for Working Group II (Articles 28, 29, 38 and 43)', 8 November 1997, 2; United Nations High Commissioner for Refugees, 'UNHCR and the Establishment of an International Criminal Court', June 1998, para. 5; 'Proposal submitted by Croatia, Article 71, Sensitive national security information', 29 June 1998, UN Doc. A/CONF.183/C.1/WGPM/L.31; in relation to the drafting of the ICC Rules of Procedure and Evidence, see the references to the ICTY Rules of Procedure and Evidence in the influential 'Proposal submitted by Australia/Draft Rules of Procedure and Evidence of the International Criminal Court', 26 January 1999, ICC Doc. PCNICC/1999/DP.1; see also the undated 'Contributions of the Chambers of the International Criminal Tribunals for the Former Yugoslavia Submitted to the 26 July – 13 August 1999 Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court Prepared by the ICC Liaison Committee of the Chambers of the ICTY', the 'Draft Rules of Procedure and Evidence for the International Criminal Court Prepared by a Working Group of the American Bar Association Section of International Law and Practice', 10 February 1999, which are largely based on the ICTY Rules of Procedure and Evidence, and the 'Reference Paper submitted by the United States/Rules of Evidence of the International Criminal Court', 3 April 1998, UN Doc. A/AC.249/1998/DP.15, which was submitted to the Preparatory Committee and where it is stated that '[a] number of the draft provisions are derived, with appropriate modifications, from the Rules of Procedure and Evidence of the Tribunal for the Former Yugoslavia […]'; and in relation to the drafting of the Elements of Crimes the Annex to the 'Request from the Governments of Belgium, Costa Rica, Finland, Hungary, South Africa and Switzerland regarding the text prepared by the International Committee of the Red Cross on Article 8', 19 February 1999, ICC Doc. PCNICC/1999/WGEC/INF.1; the 'Proposal submitted by France: Comments on the proposal submitted by the United States of America concerning Article 6, Crime of

Rules of Procedure and Evidence,[7] the Elements of Crimes,[8] and the Regulations of the Court.[9] The drafters of these instruments considered the ICTY and ICTR as first-hand experience of running complex trials at the international level; and indeed many of the challenges that the ICC is now facing are similar, if not identical, to those that the *ad hoc* tribunals have already faced, and for which they have found solutions. Furthermore, several of the elected officials and of the staff members of the ICC previously worked at the *ad hoc* tribunals, providing them with insider's knowledge of the case law of these institutions.[10]

Nevertheless, some decisions of the Chambers of the ICC have already cast doubt on the exact status of precedent of the ICTY and ICTR in proceedings before the Court. Notably, in one of its first decisions, Pre-Trial Chamber II stated that:

> "As to the relevance of the case law of the ad hoc tribunals, the matter must be assessed against the provisions governing the law applicable before the Court. … [T]he law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute".[11]

More recently, Trial Chamber I held that:

> "[ICTY and ICTR] precedent [on the proofing of witnesses] is in no sense binding on the Trial Chamber at this Court. … [T]he Chamber does not consider the procedural

genocide (PCNICC/1999/DP.4)', 18 February 1999, ICC Doc.PCNICC/1999/WGEC/DP.1, and Women's Caucus for Gender Justice, 'Recommendations and Commentary for the Elements Annex Part I, Submitted to the Preparatory Commission for the International Criminal Court 29 November – 17 December 1999', undated. The above documents are available in the 'Legal Tools' section of the website of the ICC <www.icc-cpi.int>, last visited on 20 January 2008).

7 The Rules of Procedure and Evidence were adopted by the Assembly of States Parties to the Rome Statute on 9 September 2002 pursuant to Art. 51(1) of the Rome Statute; see ICC Doc. ICC-ASP/1/3, Part II-A; available at <www.icc-cpi.int> (last visited on 20 January 2008).

8 The Elements of Crimes were adopted by the Assembly of States Parties to the Rome Statute on 9 September 2002 pursuant to Art. 9 (1) of the Rome Statute; see ICC Doc. ICC-ASP/1/3, Part II-B; available at <www.icc-cpi.int> (last visited on 20 January 2008).

9 The Regulations of the Court were adopted by the plenary of judges of the ICC on 26 May 2004 pursuant to Article 52 (1) of the Rome Statute; see ICC Doc. ICC-BD/01-01-04; available at <www.icc-cpi.int> (last visited on 20 January 2008).

10 At the time of writing, three of the eighteen judges of the Court, the Deputy Prosecutor and the Registrar had previously worked at the ICTY or the ICTR (see the biographical information available at <www.icc-cpi.int>).

11 *Prosecutor v. Kony et al.,* Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, ICC-02/04-01/05-60, PTC II, 28 October 2005, para. 19.

> rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis".[12]

Thus, the ICC seems to be faced with a dilemma: there is a wealth of relevant jurisprudence of the *ad hoc* tribunals, but it is unclear if and how it may be harnessed by the Court. It seems as if the ICC were forced to reinvent the wheel, even though it has already been invented a few kilometres down the road from the Court's headquarters in The Hague.

In light of these uncertainties, the present contribution attempts to survey the status of ICTY and ICTR jurisprudence before the ICC from a methodological perspective. First, the use of precedent before the ICTY and ICTR will be outlined. Then, the role of jurisprudence of the *ad hoc* tribunals under Article 21 of the Rome Statute ('Applicable law') will be addressed. The last section of the present contribution analyses the relevance of decisions of the *ad hoc* tribunals to the interpretation of the Rome Statute and of the other legal instruments of the ICC. A summary of the findings concludes the present analysis.

2. The use of precedent at the ICTY and ICTR – an overview

The *ad hoc* tribunals of the United Nations were established by the Security Council under Chapter VII of the UN Charter in response to specific conflicts – the wars in the former Yugoslavia since 1991 in the case of the ICTY, and the mass atrocities committed in Rwanda in the year of 1994 in the case of the ICTR; the Statutes of the tribunals were annexed to the respective resolutions of the Security Council.[13] The jurisdictional reach of the two tribunals is limited: the ICTY may adjudge 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia';[14] the ICTR has the 'power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.'[15] The Statutes of the *ad hoc* tribunals do not exhaustively regulate their substantive and procedural law. In respect of the substantive law, the *ad hoc* tribunals rely heavily on customary international law to determine the definition of the crimes under the tribunals' jurisdiction as well as the applicable general rules of criminal law.[16]

12 *Prosecutor v. Lubanga,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, TC I, 30 November 2007, para. 44.

13 See UN Security Council Resolution 827 of 25 May 1993, UN Doc. S/RES/827 (1993), and UN Security Council Resolution 995 of 8 November 1994, UN Doc. S/RES/827 (1994).

14 Article 1 of the ICTY Statute.

15 Article 1 of the ICTR Statute.

16 The reliance on customary law is perhaps most pronounced in the ICTY, which has interpreted Article 3 of its Statute as incorporating under the tribunal's jurisdiction all violations of international humanitarian law that, under customary law, entail individual

Large parts of the procedural law are spelt out in the Rules of Procedure and Evidence of the *ad hoc* tribunals, which were adopted (and frequently changed)[17] by the judges of the ICTY and ICTR, sitting in plenary session.[18]

The Statutes of the *ad hoc* tribunals have established a two-tier judiciary: trial chambers consisting of three judges determine whether an accused person is guilty or innocent, and an appeals chamber consisting of five judges hears appeals against convictions or acquittals as well as certain interlocutory appeals.[19]

The leading case on the use of precedent in the ad hoc tribunals is the judgment of the ICTY Appeals Chamber in the *Aleksovski Case*, in which the Chamber held that the trial chambers of the ICTY are bound by the decisions of the Appeals Chamber.[20] The Appeals Chamber determined furthermore that it would, in principle, follow its own previous jurisprudence, unless there are 'cogent reasons to depart from it'.[21]

As to the use of precedent of other courts and tribunals, a trial chamber of the ICTY held in the *Kupreškić Case* that:

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responsibility. See ICTY, *Prosecutor v. Tadić,* Decision on the Defence motion for interlocutory appeal on jurisdiction, IT-94-1-A, AC, 2 October 1995, paras. 87 et seq.

17 At the time of writing, the Rules of Procedure and Evidence of the ICTY have been amended and revised 40 times since their initial adoption on 11 February 1994; the Rules of Procedure and Evidence of the ICTR have been amended 16 times since their initial adoption on 29 June 1995. The Rules of Procedure and Evidence of the ICTY and the ICTR are available at <www.un.org/icty> and <www.ictr.org>, respectively (last visited on 20 January 2008).

18 See Article 15 of the ICTY Statute and Article 14 ICTR Statute, pursuant to which the plenary of judges of the ICTR shall adopt the Rules of Procedure and Evidence of the ICTY 'with such changes as they deem necessary.' Art. 14 of the ICTR Statute does not provide that changes made to the ICTY Rules of Procedure and Evidence are automatically transposed into the ICTR Rules of Procedure and Evidence. On the ICTY Rules of Procedure and Evidence see G. Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY', in G. Boas and W. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2003), 1 et seq.; D. A. Mundis, 'The Legal Character and Status of the Rules and Procedure and Evidence of the *ad hoc* International Criminal Tribunals', (2001) 1 *International Criminal Law Review,* 191-293.

19 The two *ad hoc* tribunals 'share' the same appeals chamber: the ICTY and ICTR Statutes provide that judges of the ICTY Appeals Chamber shall also sit in the Appeals Chamber of the ICTR and *vice versa,* see Article 14 (4) of the ICTY Statute; Article 13 (4) of the ICTR Statute. Until the amendment of 30 November 2000 of the ICTR Statute by the Security Council (see UN Doc. S/RES/1329 [2000]), the ICTY and ICTR Appeals Chamber consisted only of judges of the ICTY. According to the Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995, UN Doc. S/1995/134, para. 9, such institutional links between the two tribunals were necessary to 'ensure a unity of legal approach'. Nevertheless, depending on the origin of the appeal at hand, the Appeals Chamber applies either the ICTY or the ICTR Statute and Rules of Procedure and Evidence.

20 ICTY, Appeals Chamber, *Prosecutor v. Aleksovski,* Judgment, 24 March 2000, Case No. IT-95-14/1-A, para. 113.

21 Ibid., para. 107.

> "Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents *(auctoritas rerum similiter judicatarum)* can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases *(non exemplis, sed legibus iudicandum est)* also applies to the Tribunal as to other international criminal courts". [22]

This approach to the use of precedent is reflected in the practice of the Chambers of the ICTY and the ICTR, which refer frequently to jurisprudence of other international courts such as the International Court of Justice (ICJ) or the European Court of Human Rights (ECHR).[23] At the same time, the *ad hoc* tribunals clearly do not

22 ICTY, *Prosecutor v. Kupreškić et al.,* Judgment, IT-95-16-T, TC, 14 January 2000, at para. 540.

23 For recent examples in the jurisprudence of the ICTY, see *Prosecutor v. Brđanin,* Judgment, IT-99-36-A, AC, 3 April 2007, para. 250 (reference to ECHR cases to determine degree of harm necessary for an act to be classified as torture); *Prosecutor v. Galić,* Judgment, IT-98-29-A, AC, 30 November 2006, para. 87, footnote 271 (reference to ICJ Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons* and to the ICJ's finding that the principle of distinction is 'the cardinal principle' of humanitarian law); *Prosecutor v. Naletilic and Martinovic,* Judgment, IT-98-34-A, AC, 3 May 2006, para. 603, footnote 1310 (reference to ECHR case in which the requirements for reasoned judgment were elicited); *Prosecutor v. Halilovic,* Judgment, IT-01-48-T, TC, November 2005, para. 25 (reference to ICJ judgment in the *Nicaragua Case*, where ICJ held that common Art. 3 of the Geneva Conventions of 1949 was 'minimum yardstick' in armed conflicts), para. 87, footnote 200 (reference to ECHR case to establish that humanitarian law aims at preventing breaches of its norms); *Prosecutor v. Strugar,* Judgment, IT-01-42-T, TC, 31 January 2005, para. 227, footnote 775 (reference to finding of the ICJ in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that Hague Regulations have acquired status of customary international law). On the use of precedent in the ad hoc tribunals see I. Bantekas, 'Reflections on Some Sources and Methods of International Criminal Humanitarian Law', (2006) 6 *International Criminal Law Review*, 121, at 130 et seq.; V.-D. Degan, 'On the Sources of International Criminal Law', (2005) 4 *Chinese Journal of International Law* , 45, at 73 et seq.; C. Harris, 'Precedent in the Practice of the ICTY', in R. May *et al.* (eds.), *Essays*

feel bound by precedent of other international courts or tribunals. This became apparent in the 1999 *Tadić* judgment of the Appeals Chamber of the ICTY, which held that the effective-control test elaborated by the ICJ in *Nicaragua Case*[24] to determine state responsibility for the actions of paramilitary forces was incorrect and that a different test should be applied.[25] Similarly, in a recent decision on witness proofing,[26] a trial chamber of the ICTY did not follow the decision of ICC Pre-Trial Chamber I of 8 November 2006, which had prohibited such practice prior to the confirmation hearing in the *Lubanga Dyilo Case* (a decision that itself was at odds with prior practice of the ad hoc tribunals).[27]

3. ICTY and ICTR precedent and the determination of sources under Article 21 (1) (b) and (c) of the Rome Statute

3.1. The hierarchy of sources in Article 21(1) of the Rome Statute

Pursuant to Article 21 (1) (a) of the Rome Statute,[28] the Court shall apply the Statute, the ICC Rules of Procedure and Evidence, the Elements of Crimes and the Regula-

on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (2000), 341 et seq.; A. Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in Boas and Schabas (eds.), *supra* note 18, at 277 et seq.

24 International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua vs. United States of America)*, Judgment, Merits, 27 June 1986; available at <www.icj-cij.org> (last visited on 20 January 2008).

25 ICTY, *Prosecutor v. Tadić,* Judgment, IT-94-1-A, AC, 15 July 1999, paras 115 et seq.

26 See ICTY, *Prosecutor v. Milutinović et al.,* IT-05-87-T, Trial Chamber, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006. On the practice of witness proofing, see the contribution by K. Ambos in Chap. 31 of the present volume.

27 See Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* 'Decision on the Practices of Witness Familiarisation and Witness Proofing', 8 November 2006, ICC-01/04-01/06-679; the Pre-Trial Chamber found at para. 33 of the decision that "that the Prosecution assertion that the practice of witness proofing as defined by the Prosecution in the Prosecution Information 'is a widely accepted practice in international criminal law', is unsupported".

28 On Article 21 of the Rome Statute, see generally Degan, *supra* note 23, at 79 et seq.; M. McAuliffe deGuzman, 'Article 21, Applicable Law', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 435 et seq.; A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court, A Commentary* (2002), Vol. II, 1051 et seq.; W. Schabas, *An Introduction to the International Criminal Court* (2007), at 194 et seq.; B. Simma and A. Paulus, 'Le rôle relatif des différentes sources du droit international pénal (dont les principes géneraux de droit)', in H. Ascenio, E. Decaux and A. Pellet, *Droit International Pénal* (2000), 55 et seq.

tions of the Court[29] 'in the first place', firmly establishing these instruments as the primary sources of applicable law.[30] In its judgment of 13 July 2006, the Appeals Chamber of the ICC held that recourse to sources of law other than those listed in Article 21 (1) (a) of the Rome Statute may only be had if the primary sources leave a gap in the law that has to be filled.[31]

Nevertheless, the Statute, Rules of Procedure and Evidence, Elements of Crimes and Regulations of the Court do not stipulate the applicable law of the ICC exhaustively. Article 21 (1) (b) and (c) of the Statute gives the Court room to consider other sources of law as well. It reads as follows:

> "1. The Court shall apply:
> … (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".

3.2. Principles and rules of international law

For the purposes of the present analysis, Article 21 (1) (b) of the Rome Statute is of particular relevance. The provision gives the ICC the power to apply 'principles and

29 Although Article 21 (1) (a) of the Rome Statute does not refer to the Regulations of the Court adopted by the judges of the Court pursuant to Article 52 of the Rome Statute, the Regulations also form part of the principal legal instruments that the ICC must apply.

30 As to the internal hierarchy of the sources listed in Article 21 (1) (a) of the Rome Statute, Articles 51 (5), 9 (3) and 52 (1) of the Statute ensure that the Statute prevails in case of conflict with the Rules of Procedure and Evidence, the Elements of Crimes or the Regulations of the Court. At the same time, the principle of *lex specialis derogat legi generali* demands that the more detailed rules to be found in, for example, in the Rules of Procedure and Evidence or the Regulations of the Court must be applied before the provisions of the Statute can be applied.

31 See Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 39. The said judgment of the Appeals Chamber also indicated that the mere fact that the legal instruments of the ICC are silent on a specific issue or do not provide for a specific remedy does not necessarily mean that such a *lacuna* exists. Rather, it has to be analysed whether the fact that the founding documents do not provide for a specific rule must be construed as a decision against such a rule, or whether the non-existence of such a rule is unintended. Only in the latter case may the ICC rely on the sources listed in Article 21 (1) (b) or Article 21 (1) (c) of the Statute. The identification of gaps is eventually a question of interpretation of the Rome Statute and its subsidiary instruments.

rules of international law'. Although this terminology diverges somewhat from the terminology commonly used in international law, it is generally understood that the term 'principles and rules of international law' in Article 21 (1) (b) includes rules of customary international law.[32] In addition to this, it is submitted that certain principles of international criminal law, as have been occasionally identified by the ICTY,[33] may be subsumed under this term. Thus, in spite of the establishment of the ICC on the basis of a treaty outside of the United Nations system, the *ad hoc* tribunals and the ICC partly apply the same law – customary law and general principles of law and, potentially, certain rules of conventional international law.[34]

The immediate relevance of the jurisprudence of the *ad hoc* tribunals for the application of these sources of law by the ICC results from Article 38 (1) (d) of the Statute of the ICJ, which refers to 'judicial decision … as subsidiary means for the determination of rules of law.'[35] According to this rule, judicial decisions are not sources of law in themselves, but they may be used to determine the existence of, for example, a rule of customary law.[36] Arguably, this provision is reflective of a general methodological approach for the ascertainment of rules of international law.[37] Thus, in order to identify principles and rules of international law, the ICC may turn to the jurisprudence of the *ad hoc* tribunals as well as the jurisprudence of other international courts. As the Court and the *ad hoc* tribunals deal with similar subject matters, it is likely that their jurisprudence will be a rich resource in this regard.

If a decision of the ICTY or the ICTR has identified a given principle or rule of international law, this will, however, not necessarily be the end of the matter for the ICC. As the above-mentioned example of the *Tadić* case before the ICTY demonstrates, it may well be that an international court concludes that it should not follow the jurisprudence of another international jurisdiction. Thus, the ICC may 'use' such

32 See McAuliffe deGuzman, *supra* note 28, at mn. 14; Pellet, *supra* note 28, at 1071; see also Degan, *supra* note 23, 64.

33 See the references in A. Cassese, *International Criminal Law* (2003), at 31; critical of this concept Bantekas, *supra* note 23, at 126; see also Degan, *supra* note 23, at 52 et seq.

34 It is questionable under which conditions a treaty would be 'applicable' in proceedings before the ICC, given that treaties generally only bind states; see Pellet, *supra* note 28, at 1068 et seq. Cassese, *supra* note 33, at 27, notes in this context that the ICC may turn to, for example, the Geneva Conventions of 1949 or the Additional Protocols of 1977 not as 'applicable treaties', but as 'evidence of the crystallization of customary rules'. See also Degan, *supra* note 23, at 62 et seq.

35 On the interpretation of Article 38 (1) (d) of the ICJ Statute see A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2006), 678 at mn. 301 et seq.

36 See P. Daillier and A. Pellet, *Droit International Public* (2002), 393: 'La Cour [internationale de Justice] « applique » des règles de droit, en se servant de la jurisprudence et de la doctrine pour les découvrir.'

37 See McAuliffe deGuzman, *supra* note 28, at mn. 1, who submits that '[t]he applicable law elaborated in Article 21 derive generally from the sources enumerated in Article 38 of the ICJ Statute. Article 38 of the ICJ Statute represents the most authoritative statement of the sources of general international law' (footnote omitted).

precedent in order to ascertain whether the principle or rule in question exists, but such precedent is not in itself binding on the Court. The weight that the ICC will accord to the jurisprudence of the *ad hoc* tribunals is likely to depend on factors such as the persuasiveness and solidity of the legal argumentation of the decision that is surveyed by the Court, and on the recurrence of the same finding in other decisions of the ad hoc tribunals or of other courts (it is likely that a finding that has acquired the status of *jurisprudence constante* in the *ad hoc* tribunals will be given more weight than isolated rulings[38]). Furthermore, given that the *ad hoc* tribunals themselves differentiate between the precedential value of decisions of the Appeals Chamber of the ICTY and the ICTR on the one hand and decisions of the trial chambers on the other hand, it would stand to reason to afford more weight to the decisions of the former than to those of the latter. Similarly, it is unlikely that much weight would be given to a finding by a trial chamber of the *ad hoc* tribunals that was subsequently overturned on appeal.

3.3. General principles of law derived from national laws

In principle, the same considerations apply when it comes to the identification of 'general principles of law derived by the Court from national laws of legal systems of the world', which are sources of law of the ICC under Article 21 (1) (c) of the Rome Statute: if such principles have been identified in the jurisprudence of the ad hoc tribunals, the ICC may take such precedents as means for determining their existence. However, in identifying general principles of law on the basis of precedent of the *ad hoc* tribunals even more caution than with respect to 'general principles and rules of international law' may be necessary. The identification of principles of law by reference to national legal systems is inevitably a somewhat subjective endeavour: a survey of all municipal jurisdictions of the world is infeasible and thus the decision-maker will have to determine which jurisdictions to include in his or her survey and how much weight to afford to each of these jurisdictions for the 'distillation' of the general principle.[39] The somewhat discomforting consequence of the subjectivity of

38 Arguably, an isolated ruling may not even be considered for the determination of a rule of international law, as Article 38 (1) (d) of the ICJ Statute refers to "judicial decisions"; see P. Daillier and A. Pellet, *supra* note 36, at 396.

39 In *Prosecutor v. Erdemovic,* Appeals Chamber, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, IT-22-96-A, 7 October 1997, at para. 57, two judges of the ICTY Appeals Chamber explained in respect of the identification of a general principle of law on duress as a defence that 'our approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.' The judges went on to state in para. 58: 'In order to arrive at a general principle relating to duress, we have undertaken a limited survey of the treatment of duress in the world's legal systems. This survey is necessarily modest in its undertaking and is not a thorough comparative analysis.' It is noteworthy that the judges in para. 88

the identification of general principles of law is that the 'general principle' may vary, depending on who determines what the content of the principle is.[40]

It may be for that reason that Article 21 (1) (c) of the Rome Statute states that the general principles must be 'derived by the Court'. The Statute thus entrusts the judges of the ICC – who are elected by, and enjoy the confidence of, the Assembly of States Parties of the Rome Statute – with the task of identifying general principles of law. Affording too much weight to ICTY and ICTR precedent in the determination of general principles of law would run counter to this; precedent of the *ad hoc* tribunals can only be a starting point, but never conclusive. It may also be noted that Article 21 (1) (c) provides that the municipal jurisdictions from which the general principle is derived may include 'as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'. Obviously, the *ad hoc* tribunals have had no reason to give particular consideration to these jurisdictions.

3.4. ICTY and ICTR precedent as autonomous sources of law?

It remains to be determined whether ICTY and ICTR decisions may even be considered autonomous sources of applicable law for the ICC. Could the Court, for example, hold that the essence of a decision of the ICTY or the ICTR is a rule of international law that is directly applicable before the Court, without having to establish that the rule forms part of, say, customary law? The question of the law-making power of international courts and tribunals has been the object of a long debate. Traditionally, international lawyers have been reluctant to afford decisions of international tribunals the character of a source of law in its own right.[41] Nevertheless, it has been argued that in light of the impact that judicial decisions have on the development of international law, it is undeniable that judicial decisions can create new norms.[42] The

of their opinion took 'the view that duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives.' Not even one year later, the Rome Conference adopted Article 31 (1) (d) of the Rome Statute, which takes a different approach in respect of this matter.

40 See also Bantekas, *supra* note 23, at 129, who notes that the *ad hoc* tribunals 'have never developed a coherent methodology for ascertaining general principles.'

41 See, for example, I. Brownlie, *Principles of Public International Law* (2003), 19; W. Heintschel von Heinegg, '4. Kapitel: Die weiteren Quellen des Völkerrechts', in K. Ipsen, *Völkerrecht* (2004), 255; R. Monaco, 'Sources of International Law', in Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. IV (2000), 467, at 474; R. Nieto-Navia, 'Do International Courts and Tribunals Have the Power to 'Create Law'?', *The Global Community/Yearbook of International Law and Jurisprudence* 2006, 75 et seq.

42 On the jurisprudence of the *ad hoc* tribunals as sources of law, see R. Heinsch, *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda: Zur Bedeutung von internationalen Gerichtsentscheidungen als Rechtsquelle des Völkerstrafrechts* (2007), see also B. B. Jia, 'Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict', in S. Yee and W. Tieya (eds.), *International Law in the Post-Cold War World/Essays in Memory of Li Haopei* (2001), 77. On the jurisprudence of the ICJ as

Rome Statute's Article 21 (2) is an indication that the Court may afford a degree of precedential value to its own decisions.[43]

Irrespective of these developments, it appears safe to say that the decisions of the ad hoc tribunals cannot be considered autonomous sources of law for the ICC: the ICTY and ICTR are tribunals with a limited jurisdiction. It is self-evident that their Statutes and their Rules of Procedure and Evidence cannot be considered applicable law of the ICC. These instruments were never intended to apply in the ICC, nor would the Security Council (in the case of the ICTY and ICTR Statutes) or the plenary of judges of the *ad hoc* tribunals (in the case of the ICTY and ICTR Rules of Procedure and Evidence) be authorised to 'legislate' for the ICC. How, then, could judicial decisions emanating from these tribunals be considered autonomous sources of applicable law of the ICC? It would be illogical to afford the judges of the *ad hoc* tribunals a law-making power that is greater in reach than that of the creator of the ad hoc tribunals and of their legal instruments.

4. ICTY and ICTR precedent and the interpretation of the ICC legal instruments

In the preceding section, it was submitted that ICTY and ICTR precedent may be instrumental in the determination of additional sources of law, pursuant to Article 21 (a) (b) and (c) of the Rome Statute. In light of the primacy of the ICC legal instruments[44] and their density of regulation,[45] it is, however, likely that the application by the Court of other sources of law (such as custom or general principles of law) will be the exception rather than the rule. Accordingly, perhaps the most common way in which the jurisprudence of the *ad hoc* tribunals could influence the ICC is in the interpretation of the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence and the Regulations of the Court, in particular in situations where the legal texts of the ad hoc tribunals and those of the ICC contain similar or even identical provisions. It therefore is the role of the precedent of the *ad hoc* tribunals for

a source of law see Pellet, *supra* note 35, at mn. 313 et seq.; M. Shahabuddeen, *Precedent in the World Court* (1996), at 67 et seq.

43 See *Prosecutor v. Kony et al.*, Decision of the Appeals Chamber on the Unsealing of Documents, ICC-02/04-01/05-266, AC, Separate Opinion of Judge Pikis, 4 February 2008, para. 9, who notes the 'significance of judgments and decisions *as a source of law*, a fact expressly acknowledged by Article 21 (2) of the Statute' (emphasis added). But see Pellet, *supra* note 28, at 1066, who submits that Article 21 (2) of the Rome Statute 'clearly leans in favour of the [civil law concept that precedent has no compulsory effect] since the Court *may* follow the principles laid down in its previous decisions, but is not *bound* to.'

44 See above, section 3.1.

45 The density of regulation in the principal instruments of the ICC is much higher than in those of the *ad hoc* tribunals: while the Statutes of the ICTY and ICTR, as amended, consist of 37 and 35 Articles, respectively, and their Rules of Procedure and Evidence of 163 and 155 rules, the Rome Statute contains 128 Articles, the ICC Rules of Procedure and Evidence 225 rules, and the Regulations of the Court, as amended, 129 regulations.

the interpretation of the ICC legal instruments that will be addressed in the present section.

4.1. ICTY and ICTR precedent and the rules on treaty interpretation

From a methodological perspective, the relevance of jurisprudence of the *ad hoc* tribunals for the interpretation of the instruments of the ICC appears doubtful. Why should the case law of the *ad hoc* tribunals shed light on the Rome Statute or its subsidiary instruments? The Rome Statute has established an international criminal jurisdiction that is distinct from, and independent of, the *ad hoc* tribunals; and when interpreting legal texts applicable in a given jurisdiction one does not normally turn to the jurisprudence of *other* jurisdictions relating to the interpretation of *other* legal texts (in the present case, the findings of the *ad hoc* tribunals on the ICTY and ICTR Statutes and Rules of Procedure and Evidence). After all, the Rome Statute does *not* contain a provision similar to Article 20 (3), first sentence, of the Statute of Special Court for Sierra Leone[46] (SCSL), which gives the SCSL a clear textual basis in its Statute for heeding the jurisprudence of the *ad hoc* tribunals.[47]

Is therefore any reliance on ICTY and ICTR precedent for the purpose of interpreting the Court's principal legal instruments methodologically misplaced and owed only to the dire search of lawyers for precedent to reinforce their arguments, irrespective of the actual weight of the decisions relied upon?[48]

Arguably, the rules of interpretation of international treaties, as enshrined in Article 31 of the Vienna Convention on the Law of Treaties (1961) (Vienna Convention)[49]

46 Statute of the Special Court for Sierra Leone, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* of 16 January 2002; the Statute is available at <www.sc-sl.org> (last visited on 20 January 2008). Art. 20(3), first sentence, of the SCSL Statute reads as follows: 'The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.'

47 It may also be noted that pursuant to Art. 14 of the SCSL Statute, the Rules of Procedure and Evidence of the SCSL are the same as those of the ICTR, save for such amendments and changes to the ICTR Rules of Procedure and Evidence that the judges of the SCSL have adopted because 'the applicable Rules do not, or do not adequately, provide for a specific situation'. See Article 14 (2) of the SCSL Statute.

48 See also Bantekas, *supra* note 23, at 132, who notes that '[t]he vast majority of these academics and lawyers [who work on international criminal law] originated from common law backgrounds where precedent is a source of law and they proceeded to apply the same principle to international criminal adjudication, although there is no rule or method to this effect.'

49 Art. 31 of the Vienna Convention provides under the heading 'General rule interpretation' as follows:

> '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

may lead to a nuanced answer to this question. These rules provide for at least the following two possible inroads for ICTY and ICTR jurisprudence in the interpretation of the Rome Statute and its subsidiary texts: first, as part of the 'context' in which the Court's instruments are to be interpreted (Article 31 (1) of the Vienna Convention), and second, through Article 31 (3) (c) of the Vienna Convention ('[t]here shall be taken into account … (c) any relevant rules of international law applicable in the relations between the parties'), the purpose of which is to foster coherency between several sources of international law.[50]

Admittedly, both approaches are open to criticism based on the wording of Article 31 of the Vienna Convention: Article 31 (2) of the Vienna Convention defines the context for the purpose of treaty interpretation narrowly and limits it to the text of the instrument in question, including its preamble, and agreements concluded in connection with the conclusion of the treaty. Clearly, neither the Statutes nor the Rules of Procedure and Evidence of the *ad hoc* tribunals fulfil these requirements, and consequently it would seem to appear that any jurisprudence relating to such extrane-

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.'

50 See generally on the role of Art. 31 (3) (c) of the Vienna Convention on treaty interpretation, C. Brown, *A Common Law of International Adjudication* (2007), at 49 et seq.; D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', in 55 *International and Comparative Law Quarterly* (2006), 281 at 300 et seq.; M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Expansion and Diversification of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, paras. 410 et seq.; C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', (2005) 54 *International and Comparative Law Quarterly*, 279 et seq. M. Bos, 'Theory and Practice of Treaty Interpretation', in S. Davidson (ed.), *The Law of Treaties* (2004), 327 at 373 has noted that other applicable rules in the meaning of Art. 31 (3) (c) of the Vienna Convention are, in fact, part of the context of the treaty. For a recent application of Article 31 (3) (c) of the Vienna Convention by the ICJ see ICJ, *Case Concerning Oil Platforms (Islamic Republic of Iran vs. United States of America),* Judgment, 6 November 2003, para. 43.

ous agreements – namely the case law of the ICTY and the ICTR interpreting their respective Statutes and Rules of Procedure and Evidence – cannot be considered part of the context of the Rome Statute and its subsidiary legal texts.

Similarly, the wording of Article 31 (3) (c) of the Vienna Convention does not seem to support an interpretation of the Rome Statute on the basis of ICTY and ICTR precedent. First of all, it is questionable who the 'parties' are in whose relation the rule must be applicable: the States Parties to the Rome Statute?[51] Or the ICC Prosecutor and the suspect or the accused person (and potentially the victims participating in the proceedings pursuant to Article 68 (3) of the Rome Statute)? The former approach would neglect that states will only occasionally appear as participants before the Court. But what are the applicable international rules in the relations between the ICC Prosecutor and the suspect or accused person? Moreover, it is questionable whether the Statutes of the ICTY and the ICTR and their Rules of Procedure and Evidence could ever be 'applicable' in the relations between the parties (whoever that may be). As stated above, the Statutes of the *ad hoc* tribunals were annexed to resolutions of the Security Council, acting under Chapter VII of the UN Charter. While, in principle, all member states of the United Nations are obliged to follow such resolutions,[52] the very nature of the Statutes as constitutional documents of international judicial institutions calls into question their status as 'applicable rules' for the purpose of Article 31 (3) (c) of the Vienna Convention. Even stronger doubts exist regarding the *ad hoc* tribunals' Rules of Procedure and Evidence, which were adopted by the judges of the tribunals. Can it really be maintained that the ICTY and ICTR Rules of Procedure and Evidence are applicable between the States Parties to the Rome Statute or between the ICC Prosecutor and the accused persons in proceedings before the Court? The answer to this question can only be a 'no'.

Thus, one cannot but conclude that a literal reading of the rules of treaty interpretation, as stipulated in Article 31 of the Vienna Convention, does not leave much room for interpreting the Rome Statute and its subsidiary instruments on the basis of the jurisprudence of the *ad hoc* tribunals. The question is, however, to what extent such a literal reading of the rule on treaty interpretation would be appropriate for the Rome Statute. For one might argue that the definition of the 'context' for the purpose of treaty interpretation may well be adequate for bilateral agreements and even for regular multilateral treaties, but hardly so for treaties that establish a new international court. As the drafting of the Court's legal texts was influenced by the ad hoc tribunals, it would appear consistent also to consider their jurisprudence as part of the context for the purpose of interpreting the Rome Statute. Put differently, if the drafters of the Rome Statute had regard to the ICTY and the ICTR, why should those who apply the Rome Statute not do so as well? A broader definition of the context,

51 It is unclear in respect of multilateral treaties whether the term 'parties' in Article 31 (3) (c) of the Vienna Convention refers only to the states engaged in litigation in the course of which a provision of that treaty is interpreted or whether it encompasses all states parties to that treaty; see French, *supra* note 50, at 305 et seq.; McLachlan, *supra* note 50, at 315.

52 See Article 25 of the UN Charter.

which also includes external sources, also appears to be in line with the practice in domestic jurisdictions[53] and has been proposed for the international context.[54]

Similarly, even if the plain wording of Article 31 (3) (c) of the Vienna Convention does not support an interpretation of the Rome Statute and its subsidiary instruments that takes into account the precedent of the *ad hoc* tribunals, such an approach would be fully in line with the underlying purpose of Article 31 (3) (c): it would avoid inconsistencies within, and the fragmentation of, international law and would foster cross-fertilisation among international judicial institutions.[55] If interpreted in this manner, the Article 31 (3) (c) of the Vienna Convention could indeed be a basis for 'systemic integration'.[56]

In sum, it is therefore submitted that ICTY and ICTR precedent may be taken into account when interpreting the Rome Statute and its subsidiary instruments. The methodological basis for this can be found in a broader conception of the context in which these instruments have to be interpreted, and in the purpose underlying Article 31 (3) (c) of the Vienna Convention. The doctrinal foundation for relying on the precedent of the *ad hoc* tribunals when interpreting the Court's legal texts is admittedly weak; but it does exist and if used in full awareness of its weakness, it may well make for a better understanding of the provisions that the ICC has to apply.

53 For England and Wales, see J. Bell and G. Engle, *Rupert Cross, Statutory Interpretation* (1995), 150 et seq., according to which for the interpretation of a statute other statutes on the same subject may be taken into account. See also P. Häberle, 'Gemeineuropäisches Verfassungsrecht', in P. Häberle, *Rechtsvergleichung im Kraftfeld des Verfasungsstaates* (1992), 71 at 98 et seq., who submits that constitutions of national states should be interpreted also by comparing them to the constitutions of other states in order to foster the coming into being of a common constitutional culture.

54 See R. Bernhardt, 'Interpretation', in Bernhardt (ed.), *supra* note 41, Vol. II (1995), at 1420: 'In a broader sense systematic interpretation can also include the consideration of texts and events outside the framework of the treaty.'

55 It may be noted in this context that the ECHR has relied on Art. 31(3)(c) of the Vienna Convention for example in *Al-Adsani v. United Kingdom,* Application no. 35763/97, judgment of 21 November 2001, at para. 55, as a means for achieving 'harmony with other rules of international law', even though the wording of the provision would not have given occasion to do so in the case at hand: the customary rules of state immunity were invoked by the United Kingdom to restrict access to the courts in relation to a civil claim of torture brought against Kuwait in English courts. Kuwait, of course, is not party to the European Convention on Human Rights and therefore cannot be considered under any perspective a 'party' to the litigation between the applicant and the United Kingdom before the ECHR.

56 On systemic integration see Koskenniemi, *supra* note 50, at paras 410 et seq.; McLachlan, *supra* note 50.

4.2. Methodological limits of the reliance on precedent of the ad hoc *tribunals*

Nevertheless, a word of caution is necessary: when ICTY and ICTR precedent is relied upon to interpret the Rome Statute, one should never forget that the case law of the *ad hoc* tribunals did not give an interpretation to the Rome Statute and the ICC Rules of Procedure and Evidence, but to the Statutes of the *ad hoc* tribunals and their respective Rules of Procedure and Evidence. These instruments are in many respects very different from the legal instruments that the ICC has to apply. Two examples may suffice to illustrate this difference – the procedural system established by the Rome Statute, and the provisions in the Statute on the 'general part' of international criminal law.

While the *ad hoc* tribunals largely follow the common law approach of a party-driven, strictly adversarial procedure,[57] the Rome Statute diverts from this approach in at least two significant ways:[58] pursuant to Article 54 (1) (a) of the Rome Statute, the Prosecutor, an independent organ of the Court,[59] is under an obligation to 'establish the truth' and to 'investigate incriminating and exonerating circumstances equally'. Hence, during the investigation phase of proceedings, the role of Prosecutor of the ICC is conceived by the Rome Statute as that of an impartial minister of justice, and not as that of a party to an adversarial process who wants to 'win' his or her case; the role of the ICC Prosecutor thus shares many of the characteristics of the investigating judge in French criminal procedure.[60] While it is yet unclear whether and how a suspect or an accused person could successfully claim that the Prosecutor failed to fulfil the obligation under Article 54 (1) (a) of the Rome Statute,[61] it is evident that the role of the Prosecutor of the ICC is significantly different from that of the prosecutors of the *ad hoc* tribunals.

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57 See, for example, Boas, *supra* note 18, at 18 et seq.; V. Tochilovsky, 'Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia', in H. Fischer, C. Kress, S. R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (2001), 627.

58 See generally on the character of the procedural system established by the Rome Statute, for example, K. Ambos, 'The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial'or Mixed?', in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007), 429 et seq.; S. Kirsch, 'The Trial Proceedings Before the ICC', (2006) 6 *International Criminal Law Review*, 275 et seq.; C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *Journal of International Criminal Justice,* 603 et seq.; A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings', in Cassese, Gaeta and Jones (ed.), *supra* note 28, Vol. II, 1439 et seq.

59 See Article 42 (1) of the Rome Statute.

60 On the role of the investigating judge in French criminal procedure see, for example, G. Stefani, G. Levasseur and B. Bouloc, *Procédure pénale* (2004), at 433 et seq.

61 See on the related question of whether the trial chambers of the ICC are under an obligation to establish the truth Kirsch, *supra* note 57, at 278 et seq.

The second significant difference between the procedural systems of the *ad hoc* tribunals one the one hand and that of the ICC on the other hand lies in the possibility of the participation of victims in the proceedings before the Court.[62] The exact boundaries of the participation of victims are not yet settled in the jurisprudence of the ICC;[63] but it is already clear that the criminal trial before the ICC is not a strictly bi-polar procedure between the prosecution and the defence. Victims participating in the proceedings may provide a third perspective and may even lead the Chambers of the ICC to become more actively involved in the conduct of the proceedings than their counterparts in the *ad hoc* tribunals.

In light of these fundamental differences, any reliance on ICTY and ICTR precedent in relation to the interpretation of the procedural law of the ICC must be made with utmost caution. In many instances, the differences between the procedural systems may be too great as to allow ICTY and ICTR precedent to be of much help for the interpretation of the Rome Statute and its subsidiary instruments. Particular care should be exercised in identifying *faux amies*: many of the procedural provisions of the ICC Rules of Procedure and Evidence are similar, or even identical, to provisions of the Rules of Procedure and Evidence of the *ad hoc* tribunals; yet given the systemic difference between the procedural systems outlined above, it may well be that an interpretation of the corresponding provisions by ICTY or the ICTR may be inappropriate for the ICC. In other words, when relying on the external context of a provision it must always be ensured that the *internal* context – the procedural regime established by the Rome Statute and the ICC Rules of Procedure and Evidence – is respected. In cases of conflict, the interpretation based on the latter must prevail.

Similar caution is indispensable when interpreting the provisions relating to the 'general part' of criminal law, as established in Articles 22 to 33 of the Rome Statute, on the basis of ICTY and ICTR precedent. These provisions provide for relatively refined rules on participation in crime, the requisite mental elements, and grounds

62 See Article 68 (3) of the Rome Statute.

63 See the decisions on the participation of victims during the different stages of the proceedings Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006; Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0127/06, ICC-02/04-101, 10 August 2007; Pre-Trial Chamber I, Corrigendum to Decision on Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ICC-02/05-111-Corr, 14 December 2007; Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008; Appeals Chamber, *Prosecutor v. Lubanga Dyilo,* Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824 OA 7, 13 February 2007, paras. 35 et seq.; Appeals Chamber, *Prosecutor v. Lubanga Dyilo,* Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, ICC-01/04-01/06-925 OA 8, AC, 13 June 2007.

for excluding criminal responsibility. The ICTY and ICTR Statutes lack such detailed provisions, which has forced the tribunals to develop a 'general part' of international criminal law on the basis of rules and principles derived from customary international law and general principles of law.[64] Even if one accepts that the ICTY and ICTR have correctly identified the customary rules and principles of general international criminal law, the principle of *lex specialis* and indeed the wording of Article 21 (1) (a) of the Rome Statute demand that precedence must always be given to Articles 22 et seq. of the Rome Statute over the jurisprudence of the *ad hoc* tribunals.[65]

There is yet another methodological pitfall that one must avoid when interpreting the legal instruments of the Court on the basis of ICTY and ICTR precedent: the law of the *ad hoc* tribunals has evolved significantly since the adoption of the Rome Statute and of the ICC Rules of Procedure and Evidence. In particular the ICTY and ICTR Rules of Procedure and Evidence have been frequently changed. Thus, it is questionable which 'version' of the ICTY and ICTR (case) law should be relied upon when interpreting the Rome Statute and the ICC Rules of Procedure and Evidence. The law in force at the time of the drafting of these latter documents was concluded (summer 1998 and summer 2000, respectively) or the version of the law that is in force at time of interpretation of the Rome Statute or its subsidiary instruments?[66] This question is not only of theoretical relevance, as the following example will demonstrate: the Rome Statute and the Rules of Procedure and Evidence do not contain any express provision regulating whether exonerating material that the Prosecutor has received on the condition of confidentiality and only for the generation of further evidence (see Article 54 (3) (e) of the Rome Statute) has to be disclosed to the defence. The law at the *ad hoc* tribunals regarding this question was equally unclear until the ICTY Rules of Procedure and Evidence were amended in July 2004 – at a

64 See Werle, *supra* note 4, mn. 266 et seq.

65 An example for a possible divergence between the provision in the Rome Statute and the rules under customary law as identified by the *ad hoc* tribunals is the question of duress: while Art. 31 of the Rome Statute provides that duress may, under certain conditions, exclude criminal responsibility, the ICTY Appeals Chamber in *Prosecutor v. Erdemovic,* Judgment, IT-96-22-A, 7 October 1997, para. 18, held by majority that 'duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human being.' Similarly, there appears to be a divergence between the provision on superior orders in Article 33 of the Rome Statute and prior rules of international law on superior orders as grounds for excluding criminal responsibility; see P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', (1999) 10 *European Journal of International Law,* 172 et seq.

66 See on the question of whether subsequent changes in the law should be taken into account when interpreting a treaty (so-called inter-temporal *renvoi)*, Bos, *supra* note 50, at 152; French, *supra* note 50, at 295 et seq.; H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989 Part One', 60 *British Yearbook of International Law* (1989), 1, at 135 et seq.

time when the Rules of Procedure and Evidence of the ICC were already in force.[67] It is thus unclear whether this subsequent amendment of the ICTY Rules of Procedure and Evidence would argue in favour of or against such disclosure obligations of the ICC Prosecutor.

Finally, whenever an interpretation of the Rome Statute is based on ICTY or ICTR precedent, it has to be compatible with the principles of strict construction of definitions of crimes[68] (see Article 22 (2) of the Rome Statute) and consistent with internationally recognised human rights (see Article 21 (3) of the Rome Statute).[69] The former rule is particularly relevant for the interpretation of Articles 5 to 9 of the Rome Statute and of the Elements of Crimes: whenever the Court relies on ICTY or ICTR precedent to interpret a definition of a crime under the Rome Statute, the Court will have to satisfy itself that the interpretation results in a strict construction of the crime and that analogies are avoided. Otherwise, the interpretation has to be dismissed. Similarly, any interpretation of the Rome Statute and of the ICC Rules of Procedure and Evidence on the basis of ICTY and ICTR precedent must necessarily be checked against internationally recognised human rights norms and the principle of non-discrimination.

5. Conclusion

It has been observed that reliance by the international courts on previous decisions of other courts will contribute to the construction of a coherent system of international criminal law, prevent the fragmentation of this young branch of the law, and reinforce the yet fragile institutions of international criminal justice.[70] From a methodological perspective, the above survey suggests that the ICC may indeed make use of the precedents of the *ad hoc* tribunals: first of all, as a means for the determination of other rules of applicable law, in particular those of customary law and general principles

67 With the amendment of 28 July 2004, the disclosure obligation of the Prosecutor under rule 68 of the ICTY Rules of Procedure and Evidence was made '[s]ubject to the provisions of Rule 70', a rule which provides *inter alia* for the non-disclosure of information that the Prosecutor has obtained on the basis of confidentiality and used solely for the purpose of the generation of further evidence. On the interpretation of the disclosure obligation of the ICTY Prosecutor prior to the amendment see ICTY, *Prosecutor v. Brđanin and Talic,* Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, IT-99-36-T, TC, 23 May 2002, para. 19.

68 See B. Broomhall, 'Article 22 – *Nullum crimen sine lege*', in Trifferer (ed.), *supra* note 28, 447 et seq.; S. Lamb, '*Nullum crimen, nulla poena sine lege* in International Criminal Law', in Cassese, Gaeta and Jones (ed.), *supra* note 28, Vol. I, 733 et seq.; H. Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', (2007) 18 *Criminal Law Forum*, 301 et seq.

69 Pellet, *supra* note 28, at 1079 et seq., has noted that Article 21 (3) of the Rome Statute creates a system of 'super-legality', in which human rights norms enjoy a higher status than the provisions of the Statute.

70 See J. S. Martinez, 'Towards an International Judicial System', (2003/2004) 56 *Stanford Law Review*, 429 et seq.

of international law, and secondly for the interpretation of the principal legal instruments of the Court. The present contribution has, however, also demonstrated that such cross-fertilisation clearly has its methodological limits and pit-falls, and one must warn against ingenious reliance on the case law of the ICTY and ICTR.

True, the construction of an international justice system requires an active dialogue among the different jurisdictions – be they national, international or hybrid. But it is the obligation and responsibility of each jurisdiction to consider first and foremost its own principal legal instruments.[71] When the Court relies on the jurisprudence of other jurisdictions, it should do so on clear methodological grounds. Thus, the ICC will not have to reinvent the wheels that have already been invented by the *ad hoc* tribunals. But before mounting such wheels, the Court will have to consider carefully whether they really fit. Otherwise, the ICC may jolt, and the reliance on the jurisprudence of the *ad hoc* tribunals would not strengthen, but weaken the jurisprudence of the Court.

71 See A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Justice,* 144 at 157, who also submits that 'the Statute itself seems to postulate the future existence of *two possible regimes of corpora of international criminal law,* one established by the Statute and the other laid down in general international criminal law'.

Modes of Liability

Chapter 18 Committing liability in international criminal law

*Steffen Wirth**

1. Introduction

International criminal law as applied by international courts is mainly concerned with holding responsible those who are the driving and organising forces behind mass atrocities, or at least persons playing crucial roles in the committing of the crimes. Members of the leadership rarely commit crimes with their own hands. Rather, they use others to have the crimes committed. But even if the accused is not (acting as) a leader he or she is still, usually, acting in a multi-perpetrator setting. In most of these cases it is not possible nor would it be sufficient to isolate the conduct of the accused from the wider criminal context and limit his or her responsibility to such crimes as were carried out by the accused's own hand.

Thus, international criminal law is regularly confronted with the question whether and how one person can be held criminally liable for criminal conduct carried out by other persons. This may concern the liability of a leader or a group of leaders for the conduct of soldiers or paramilitaries "on the ground" or simply the liability of an accused who played an important part in a crime involving several persons, for example an incident of extermination.

The approaches taken by international criminal law jurisdictions in order to address such multi-person criminality are greatly influenced by the fact that these jurisdictions tend to take a dualistic approach.[1] They distinguish between committing one's own crime and participating in someone else's crime.[2] Under this approach

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1 In contrast, monistic systems do not formally distinguish between committers and other types of participants; in the United States 18 USC 2 (a) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Other examples for monist systems are Italy (Criminal Code, Article 110) and Austria (Criminal Code, ss. 12, 13).

2 *Brđanin* Trial Judgement, para. 267: "In order to establish individual criminal responsibility for planning, instigating, ordering and otherwise aiding and abetting in the plan-

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committing liability is considered particularly grave, whereas, aiding and abetting,[3] ordering and instigating,[4] have been considered, in general, to be less grave.

In this context, it is arguably unsatisfactory to qualify, for example, members of the leadership, who direct and organise the crimes, as mere aiders and abettors.[5] The same holds true where a person (who need not be a leader) plays an important role in a crime even though he or she did not personally carry out all elements of the crime's *actus reus*.[6] It has, therefore, been explored under which circumstances such conduct can be qualified as committing.

The present overview discusses various approaches explored by the ICTY and the ICTR (hereinafter: "Tribunals") as well as the ICC with regard to multi-person committing liability.[7]

For the purposes of this overview the jurisprudence on multi-person committing liability can be divided into three groups: co-perpetration, indirect perpetration and "uncategorised" multi-person committing.[8]

This essay will first address forms of co-perpetration. Joint criminal enterprise (JCE)[9] and joint committing[10] fall into this category. The common characteristic of forms of co-perpetration is that a number of persons contribute to carrying out the crime(s) on the basis of a common plan, design or purpose. The following part of this overview will consider indirect perpetration. The ICC's *Lubanga* decision held that

ning, preparation or execution of a crime referred to in Articles 2 to 5 of the Statute, proof is required that the crime in question *has actually been committed by the principal offender(s)*" (emphasis added). See also *Simić*, Trial Judgment, para. 137. *Gacumbitsi*, Appeal Judgment, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 5, noting that the Tribunals could have adopted a monistic approach but did not.

3 *Vasiljević* Appeal Judgment, para. 182; Vasiljević's sentence was reduced from 20 to 15 years because he had been found to be a (mere) aider and abettor rather than a JCE member.

4 *Gacumbitsi* Appeal Judgment, paras. 60-61.

5 The Prosecution, in several cases, requested the Appeals Chamber to enter convictions for committing instead of aiding and abetting, *e.g. Prosecutor v. Brđanin*, Appeal Judgment, para. 434; *Prosecutor v. Seromba*, Appeal Judgment, para. 153.

6 See, generally, *Tadić* Appeal Judgment, para. 192.

7 The simplest form of committing liability is single perpetrator physical or "principal" (see, *Brđanin*, Appeal Judgment, para. 362) liability. It applies where a person carries out the *actus reus* of a crime alone and, usually, with his own hands although omission liability may also fall within this group; id. This simple form of committing liability is rarely relevant in international criminal law.

8 These groups are not intended as a basis for legal conclusions but merely serve to structure the jurisprudence.

9 See, for example, *Tadić* Appeal Judgment, paras. 227 et seq.; *Vasiljević* Appeal Judgment, paras. 96 et seq ; Rome Statute, Article 25 (3) (a).

10 *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007 (hereinafter "*Lubanga* Decision"), paras. 322 et seq. See also the contribution by H. Olasolo in Ch. 19 of this volume.

indirect perpetration applies where the indirect perpetrator controls the will of those carrying out the *actus reus* of the crime.[11] The ICTY's *Stakić Case*, too, referred to indirect perpetration when convicting Stakić for the crimes of non-co-perpetrators.[12]

Finally, the last part of this overview will address cases of multi-perpetrator settings where the accused was found guilty as a committer but where no specific "category" was attached to such committing. For example, with regard to genocide it has been found sufficient for committing liability that a perpetrator carried out actions which were "as much an integral part of the genocide as were the killings which [they] enabled."[13]

2. Co-perpetration

Under the law of co-perpetration the conduct of each co-perpetrator is mutually attributed to each of the other co-perpetrators. Thus each co-perpetrator is regarded as if he had carried out all parts of the *actus reus* of the crime himself or herself.

The two most important forms of co-perpetration in international criminal law are joint committing, the ICC's form of co-perpetration,[14] and the Tribunals' approach, namely JCE. Both require a plurality of persons having a common criminal plan[15] as well as a contribution and a *mens rea*. As will be described below, the exact requirements for the latter two elements differ, depending on the form of co-perpetration.

2.1. Joint commission

Joint commission under Art. 25 (3) (a) of the Rome Statute is characterised by a relatively high contribution requirement. The accused's contribution must be of such a nature that, jointly with his co-perpetrators, he or she controls the committing of the crime, in the sense that withholding the contribution would frustrate the carrying out of the common plan.[16] On the other hand, there is no specific *mens rea* requirement. It is sufficient that the co-perpetrators simply have the normal *mens rea* required for the crime that is jointly committed.[17] Thus, if knowledge that the criminal result will (likely) occur is sufficient for the crime, this *mens rea* is also sufficient for joint committing.

11 *Lubanga* Decision, *supra* note 11, para. 332.

12 *Stakić*, Trial Judgment , para. 741.

13 *Gacumbitsi* Appeal Judgment, para. 60; *Ndindabahizi* Appeal Judgment, para. 123; both referred to with approval in *Seromba* Appeal Judgment, para. 161.

14 It has been argued that JCE is applicable at the ICC under Article 25 (3) (d) of the Rome Statute. However, provision appears to focus on the assistance given by an "outsider" to the criminal activities of a group, not the conduct of the members of this group. In particular, Article 25 (3) (d) of the Rome Statute does not require, as does JCE, that the accused shares the aim of the group; knowledge is sufficient.

15 *Tadić Appeal Judgment*, para. 227; *Lubanga* Decision , *supra* note 11, paras. 343 et seq.

16 *Lubanga* Decision, *supra* note 11, para. 347.

17 *Lubanga* Decision, *supra* note 11, paras. 349 *and following*.

An approach very similar to joint commission was taken in the *Stakić* Trial Judgement.[18] The Trial Chamber convicted *Stakić* under a form of co-perpetration that required "joint control" over the criminal conduct in the sense that each co-perpetrator can frustrate the plan if he does not carry out his part.[19] However, the ICTY Appeals Chamber decided that the Trial Chamber erred in applying this form of co-perpetration and that it should instead have applied JCE. The *Stakić* Appeal Judgment, therefore, re-assessed the evidence under the law of JCE and, being satisfied that the requirements were met, convicted *Stakić* under this theory.[20]

2.2. The three forms of JCE

JCE is the form of co-perpetration[21] that has, to date, received most attention in international criminal law, since it has been discussed in a multitude of ICTY and ICTR cases. JCE has three sub-categories and, moreover, can also apply where the *actus reus* of the crime is carried out by a JCE non-member.[22]

2.2.1. JCE I

The basic form of JCE (or JCE I) can be contrasted with joint commission. Whereas, as noted, there is no difference regarding the requirement of a plurality of persons sharing a common plan, the contribution and *mens rea* requirements of JCE I differ from those required for joint commission.

The contribution required for JCE need not be of such a nature that it provides the co-perpetrator with control over the crime. It need not even be substantial. Rather, any contribution is sufficient as long as it is at least significant.[23] Thus the contribution requirement for JCE is lower than the contribution requirement for joint commission.

The *mens rea* requirement, on the other hand is high. JCE requires (shared) intent to commit the crime.[24] In the *Vasiljević Case*, the accused's conviction for committing (in the form of JCE) was set aside on appeal, and a conviction for aiding and

18 *Stakić*¸ Trial Judgment, para. 490.

19 *Stakić* Trial Judgement, para. 440; the *mens rea* for this form of co-perpetration was found to be the unchanged *mens rea* required for the crime itself, ibid. para. 442.

20 *Stakić* Appeal Judgment, paras. 62, 66 et seq.

21 JCE has been considered committing liability (see *Prosecutor* v. *Milutinović* et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, para. 20) however, the *Brđanin* Appeal Judgement, para. 413, fn. 891, now leaves open whether JCE liability is always committing liability.

22 *Brđanin Appeal Judgment*, paras. 410 et seq; see also para. 409 of this Judgement referring to the *Stakić* case.

23 *Brđanin Appeal Judgment*, para. 430.

24 *Tadić Appeal Judgment*, para. 227; *Brđanin* Appeal Judgement, para. 440; intent is not used in the sense of general intent but in a narrow sense- mere knowledge is insufficient; *Vasiljević* AJ, paras. 128 et seq.

abetting was entered instead, because the evidence showed only that he knew that the victims would be killed but not that he intended their death.[25]

Thus, it can be said that the focus of JCE is on the *mens rea* whereas the focus of joint commission is on the contribution (*actus reus*).[26]

2.2.2. JCE II

The systemic form of JCE (or JCE II) is intended for the so-called camp cases, where the perpetrators carry out crimes against the inmates of a detention camp or prison. Like JCE I it requires a plurality of persons sharing a common plan and a contribution. In addition, it also requires an organised criminal system (for example, the camp).[27] The relationship between the element of common plan and the organised criminal system has not been expressly addressed in the jurisprudence. The organised criminal system is probably to be understood as a physical manifestation of the common plan.

The *mens rea* of JCE II has been formulated slightly differently from the *mens rea* of JCE I, namely as knowledge of the system and intent to further the criminal purpose of the system.[28] Because of the similarities between JCE I and JCE II, the latter has often been characterised as a (mere) variant of JCE I.[29]

2.2.3. JCE III

The extended form of JCE (or JCE III)[30] provides that an accused who is a member in a JCE I or II can be responsible for a crime of one or more other JCE members, even if this crime was not provided for in the common plan. JCE III liability arises where the crime carried out by the other JCE member(s) was foreseeable, and where the accused considered it at least a possible[31] consequence of the carrying out of the common plan, and willingly took that risk.[32]

This was the situation in the *Tadić Case*, the first application of JCE before the Tribunals. Duško Tadić was a member of a group of soldiers who entered a village in pursuance of the common purpose to rid the region of the non-Serb population by committing inhumane acts against them. Thus, the soldiers were members of a JCE

25 *Vasiljević* AJ, paras. 128 et seq.

26 Judge Schomburg noted: "While joint criminal enterprise is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship and indirect perpetratorship also depend on whether the perpetrator exercises control over the criminal act (objective criterion)"; *Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 22, fn. 41.

27 *Stakić* Appeal Judgment, para. 65.

28 *Stakić* Appeal Judgment, para. 65.

29 *Vasiljević* Appeal Judgment, para. 98; *Ntakirutimana* Appeal Judgement, para. 464; *Kvočka et al.* Appeal Judgement, para. 82.

30 *Tadić Appeal Judgment*, para. 227.

31 *Blaškić Appeal Judgment*, para. 33.

32 *Tadić Appeal Judgment*, para. 204; *Vasiljević* Appeal Judgment, para. 101.

I regarding inhumane acts. Members of the group, it was not proven who, killed five villagers. While these killings did not form part of the common purpose they were foreseeable and Tadić was aware of and willingly took the risk of them being carried out. On this basis he was held responsible for the deaths of the nine villagers.[33]

Whereas, as illustrated by *Tadić*, JCE III liability always requires the existence of a JCE I or II, this does not mean that the JCE members must actually succeed in carrying out the crime envisioned in the common plan.[34] If the accused is a member of a JCE to destroy a cultural monument, but the destruction ultimately fails (because the charges do not explode), the killing of the monument's custodian, committed by one of the JCE members can nevertheless be attributed to the accused under JCE III if the killing was a foreseeable result of the execution of the plan and the accused was aware of this possibility.

2.3. Liability of JCE members for acts of JCE non-members

The *Brđanin* Appeal Judgment revealed an interesting aspect of JCE by holding that the person carrying out the crime with his/her own hands need not be a member of the JCE.[35] This approach enables international criminal law to address situations where the members of a (relatively small) "leadership" JCE use non-members to carry out the actual crimes. The Appeals Chamber found that, as long as the non-member's crime can be imputed to at least one JCE member, all JCE members incur liability for this crime.

The Appeals Chamber found that whether or not the link allowing to impute the non-member's crime existed was to be determined on a case-by-case basis.[36] It left open whether JCE liability in such cases should still be considered as a form of committing liability.[37] Judge Meron, in a separate opinion expanding upon this question, suggested that the link allowing the crime to be imputed should be a mode of liability. He argued that if the crime is imputed to one JCE member through the mode of liability of ordering then this would be the mode of liability attaching to all members of the JCE.[38]

3. Indirect perpetration

Indirect perpetration is provided for in Article 25 (3) (a) of the Rome Statute. Under indirect perpetration an accused incurs committing liability where he or she carries

33 *Tadić Appeal Judgment*, para. 232.

34 In this context is should be noted that no JCE can exist for a crime that has merely been attempted since the ICTY and the ICTR have no jurisdiction for attempt. However, attempted murder may amount to (completed) cruel treatment, *Vasiljević* Trial Judgment, para. 239; *Vasiljević*, Appeal Judgment, paras. 166-167.

35 *Brđanin Appeal Judgment*, para. 413.

36 *Brđanin* Appeal Judgment, para. 413.

37 *Brđanin* Appeal Judgment, para. 413, fn. 891.

38 *Brđanin* Appeal Judgment, Separate Opinion of Judge Meron, para. 6.

out a crime through another person. Significantly, the provision states that liability arises regardless of whether or not that other person has the *mens rea* required for the crime. This shows that indirect perpetration under the Rome Statute is not limited to cases of innocent agency[39] (for example, the unsuspecting nurse administering the toxic "medication" that was given to her by the (criminal) doctor). Rather, the *Lubanga* Decision found that such committing through another person is possible in all cases where the accused controls the will of the person carrying out the *actus reus*.[40]

One example of indirect perpetration that would probably conform to the *Lubanga* requirement of control over will is an army commander instructing his unit to carry out a certain crime. If the particular soldier who is tasked with carrying out the crime refuses to comply with the criminal instruction, all that happens is that another soldier will take his place and carry out the crime (so-called fungibility). Since it is the commander who decides whether or not the crime will be carried out, it is his will that controls the criminal conduct, not the will of the soldier. The fact that the soldier (the physical/principal perpetrator), too, incurs criminal liability,[41] does not relieve the commander of liability for committing.

At the ICTY the concept of indirect perpetration was applied in the *Stakić Case*. The Trial Chamber in that case, emphasized that under the law of indirect perpetration it did not matter whether or not the "tools" for whose conduct Stakić was responsible did or did not have the *mens rea* for the crime[42] (for example the discriminatory intent required for persecution[43]). The Appeals Chamber upheld this part of the *Stakić Trial Judgment.*[44]

An approach comparable to that taken in *Lubanga* and *Stakić* was taken by the Supreme Court of Germany when finding high-level government members responsible for ordering the shootings of refugees at the border between the GDR and the FRG.[45]

39 On this concept, see, e.g., Archbold, *Criminal Pleading, Evidence and Practice* (2007), § 18-7.

40 *Lubanga* Decision, *supra* note 11, para. 332; see, *also*: *Seromba* Appeal Judgment, Dissenting Opinion of Judge Liu, paras. 8-10, and fn. 17.

41 Generally, acting pursuant to orders is no defence in international criminal law, see, e.g., Art. 33 Rome Statute.

42 *Stakić* Trial Judgment, para. 741.

43 *Stakić* Trial Judgment, paras. 743, 746.

44 Whereas the *Stakić* Appeal Judgment (in para. 62) decided that the form of co-perpetration applied in the *Stakić* Trial Judgment was not applicable before the Tribunal, it left untouched the Trial Chamber's approach to imputing the crimes of non-members of the co-perpetrator group (be it a group of JCE members or of joint committers) to members of this group. The *Brđanin* Appeal Judgment, para. 409, recognises the relevance of the *Stakić* case for imputing liability for acts carried out by JCE non-members.

45 E.g., German Federal Court, BGHSt 40, 218, 236.

4. Other examples of multi-person commission

Apart from the case law dealing with forms of co-perpetration and indirect perpetration that has been discussed above, the jurisprudence has addressed additional "uncategorised" situations of multi-person commission.

In *Gacumbitsi*, the Appeals Chamber found that "In the context of genocide … 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime." The Appeals Chamber went on to find that, since the accused "was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed," he had committed genocide and not merely ordered and instigated this crime.[46]

Judge Güney appended a partially dissenting opinion to this judgment in which he criticised the Appeals Chamber's "expansion of 'committing'."[47] According to him the Tribunal's jurisprudence knows only two forms of committing: "the physical perpetration of a crime by the offender himself" and JCE liability.[48] Since JCE was not pled Gacumbitsi's committing liability could not be found on this basis. Judge Güney opines that since Gacumbitsi was not found to have physically perpetrated any of the *actus reus* of genocide listed in Art. 2(2) of the ICTR Statute, he could not be a physical perpetrator either. In his view the Appeals Chamber's approach was therefore equivalent to identifying a new form of committing.[49]

Judge Schomburg also appended an opinion to the *Gacumbitsi* Appeal Judgment. He agrees with the Chamber's finding that Gacumbitsi incurred committing liability. In his view, because of the leading role played by Gacumbitsi during the crimes, his conduct is best described as indirect perpetration.[50]

The *Ndindabahizi* Appeal Judgement the Appeals Chamber upheld a conviction of the Trial Chamber which had found that Ndindabahizi had committed extermination by indirectly causing death,[51] that is through "distributing weapons, transporting attackers and speaking words of encouragement."[52] Again, Judge Güney dissented on the same grounds that he had advanced in the *Gacumbitsi Case*.[53]

The recent *Seromba* Appeal Judgement concerned a case where the crime was carried out by a bulldozer driver who was instructed by Seromba, a catholic priest, to destroy a church where at least 1,500 Tutsis had sought refuge; all were killed. The

46 *Gacumbitsi*, Appeal Judgement, paras. 60-61.

47 *Gacumbitsi*, Appeal Judgement, Partially Dissenting Opinion of Judge Güney, para. 7.

48 *Gacumbitsi*, Appeal Judgment, Partially Dissenting Opinion of Judge Güney, para. 4; referring to the *Tadić Appeal Judgment*, para. 188.

49 *Gacumbitsi*, Appeal Judgment, Partially Dissenting Opinion of Judge Güney, paras. 5-6.

50 *Gacumbitsi*, Appeal Judgment, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 28.

51 *Ndindabahizi Appeal Judgment*, para. 123, fn. 268.

52 *Ndindabahizi Appeal Judgment*, para. 123.

53 *Ndindabahizi Appeal Judgment*, Partially Dissenting Opinion of Judge Güney, paras. 4-6.

bulldozer driver carried out the crime because of the moral and religious authority wielded by the priest. The *Seromba* Appeals Chamber considered that the priest had incurred committing liability for the killings (genocide), since his conduct was "as much an integral part of the genocide as were the killings".[54] The Appeal Judgement, referring to *Gacumbitsi* and *Ndindabahizi*, stated: "The jurisprudence makes clear that 'committing' is not limited to direct and physical perpetration and that other acts can constitute direct participation in the *actus reus* of the crime."[55]

Judge Liu appended a dissenting opinion to the Judgement arguing that the Appeals Chamber confused "'committing' *simpliciter* with other forms of committing."[56] He considers that Seromba's conduct amounted to either co-perpetration or indirect perpetration[57] but like Judge Güney concluded that the only form of "non-physical" committing accepted in the Tribunals' jurisprudence is JCE.[58]

Another example of "uncategorised" multi-person committing can be found in the ICTY's *Limaj Case*. The *Limaj Trial Judgment* found that the Accused Bala, "acted together with" one or two others in shooting and killing a group of nine prisoners.[59] It concluded that "Bala participated physically in the material elements of the crime of murder, jointly with" one or two others and that Bala was "responsible for the murder of the nine prisoners as a direct perpetrator."[60] The Appeals Chamber referred to these passages without indicating any disagreement with this approach.[61]

5. Conclusion

It is possible to use modes of liability other than committing (such as aiding and abetting) in order to address the conduct of important actors in multi-person criminal settings. This has been done in a number of cases.[62] Nevertheless, international criminal law has examined several approaches to assessing such situations as committing liability, thus endeavouring to more properly characterise the conduct of those most responsible for international crimes.

54 *Seromba Appeal Judgment*, paras. 161, 171.

55 *Seromba Appeal Judgment*, para. 161, fn. 388.

56 *Seromba Appeal Judgement*, Dissenting Opinion of Judge Liu, para. 6.

57 *Seromba Appeal Judgement*, Dissenting Opinion of Judge Liu, paras. 8-10.

58 Seromba Appeal Judgement, Dissenting Opinion of Judge Liu, paras. 6, 10.

59 *Limaj Appeal Judgment*, para. 454.

60 *Limaj Trial Judgment*, para. 664.

61 *Limaj Appeal Judgment*, paras. 47-51.

62 *Brđanin,* for example, an important regional leader, has been convicted as an aider and abettor.

Chapter 19 Developments in the distinction between principal and accessorial liability in light of the first case law of the International Criminal Court

*Héctor Olásolo**

1. The meaning of the distinction between principal and accessorial liability

The distinction between perpetration of a crime, which gives rise to principal liability, and participation in a crime committed by a third person, which gives rise to accessorial liability, responds to the distinction between those who are directly liable for the violation of a penal norm (perpetrators or principals to the crime) and those others who are derivatively liable (accessories to the crime or secondary parties).[1]

Although this distinction is embraced by most national criminal law systems,[2] there are a few national systems (in particular Denmark[3] and Italy[4]) – usually referred

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1 G. P. Fletcher, *Rethinking Criminal Law*, 2nd ed. (2000), p. 636; Smith & Hogan, Criminal Law, 11th ed. (2005), p. 165.

2 K. Ambos, *La Parte General del Derecho Penal Internacional: Bases para una Elaboración Dogmática*, Translation by E. Malarino (2005), p. 171; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 59.

3 Article 23 (1) of the Danish Penal Code. See K. Hamdorf, *Beteiligungsmodelle im Strafrecht: Ein Vergleich von Teilnahme – und Einheit- Stätersystemen in Skandinavien, Österreich und Deutschland* (2002), pp. 66 et seq and 233 et seq. As Ambos, *La Parte General del Derecho Penal Internacional: Bases para una Elaboración Dogmática*, *supra* note 2, p. 173, has pointed out, Denmark has adopted the purest variant of the unitary system because it does not even embrace a formal distinction between perpetration and participation.

4 Article 110 of the Italian Penal Code states: "When a plurality of persons participate in the crime, each of them will be imposed the sentence attached to such crime, unless the

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to as "unitary systems" – which do not endorse it.[5] For these systems, principals to the crime are all those persons who contribute to the commission of a crime with the subjective element required by the crime in question.[6] As a result, these systems endorse the autonomous criminal liability as a principal to the crime of any person who intervenes in its commission.

The main reason behind the distinction between principal and accessorial liability is the derivative nature of any punishable form of participation in the commission of a crime by a third person. As Gillies has explained it, "[a]ccessoryship is not a crime in itself. Rather, it is simply a mode of participation in another´s crime – an alternative route to liability. Because accessoryship is not an independent head of liability in the criminal law, there can be no accessory without a principal".[7] In common law jurisdictions this principle is reflected in the theory of "derivative liability";[8] Spanish and latino-American systems embrace this idea under the principle of "*accesoriedad*

following Articles provide otherwise". See R. Dell' Andro, *La Fattispecie Plurisoggettiva in Diritto penale* (1957), pp. 77 et seq, and A. Pagliaro, *Principi di Diritto Penale: Parte Generale*, 8th ed. (2003), pp. 540 et seq.

5 Austria and Poland have adopted a so-called "functional unitary system", as opposed to the pure unitary system adopted in Denmark and Italy. Section 12 of the Austrian Penal Code and Article 18 of the Polish Penal Code formally distinguish between perpetration and participation. Nevertheless, the Austrian and Polish systems do not recognize the derivative nature of participation. In relation to Austria, see O. Triffterer, *Die Österreichische Beteiligungslehre. Eine Regelung Zwischen Einheitstäter und Teilnahmesystem?* (1983), pp. 33 et seq; D. Kienapfel, *Erscheinungsformen der Einheitstäterschaft* in *Müller-Dietz* (eds.), Strafrechtsdogmatik und Kriminalpolitik (1971), pp. 25 et seq. In relation to Poland see E. Weigend, *Das Polnische StGB vom 6. Juni 1997* (1998), p. 43 and A. Zoll, *Alleinhandeln und Zusammenwirken aus Polnischer Sicht*, in A. Eser, B. Huber, K. Cornils (eds.), *Einzelverantwortung und Mitverantwortung im Strafrecht* (1998), pp. 57- 60. Concerning the distinction between pure unitary systems, which do not even embrace a formal distinction between perpetration and participation, and functional unitary systems, which do not recognize the derivative nature of participation despite formally embracing the distinction between perpetration and participation, see Ambos, *La Parte General del Derecho Penal: Bases para una Elaboración Dogmática*, *supra* note 2, pp. 172 and 173; M. Díaz y García Conlledo, *La Autoría en Derecho Penal*, Barcelona (1991), pp. 47 et seq., 200 et seq; M.J. López Peregrín, *La Complicidad en el Delito*, Valencia (1997), pp. 29 et seq.

6 By doing so, these systems adopt a purely causal approach to the notion of perpetration.

7 P. Gillies, *Criminal Law*, 4th ed. (1997), p. 154.

8 S.H. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine', (1985) 73 *California Law Review,* 337-342, Smith & Hogan, *supra* note 1, p. 165, Gillies, *supra* note 7, pp. 154 to 157 and Fletcher, *supra* note 1, 636 to 637.

de la participación",[9] German and French law refer to it with the expressions "*Akzessorietät*"[10] and "*l´emprunt de criminalité*".[11]

According to Smith & Hogan, in common law jurisdictions, the distinction between principal and accessorial liability is also necessary because (i) some crimes require that principals be members of a specified class, (ii) in some crimes vicarious liability can be imposed for the acts of another who does the act of a principal, whereas no vicarious liability can be imposed for the act of an accessory to the crime; and (iii) no *mens rea* is required from perpetrators or principals in crimes of strict liability, whereas accessories to this type of crimes must always have *mens rea*.[12]

Furthermore, in those jurisdictions belonging to the Romano-Germanic tradition, such as the Spanish,[13] the Latino-Americans,[14] or the German,[15] the principle of mitigation for accessorial liability is an important additional reason for the distinction between principals and accessories. In these systems, the distinction on the level of punishment is based on the premise that punishment should be inflicted in proportion to the blameworthiness of the conduct of each person involved in the commission of a crime.[16] The wrongdoing of the principal sets the maximum level of permissible punishment; the wrongdoing of the accessory is less than that of the principal and therefore should be subject to a lesser level of punishment. Common Law[17] and French systems[18] do not officially recognize the principle of mitigation. Nevertheless,

9 F. Muñoz Conde & M. García Arán, *Derecho Penal. Parte General*, 5th ed. (2002), p. 455; G. Quintero Olivares, *Manual de Derecho Penal: Parte General*, 3rd ed. (2002), pp. 611 and 626; A. Bruno, *Direito Penal,* 3rd ed. (1967), Vol. II, p. 257 et seq; F. Velásquez, *Manual de Derecho Penal: Parte General*, 2nd ed. (2004), pp. 447 et seq; E.R. Zaffaroni, *Manual de Derecho Penal: Parte General*, 6th ed. (2003), pp. 565 et seq.

10 H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts*, 5th ed. Berlin (1996), pp. 655-661.

11 H. Angevin & A. Chavanne, *Editions du Juris-Classeur Pénal*, Paris (1998), Complicité: Art. 121-6 et 121-7.

12 Smith & Hogan, *supra* note 1, pp. 165 and 166.

13 J. M. Zugaldia Espinar (ed.), *Derecho Penal: Parte General* (2002), p. 934. See also Articles 28 and 63 of the Spanish Criminal Code.

14 E. Magalhães Noronha, *Direito Penal, Vol 1: Introdução e Parte Peral* (1965), pp. 221 et seq; S. Politoff, J.P. Matus & M.C. Ramírez, *Lecciones de Derecho Penal Chileno: Parte General* (2006), pp. 391 et seq; Velásquez, *supra* note 9, pp. 447 et seq; Zaffaroni, *supra* note 9, pp. 565 et seq. See also Articles 45 and 46 of the Argentinean Criminal Code and Articles 29 and 30 of the Colombian Criminal Code.

15 K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime', (2007) 5 *JICJ* 208, at 210. See also Section 27 (2) of the German Criminal Code.

16 Fletcher, *supra* note 1, p. 651. See also Hamdorf, *supra* note 15, at 210. According to this author, due to the fact that punishment for accessorial liability is to be mitigated pursuant to Article 27 (2) of the German Criminal Code, "a lot of attention has been paid by German courts and scholars to the line between principals and accessories".

17 Hamdorf, *supra* note 15, p. 218, and Fletcher, *supra* note 1, p. 636.

18 F. Desportes & F. Le Gunehec, *Droit Pénal General,* Económica, 12th ed. (2005), p. 541.

punishment for accessories can be informally mitigated through prosecutorial and judicial discretion.[19]

2. The adoption of the distinction between principal and accessorial liability in international criminal law

On 29 January 2007, Pre-Trial Chamber I ("PTC I") issued its decision on the confirmation of the charges in the first case before the International Criminal Court, the case of *The Prosecutor v Thomas Lubanga Dyilo*. In its decision, PTC I held that Article 25 (3) of the Rome Statute ("the Statute") contains a systematic set of rules on the publishable forms of intervention in the commission of crimes. It found that the Statute explicitly embraces the distinction between perpetration of a crime giving rise to principal liability and participation in a crime committed by a third person giving rise to accessorial liability.[20] As PTC I explained:

> "The Chamber recalls that in the decision concerning the issuance of a warrant of arrest, it distinguished between (i) the commission *stricto sensu* of a crime by a person as an individual, jointly with another or through another person within the meaning of Article 25 (3) (a) of the Statute, and (ii) the responsibility of superiors under Article 28 of the Statute and "any other forms of accessory, as opposed to principal, liability provided for in Article 25 (3) (b) to (d) of the Statute".[21]

As a result, according to PTC I, paragraph (3) (a) of Article 25 (3) introduces the notion of perpetration by using the expression "commits such a crime" to refer to the

19 According to Fletcher this would explain why the systems that are part of the Romano-Germanic tradition have given a lot of attention to the distinction between principal and accessorial liability, while the English speaking world has shown an "extraordinary disinterest" for this field. See Fletcher, *supra* note 1, p. 637, note 4. It is also from this perspective that Judge Iain Bonomy has affirmed that "[i]n countries with a common law tradition, the distinction between "principals" and "accessories" is more nominal than real." See Separate Opinion of Judge Bonomy to the ICTY Trial Decision on Indirect Co-perpetration in the Milutinović case, Case No. IT-05-87-PT, 22 March 2006, para. 29. For Hamdorf, "under English criminal law, the distinction between principals and accessories is not as important as under German law because the punishment for both modes of liability is identical and accessory liability is – unlike in German law – as a rule not restricted to the intentional acts of the principal and the accessory." See Hamdorf, *supra* note 15, p. 218. Desportes & Le Gunehec, *supra* note 18, p 541, also point out the limited interest of French scholars for this field.

20 Concurring K. Ambos, Article 25. Individual Criminal Responsibility, in O. Triffterer (ed.), *Commentary to the Rome Statute of the International Criminal Court* (1999), pp. 475-492, pp. 478 to 480, and G. Werle, *Tratado de Derecho Penal Internacional*, Translated by M.M. Díaz Pita (2005), pp. 212 and 213.

21 Pre Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of the Charges, para. 320.

"commission *stricto sensu* of a crime",[22] whereas paragraphs (3) (b) to (3) (d) of Article 25 use the expressions "orders", "solicits", "induces", "aids", "abets", "assists" and "in any other way contributes" to provide for several forms of participation which give rise to accessorial, as opposed to principal, liability.[23]

The decision on the confirmation of the charges in the *Lubanga Case* can be seen as the final step in the process of adopting the distinction between principal and accessorial liability in international criminal law. The IMT and IMTFE Charters set out the first rules on the punishable forms of intervention in international criminal law. These rules were scattered throughout the text.[24] As Ambos has pointed out, the IMT and the IMTFE Charters, and the case law of the Nuremberg and Tokyo tribunals, embraced a unitary model because they did not distinguish between principal and accessorial liability.[25]

The rules on the punishable forms of intervention in the commission of crimes included in the Allied Control Council Law No. 10 were somewhat more systematised than in the Nuremberg and Tokyo Charters. Although some rules were still part of the definition of crimes against peace,[26] there was a specific provision which, for the first time, introduced the distinction between principal and accessorial liability in international criminal law.[27] Nevertheless, in spite of these developments, US military

22 See Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Prosecution´s Application for a Warrant of Arrest, para. 78; Pre-Trial Chamber I, *Prosecutor v. Lubanga,* Decision on the Confirmation of the Charges, para. 320. See on 'committing liability' also the contribution by S. Wirth in Ch. 18 above.

23 Ibid.

24 Certain punishable forms of intervention in the commission of crimes were directly introduced as part of the definition of the crimes. In this regard, Articles 6 (a) IMT Charter and 5 (a) IMFTE Charter defined crimes against peace as "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Other punishable forms of intervention in the commission of crimes were included after the definition of crimes against humanity in the last paragraph of Articles 6 (c) IMT Charter and 5(c) IMTFE Charter, which says as follows: "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".

25 See Ambos, *supra* note 2, pp. 75 et seq. and Werle, *supra* note 20, p. 211, footnote 636.

26 According to Art II (1) (a) of Allied Control Council Law No. 10, crimes against peace where defined as follows: "Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

27 Art. II (2) of Allied Control Council Law No. 10, which followed the provisions on the definition of the crimes, established that: "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or

tribunals acting under Allied Control Council Law No. 10 embraced a unitary model which did not distinguish between principal and accessory liability.[28]

The Statutes of the ICTY and the ICTR[29] and the 1991 and 1996 Draft Codes of Crimes against Peace and Security of Mankind of the International Law Commission[30] develop the rules on the punishable forms of intervention in the commission of crimes provided for in the Nuremberg and Tokyo Charters and in the Allied Control Council Law No. 10.[31]

The distinction between principal and accessorial liability under Article 7 (1) ICTYS has been consistently embraced by the ICTY case law. On 15 July 1999, the Appeals Chamber found in the *Tadić* case that the first feature which distinguishes the notions of "acting in pursuance of a common purpose or design to commit a crime" and aiding and abetting is that the "[t]he aider and abettor is always an accessory to a crime perpetrated by another person, the principal".[32] In turn, in its 21 May 2003 De-

(d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

28 Ambos, *supra* note 2, pp. 75 et seq, and Werle, *supra* note 2, p. 211, foonote 636.

29 In particular Articles 7 (1) ICTYS and 6 (1) ICTRS.

30 According to Article 2 (3) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind (1996): "An individual shall be responsible for a crime set out in Article 17, 18, 19 or 20 if that individual: (*a*) Intentionally commits such a crime; (*b*) Orders the commission of such a crime which in fact occurs or is attempted; (*c*) Fails to prevent or repress the commission of such a crime in the circumstances set out in Article 6; (*d*) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission; (*e*) Directly participates in planning or conspiring to commit such a crime which in fact occurs; (*f*) Directly and publicly incites another individual to commit such a crime which in fact occurs; (*g*) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions."

31 Werle, *supra* note 20, p. 211.

32 See the ICTY Appeal Judgement in the *Tadić* Case, para. 229. After the ICTY Appeal Judgement in *Tadić*, Trial Chamber I stated in its 26 February 2001 Judgment in the *Kordić* case that "[t]he various forms of participation listed in Article 7(1) may be divided between principal perpetrators and accomplices." (para. 373). Subsequently, in its 2 August 2001 Judgment in the *Krstić* case, ICTY Trial Chamber I also held at para. 642 that "[i]t seems clear that "accomplice liability" denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators." This distinction was also embraced in paras. 249 and 273 of the 2 November 2001 ICTY Trial Judgement in the *Kvočka* case. There, the Trial Chamber pointed out that those participating in a joint criminal enterprise who did not physically carry out the objective elements of the crime could be (i) either principals to the crime (co-perpetrator) if they made their contribution sharing the common criminal purpose; or (ii) accessories to the crime (aiders or abettors) if they made their contribution knowing (but not sharing) the common criminal purpose.

cision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case, the ICTY Appeals Chamber held that "joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of "commission".[33] Subsequent ICTY case law – such as the *Krnojelac,*[34] *Vasiljević,*[35] *Blaskic,*[36] *Krstić,*[37] *Kvočka,*[38] *Simić,*[39] and the *Brđanin Appeal Judgments*[40] or the recent *Krajisnik*[41] and *Martić*[42] Trial Judgements – has consistently affirmed that Article 7 (1) ICTYS embraces the distinction between principal and accessorial liability.

A few ICTY decisions have unsuccessfully tried to embrace a unitary model that rejects the distinction principal and accessorial liability. For instance, the 15 February 2002 Trial Judgement in the *Krnojelac* case issued by ICTY Trial Chamber II (Judge Hunt presiding) held that the distinction between principal and accessorial liability was not only alien to the statute but it was also unnecessary.[43] Subsequently, Judge Hunt explained in his Separate Opinion to the ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case that:

> "No such distinction exists in relation to sentencing in this Tribunal, and I believe that it is unwise for this Tribunal to attempt to categorise different types of offenders in this way when it is unnecessary to do so for sentencing purposes. The Appeals Chamber has made it clear elsewhere that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation".[44]

33 ICTY, *Prosecutor v. Ojdanić*, Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise, para. 31. See also para. 20.

34 See the ICTY Appeal Judgment in the *Krnojelac* case, paras. 30 and 73.

35 See the ICTY Appeal Judgment in the *Vasiljević* case, paras. 95, 102 and 111.

36 See the ICTY Appeal Judgement in the *Blaškić* case, para. 33.

37 See the ICTY Appeal Judgement in the *Krstić* case, paras. 134, 137 and 266 to 269.

38 See the ICTY Appeal Judgement in the *Kvočka* case, paras. 79 and 91.

39 Implicitly in ICTY Appeal Judgement in the *Simić* case, paras. 243 and 265.

40 Implicitly in ICTY Appeal Judgment in the *Brđanin* case, paras. 431 *juncto* 434 and 444-450. In its Judgement in the *Stakić* case, the ICTY Appeals Chamber affirmed the customary nature of the notion joint criminal enterprise and its applicability before the ICTY (para. 62), but did not expressly state that it gives rise to principal, as opposed to accessorial, liability. Nevertheless, given the limited adjustments made in the sentence imposed on the defendant Stakić after substituting his conviction under the notion of joint criminal enterprise for his conviction as as co-pepetrator based on the notion of control of the crime ("co-perpetratorship"), it seems that the Appeals Chamber also accepted that the notion of joint criminal enterprise or the common purpose doctrine gives rises to principal liability.

41 See ICTY Trial Judgement in the *Krajisnik Case*, paras. 79 to 81.

42 See ICTY Appeals Judgement in the *Martić Case*, paras. 435 to 440.

43 See ICTY Trial Judgement in the *Krnojelac Case*, paras. 75 to 77.

44 Separate Opinion of Judge Hunt to the ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić Case*, para. 31.

In the view of the author, these are exceptional instances of disagreement with the approach overwhelmingly adopted by the ICTY's case law, which do not justify the statement by van Sliedregt that "[t]he courts have neither consistently applied or disregarded the distinction between types of offenders".[45]

Finally, at the ICTR, the issue of whether Article 6 (1) ICTRS (which mirrors Article 7 (1) ICTYS) embraces the distinction between principal and accessorial liability has also been dealt with in the context of the nature of the notion of joint criminal enterprise or common purpose doctrine. Although the ICTR's case law has also reached the conclusion that Article 6 (1) ICTRS embraces the distinction between principal and accessorial liability, the discussion of this matter at the ICTR has been far more limited than at the ICTY.[46]

3. The distinguishing criterion between principals and accessories to the crime in international criminal law: The doctrines of Joint Criminal Enterprise and Joint Control of the Crime

What is the distinguishing criterion between principals and accessories in international criminal law?

In its decision on the confirmation of the charges in the *Lubanga* case, PTC I explained that there are three main approaches to the distinction between principals and accessories to the crime:

(i) "the objective approach to such a distinction focuses on the realisation of one or more of the objective elements of the crime. From this perspective, only those who

45 See E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', (2007) 5 *JICJ* 184-207, p. 190.

46 On 13 December 2004, the ICTR Appeals Chamber in the *Ntakirutimana* case, at para. 462, explained that the ICTY Appeal Judgment in the *Tadić* Case had already held that participation in a joint criminal enterprise or common criminal purpose is a form of "commission" under Article 7 (1) ICTYS, and hence gives rise to principal, as opposed to accessorial or derivative, liability. Subsequently, on 13 December 2005, the ICTR Trial Judgment in the *Simba* case, para. 389, explicitly affirmed that: "If the Prosecution intends to rely on the theory of joint criminal enterprise to hold an accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify on which form of joint criminal enterprise the Prosecution will rely". Likewise, in the Gatumbitsi case of 7 July 2006, the ICTR Appeals Chamber expressly stated at para. 158 that "[t]he Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for ´committing´ a crime within the meaning of Article 6 (1) of the Statute under one of the three categories of ´joint criminal enterprise´ (´JCE´) liability." Hence, it can be concluded that, according to the ICTR case law, Article 6 (1) ICTRS embraces the distinction between perpetration of a crime giving rise to principal liability and participation in a crime committed by a third person giving rise to accessorial or derivative liability.

physically carry out one or more of the objective elements of the offence can be considered principals to the crime";[47]

(ii) "the subjective approach … moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission";[48]

(iii) "the concept of control over the offence constitutes a third approach for distinguishing between principals and accessories, which, contrary to the Defence claim, is applied in numerous legal systems. The notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed."[49]

Moreover, PTC I emphasized that:

(i) "the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all of the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime"; [50]

(ii) "there is a close interrelation between the distinguishing criterion between principal and accessories and the definitional criterion of the concept of co-perpetration".[51]

It is from this perspective that the doctrines of joint criminal enterprise and functional control of the crime become particularly relevant insofar as they are competing approaches to the concept of co-perpetration.

3.1. The distinction between principal and accessory liability in the case-law of the ad hoc *tribunals: The doctrine of Joint Criminal Enterprise*

The doctrine of joint criminal enterprise, also known as the common purpose doctrine, is built on the idea of a group of individuals, who do not need to belong to any administrative, military, economic or political structure, freely agreeing to jointly

47 Pre Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of the Charges, para. 328.

48 Ibid, para. 329.

49 Ibid, para. 330.

50 Ibid, para. 327.

51 Ibid, para. 327.

carry out one or more crimes.[52] Unlike in cases of conspiracy, it requires the subsequent implementation of the common criminal purpose. [53] Moreover, in order to become a participant in a joint criminal enterprise it is not sufficient to agree with the common criminal purpose; it is also necessary to make a contribution to its implementation with a view to commit the crimes that are either the ultimate goal of the enterprise or the means through which the goal of the enterprise is to be achieved.[54] This intent must be shared by all participants in a joint criminal enterprise, no matter whether they are physical perpetrators or senior political and military leaders.[55]

In this regard, it must be underscored that the level of contribution of those participating in a joint criminal enterprise to the achievement of the common criminal purpose is secondary.[56] What really matters is that they make their contributions with the aim at furthering the common criminal purpose.[57] As a result, according to the doctrine of joint criminal enterprise, the essence of the wrongdoing lies on the

52 ICTY Appeal Judgements in *Tadić*, para. 227, *Krnojelac*, para. 31; *Vasiljević*, para. 100; *Kvočka*, para. 81; *Stakić*, para. 64 and *Brđanin*, para. 364. See also the ICTY Trial Judgments in *Simić,* para. 158 and *Krajisnik*, para. 883.

53 In this regard, the ICTY Appeals Chamber in its Decision on Jurisdiction concerning Joint Criminal Enterprise in the Ojdanić case (paras. 23 to 26) has explained that the notions of "conspiracy" and "membership in a criminal organisation" differ from the notion of joint criminal enterprise or the common purpose doctrine in that the latter is "a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise." According to the ICTY Appeals Chamber, "mere agreement is sufficient in the case of conspiracy" no matter whether or not the crime is subsequently committed, whereas for membership in a criminal organisation it is sufficient "a knowing and voluntary membership of organisations which did in fact commit crimes". A different view is held by R.P. Barret & L.E. Little, 'Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Criminal Tribunals', (2003) 88 *Minnesota Law Review* 30 et seq. According to these writers, the ICTY´s case law has developed a notion of "collective criminal enterprise" which is "difficult to distinguish from the crime of conspiracy." See also A. Fichtelberg, 'Conspiracy and International Criminal Justice', (2006) 17 *Criminal Law Forum* 149-176, p. 165.

54 See ICTY Appeal Judgements the *Tadić*, para. 227; *Krnojelac*, para. 31; *Vasiljević*, para. 100; *Kvočka*, para. 96; *Stakić*, para. 64 and *Brđanin,* para. 364. See also ICTY Trial Judgment in the *Krajisnic* case, para. 883.

55 ICTY Appeal Judgments in *Tadić,* para. 228*; Krnojelac*, paras. 32 and 33; *Vasiljević,* para. 101; *Kvocka*, paras. 82, 83 and 89; *Stakić,* para. 65 and *Brđanin*, para. 365. See also the ICTY Trial Judgments in *Simić,* para. 158 and *Krajisnik*, paras. 879 and 883.

56 See ICTY Appeal Judgments in *Tadić*, paras. 227 and 229; *Kvočka*, paras. 97 and 98; *Vasiljević*, para. 100 and *Brđanin*, para. 263. See also the ICTY Trial Judgment in the *Krajisnik* case, para. 883.

57 See also the ICTY Appeal Judgments in *Tadić*, para. 228; *Krnojelac,* para. 84; *Kvočka* , para. 82; *Vasiljević*, para. 97; *Stakić,* para. 65 and *Brđanin*, para. 365. See also ICTY Trial Judgments in *Simić*, para. 157 and *Krajisnik,* para. 79. See A. Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enteprise" in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia', (2006) 6 *International Criminal Law Review*, p. 82.

shared intent by all the participants in the enterprise to have the crimes encompassed by the common criminal purpose committed.[58] Hence, one can conclude that the doctrine of joint criminal enterprise is grounded on a subjective criterion consisting of the sharing of the common criminal purpose of the enterprise.

Although the *Tadić* Appeal Judgement introduced a certain degree of uncertainty in relation to its interpretation that the doctrine of joint criminal enterprise is, under customary international law, a theory of co-perpetration which gives rise to principal liability (and thus falls under the heading "committed" in Art. 7 (1) ICTYS),[59] the 21 May 2003 ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case clarified that according to customary international law:

(i) criminal liability arises for those acting pursuant to a joint criminal enterprise;[60]
(ii) there are three different forms of joint criminal enterprise, each of them with their own objective and subjective elements;[61] and
(iii) the doctrine of joint criminal enterprise constitutes a theory of co-perpetration which gives rise to principal liability.[62]

58 See the ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case, para. 20. When the crimes are committed within a system of ill-treatment (systematic form of joint criminal enterprise), the shared intent to commit the core crimes carried out through such a system is inherent to the awareness of the nature of the system and the intent to further it. As van Sliedregt, *supra* note 45, 186, has pointed out: "With regard to the *mens rea*, the First and Second Category of JCE require 'an intention to participate in and further the criminal activity or purpose of the group', thus suggesting that all participants possess the same intent …." See also ICTY Appeal Judgments in *Tadić*, para. 228, *Krnojelac*, paras. 93 and 94, *Kvočka*, para. 82 and *Brđanin*, para. 365. Criminal responsibility for the commission by other members of the criminal enterprise of foreseeable crimes which are not part of the common criminal plan only arises as long as there is a shared intent by all participants in the enteprise to have the core crimes of the enterprise committed. See ICTY Appeals Judgments in *Tadić*, para. 228; *Vasiljević*, para. 101 and *Blaškić*, para. 33. See also H. van den Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', (2007) 5 *JICJ* 96; van Sliedregt, *supra* note 45, p. 186.

59 See van Sliedregt, *supra* note 45, pp. 189-190.

60 See ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case, paras. 21 and 29.

61 Ibid, paras. 21 and 29.

62 Ibid, paras. 20 and 31. In reaching these three findings, the Appeals Chamber rejected for the Defence´s claim that the finding of the customary status of the notion of joint criminal enterprise was inconsistent with existing customary law because state practice was too weak to give rise to such a rule. As it explained: "The Appeals Chamber does not propose to revisit its findings in *Tadić* concerning the customary status of this form of liability. It is satisfied that the state practice and *opinio iuris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when Tadić committed the crimes for which he had been charged and for which he was eventually convicted." See ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case, para. 29. Finally, in concluding that the notion of joint criminal enterprise or the common purpose doctrine is a theory

Moreover, subsequent case law of the ICTY Appeals Chamber on the doctrine of joint criminal enterprise has systematically relied on the Tadić Appeal Judgment and on the Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case to restate that under customary international law the doctrine of joint criminal enterprise is a theory of co-perpetration which gives rise to principal liability.[63]

The ICTR case law – particularly the 13 December 2004 ICTR Appeal Judgement in the Ntakirutimana case,[64] the 12 April 2006 ICTR Appeal Decision on Joint Criminal Enterprise in the *Karemera* case [65] and the 7 July 2006 ICTR Appeal Judgment in the Gatumbitsi case – has relied almost exclusively on the ICTY Appeal Judgment in the *Tadić case* to state the customary nature of the doctrine of joint criminal enterprise and the fact that, under customary international law and under Article 6 (1) ICTRS, participation in a joint criminal enterprise gives rise to principal liability.

Hence, being joint criminal enterprise a theory of co-perpetration which gives rise to principal liability and is based on a subjective criterion – and given the close interrelation between the distinguishing criterion between principals and accessories and the definitional criterion of the concept of co-perpetration –, one cannot but

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of co-perpetration which gives rise to principal liability did not refer to any source additional to those provided for in the Tadić Appeal Judgment, On the contrary, it justified its finding as follows:

> "[…] leaving aside the appropriateness of the use of the expression "co-perpetration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7 (1) of the Statute, rather than as a form of accomplice liability. The Prosecution´s approach is correct to the extent that, insofar as participants shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider or abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7 (1) of the Statute."

See ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić* case, para. 20.

63 See ICTY Appeal Judgments in *Vasiljević,* para. 95; *Kvočka*, para. 79; *Krnojelac*, paras. 29 and 30 and *Krstić*, para. 134, where the ICTY Appeals Chamber refers to a participant in a joint criminal enterprise as a "principal perpetrator". As a result, the ICTY Appeals Judgments in the *Vasiljević, Kvočka, Krnojelac, Krstić, Stakić* and *Brđanin* cases only analyse in depth specific aspects of the objective and/or subjective elements of some of the three forms of joint criminal enterprise.

64 In this Judgment, the ICTR Appeals Chamber highlighted at paras. 462-467 that the *Tadić Appeal Judgment* had already held that under customary international law and under Art. 7(1) ICTYS: (i) criminal liability arises for those acting pursuant to a joint criminal enterprise; (ii) participation in a joint criminal enterprise is a form of "commission", and hence gives rise to principal liability; and (iii) there are three different forms of joint criminal enterprise, each of them with their own objective and subjective elements. It concluded at para. 468 that, given the fact that arts. 6 (1) ICTRS and 7 (1) ICTRS are "mirror provisions", ICTY case law should be applied to the interpretation of Art. 6 (1) ICTRS.

65 ICTR, Appeal Decision on Joint Criminal Enterprise in the *Karemera* case, para. 13.

conclude that the case law of the *ad hoc* tribunals has adopted a subjective approach to the distinction between principal and accessorial liability through the doctrine of joint criminal enterprise.[66]

3.2. The distinction between principal and accessorial liability in the first case- law of the ICC: The notion of 'Control of the Crime'

In its decision on the confirmation of the charges in the *Lubanga* case, PTC I has held that Article 25 (3) (a) of the Statute does not embrace the objective approach for distinguishing between principals and accessories because "the notion of committing an offence through another person – particularly when the latter is not criminally responsible – cannot be reconciled with the idea of limiting the class of principals to those who physically carry out one or more of the objective elements of the crime".[67]

Furthermore, given the close interrelation between the distinguishing criterion between principals and accessories and the definitional criterion of the concept of co-perpetration, PTC I also found that Article 25 (3) (a) does not embrace the objective approach to the notion of co-perpetration, according to which, when the crime is committed by a plurality of persons, co-perpetrators are only those who carry out an objective element of the crime, no matter how important the contribution to the implementation of the common plan might be.[68]

In the same decision, PTC I also held that Article 25 (3) (a) does not embrace a subjective approach for distinguishing between principals and accessories,[69] and therefore the concept of co-perpetration under Article 25 (3) (a) cannot be based on a subjective approach, according to which, when the crime is committed by a plurality of persons, anyone who makes a contribution with the aim of implementing the common criminal purpose is a co-perpetrator, regardless of the nature and scope of his contribution.[70] The main argument given by PTC I for these findings is that Article 25 (3) (d), which embraces a mode of liability that is closely akin to the doctrine of joint criminal enterprise, is shaped as a residual form of accessory liability as opposed to a theory of co-perpetration.[71] According to PTC I, Article 25 (3) (d) would have been the basis of the concept of co-perpetration within the meaning of Article 25 (3) (a) of the Statute, had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories.[72]

66 Pre Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of the Charges, para. 329.

67 Ibid, para. 333.

68 Ibid, paras. 333, 340 and 341.

69 Ibid, paras. 333 to 337.

70 Ibid, paras. 334, 340 and 341.

71 Ibid, paras. 334 to 337.

72 Ibid, para. 335.

In this regard, PTC I clarified that Article 25 (3) (b) to (d) provide for a number of forms of accessorial, as opposed to principal, liability.[73] According to Article 25 (3) (b), a person who "orders, solicits or induces" the commission of a crime within the jurisdiction of the Court will be criminally liable as an accessory to the crime. As provided for in Article 25 (3) (c), accessorial liability also arises for any individual who, for the purpose of facilitating the commission of a crime within the jurisdiction of the Court, "aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[74] Finally, Article 25 (3) (d) establishes that accessorial liability arises for any person who "in any other way contributes" to the commission of a crime within the jurisdiction of the ICC by a group of persons acting with a common purpose. Hence, "Art. 25 (3) (d) of the Statute provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of Article 25 (3) (b) or Article 25 (3) (c) of the Statute, by reason of the state of mind in which the contributions were made".[75]

The author considers that the interpretation of Article 25 (3) (d) as a residual form of accessory liability is supported by the two subjective elements provided for in such a provision. On the one hand, the contribution to the commission of the crime must be "intentional". As Fletcher and Ohlin have explained, this only means that "all that has to be intentional is the act of doing something that constitutes a contribution, e.g. selling gas to those who are driving to the scene of the intended massacre."[76] On the other hand, the relevant individual must carry out his intentional act of contribution (i) "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) "in the knowledge of the intention of the group to commit the crime." Hence, Article 25 (3) (d), unlike the notion of joint criminal enterprise

73 Ibid, para. 320 and Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Prosecution´s Application for a Warrant of Arrest, para. 78.

74 The ICTR and ICTY case-law has held that aiding and abetting the commission of a crime only gives rise to criminal liability if the assistance has a substantial effect on the commission of the crime or on the consolidation of its effects. See, *inter alia,* ICTR Appeal Judgment in *Ntagurera*, para. 370 and the ICTY Appeal Judgments in *Blaškić*, paras. 45 and 46; *Vasiljević,* para. 102; *Simić,* para. 85 and *Blagojević,* para. 127. See also the ICTR Trial Judgments in *Bagilishema*, para. 33; *Kajelijeli*, para. 766 and *Kamuhanda*, para. 597 and the ICTY Trial Judgments in *Furundzija*, para. 249; *Aleksovski*, para. 61; *Kunarac,* para. 391; *Krnojelac*, para. 88 and *Orić,* para. 282. In the view of author, this interpretation is also applicable in relation to sub-para. (c) of Art. 25 (3) because sub-para. (d) of the same provision deals explicitly with the criminal liability of those individuals who "in any other way contributes" to the commission of the crime. Concurring Ambos, *supra* note 20, pp. 481 and 484.

75 Pre-Trial Chamber I, Decision on the Confirmation of the Charges in the *Lubanga case,* para. 337.

76 G.P. Fletcher & J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *JICJ* 539-561, p. 549.

in the case law of the *ad hoc* tribunals, does not require a sharing of the common criminal purpose of the group; quite the contrary, the relevant individual must only be aware of it. For this reason, Fletcher and Ohlin have highlighted:

> "The culpability nexus between the contribution and the ultimate criminal harm is left vague. The contributor might have the aim of furthering the plan (Article 25 (3) (d) (i)) or simply have the knowledge of the group´s intention (Article 25 (3)(d)(ii)), i.e., if the gas station attendant knows of the group´s criminal objective, he is guilty for ´intentionally shelling them gas. In the final analysis, the knowledge requirement would be sufficient because no one could have the aim of furthering the group objective without having knowledge of that purpose".[77]

Article 25 (3) (d) of the Statute is not only limited to "those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of Article 25 (3) (b) or Article 25 (3) (c) of the Statute";[78] it also does not require the presence of subjective elements of the crime, such as any requisite ulterior intent. Even though Article 25 (3) (d) resembles in certain ways the notion of joint criminal enterprise in the case-law of the *ad hoc* Tribunals, it cannot be considered as a notion of co-perpetration giving rise to principal liability. Indeed, in choosing a subjective approach to the concept of co-perpetration, the case-law of the *ad hoc* tribunals has emphasized that, for principal liability to arise pursuant to the notion of joint criminal enterprise, any participant in the enterprise must share the common criminal purpose and, therefore, act motivated by any ulterior intent required by any of the core crimes of the enterprise.[79]

Moreover, while Article 25 (3) (c) of the Statute specifies that the assistance must be carried out "for the purpose of facilitating the commission of […] a crime" in order to trigger accessorial liability for aiding, abetting or assisting in the commission of such a crime, Article 25 (3) (d) does not include such a requirement. Thus, according to Article 25 (3) (d) – as pursuant to the notion of aiding and abetting in the case law of the *ad hoc* tribunals[80] – criminal liability arises for acts which are carried out

77 Ibid.

78 Pre-Trial Chamber I, Decision on the Confirmation of the Charges in the *Lubanga case,* para. 337.

79 See ICTR Appeal Judgment in the *Ntagurera* case, para. 370 and the ICTY Appeal Judgments in *Blaškić*, paras. 45 and 46; *Vasiljević,* para. 102; *Simić*, para. 85 and *Blagojević*, para. 127. See also the ICTR Trial Judgments in *Bagilishema,* para. 33; *Kajelijeli*, para. 766 and *Kamuhanda*, para. 597 and the ICTY Trial Judgments in *Furundzija*, para. 249; *Aleksovski,* para. 61; *Kunarac*, para. 391; *Krnojelac*, para. 88 and *Orić*, para. 282. Moreover, as the *Furundzija Trial*, para. 257 and Appeal Judgment, para. 118 have expressly stated, for distinguishing a co-perpetrator (a participant in a joint criminal enterprise) from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture*".

80 See ICTR Appeal Judgement in the *Ntagerura case*, para. 370 and the ICTY Appeal Judgments in *Blaškić*, para. 46; *Vasiljević*, para. 102; *Krstić*, paras. 140 and 141;, *Simić* , para. 86 and *Blagojević*, para. 12. See also K. Kittichaisaree, *International Criminal Law* (2001), p. 245.

without the aim to facilitate the commission of the crimes, but in the knowledge that they will be of assistance in their commission.

Under these circumstances, one can only agree with the finding of PTC I concerning the nature of Article 25 (3) (d).[81] Furthermore, if Article 25 (3) (d) is a residual form of accessorial liability – and, therefore, the concept of co-perpetration in Article 25 (3) (a) is not based on a subjective criterion -, one must also conclude that Article 25 (3) (a) does not embrace a subjective approach for distinguishing between principals and accessories to the crime.[82]

PTC I refers to the concept of control of the crime as "a third approach for distinguishing between principals and accessories", which involves (i) an objective element consisting of the appropriate factual circumstances for exercising control over the offence; and (ii) a subjective element consisting of the awareness of such circumstances.[83] Furthermore, it has highlighted that:

> "According to this approach, only those who have control over the commission of the offence – and are aware of having such control – may be principals because: (i) they physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration); (ii) they control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration), or (iii) they have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration)".[84]

In its decision on the confirmation of the charges in the *Lubanga* case, PTC I concluded that Article 25 (3) (a) embraces the approach based on the notion of control of the crime for distinguishing between principals and accessories. It reached this conclusion in light of the fact that: (i) neither the objective approach nor the subjective approach to such a distinction has been embraced by Article 25 (3) (a);[85] and (ii) "the most typical manifestation of the concept of control over the crime, which is the commission of a crime through another person, is expressly provided for in Article 25 (3) (a) of the Statute."[86]

Moreover, in this context, and given the close interrelation between the distinguishing criterion between principals and accessories and the definitional criterion of the concept of co-perpetration, PTC I found "that the concept of co-perpetration embodied in Article 25 (3)(a) of the Statute coincides with that of joint control over the crime by reason of the essential nature of the various contributions to the com-

81 Concurring G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', (2007) 5 *JICJ* 953-975, p. 958-961 and 974.

82 H. Olasolo, *Unlawful Attacks in Combat Situations* (2008), Section VI.

83 Ibid, para. 330 and 331.

84 Ibid, para. 332.

85 Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of the Charges, para. 338.

86 Ibid, para. 339.

mission of the crime."[87] In this regard, it held that the notion of co-perpetration based on joint control of the crime "is rooted in the principle of the division of essential

87 Ibid, paras. 340 and 341. This decision confirms Pre-Trial Chamber I's Decision on the Prosecution´s Application for a Warrant of Arrest of 10 February 2006 (para. 96), in which the Chamber had already stated that the notion of co-perpetration based on joint control of the crime was embraced by Article 25 (3) (a) RS and could be applicable to Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application for a Warrant of Arrest. See also Ambos, *supra* note 20, p. 479 and J. M. Gómez Benitez, 'Elementos Comunes de los Crímenes contra la Humanidad en el Estatuto de la Corte Penal Internacional', (2002) 42 *Actualidad Penal* 1121-1138. The notion of co-perpetration based on joint control of the crime is by no means a new notion. On the contrary, apart from its application in the ICTY Trial Judgement in the *Stakić* case, the concept has been applied in a number of national jurisdictions, such as Argentina, Colombia, France, Germany, Spain or Switzerland. See the Separate Opinion of Judge Schomburg in the ICTR Appeal Judgment in the *Gacumbitsi case* (para. 30). In Argentina, see e.g. the judgment of the Cámara Nacional Criminal y Correccional, sala 1ª, 31/10/1988, Acuña. For Colombia, see Article 29 (2) of the Penal Code of Colombia ("Son coautores los que, mediando un acuerdo comun, actuan con division del trabajo criminal atendiendo la importancia del aporte"). French jurisprudence also relies on the importance of the role played during the commission of the crime (See Cour de Cassation, Chambre criminelle 25 January 1962, Bulletin Criminel No. 68; Salvage, *Juris-Classeur*, ed. 1998, Code Pénal Art. 121-6 et 121-7, Complicité, No. 86). German jurisprudence has also occasionally embraced the notion of co-perpetration based on joint control (Entscheidungen des Bundesgerichtshofs in Strafsachen 37, p. 291; 38, p. 319; Bundesgerichtshof, Strafverteidiger 1994, p. 241.). Joint control has also been applied by the Spanish Supreme Court (see e.g., Judgment of the Spanish Supreme Court of 13 December 2002). Finally, the Swiss Supreme Court has applied this notion (see, e.g., Entscheidungen des Schweizerischen Bundesgerichts 118 IV 399, 120 IV, 142, and Entscheidungen des Schweizerischen Bundesgerichts 120 IV 272). Moreover, many legal writers, including the majority of German and Spanish writers, have accepted it. See for instance, C. Roxin, *Täterschaft und Tatherrschaft*, 7th ed., p. 294, G. Jakobs, *Strafrecht Allgemeiner Teil*, 2nd ed. (1991), para. 21/35 footnote 86, (he uses a different terminology, but following the distinction between control of the act, functional control and control of the will), H. Jescheck, & T. Weigend, *Strafrecht Allgemeiner Teil*, 5th ed. (1996), p. 674, K. Kühl, Strafrecht Allgemeiner Teil, 4th ed. (2002), No. 99, L. Lackner & K. Kühl, *Kommentar zum Strafgesetzbuch*, 24th ed. (2001), § 25 No. 11, F. Haft, *Strafrecht Allgemeiner Teil*, 7th (1996), p. 199, R. Maurach, K. H. Gössel & H. Zipf, *Strafrecht Allgemeiner Teil*, Teil II, 6th ed. (1984), 49/4, J. Wessels & W. Beulke, *Strafrecht Allgemeiner Teil*, 31st ed. (2001), No. 528, V. Krey, *Strafrecht Allgemeiner Teil*, Vol. 2 (2002), No. 165, S. Mir Puig, Derecho Penal, Parte General, 6th ed. (2002), p. 385, Muňoz Conde & Garcia Aran, *supra* note 9, pp. 453-454, A. I. Perez Cepeda, L*a Responsabilidad de los Administradores de Sociedades: Criterios de Atribución* (1997), p. 417, J. Cerezo Mir, *Problemas Fundamentales del Derecho Penal* (1982), p. 339; E. Bacigalupo, *La Distinción entre Autoría y Participación en la Jurisprudencia de los Tribunales y el Nuevo Código Penal Alemán,* in Libro homenaje a Antón Oneca, Estudios Penales (1982), pp. 30 et seq., E. Bacigalupo, *Principios del Derecho español, II: El hecho Punible* (1985), pp. 135 et seq., J. M. Gomez Benitez*., El dominio del hecho en la autoría (validez y límites),* Anuario de Derecho Penal y de las Ciencias penales (1984), pp. 104 et seq.

tasks for the purpose of committing a crime between two or more persons acting in a concerted manner," so that "although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task."[88]

Therefore, when a crime is committed by a plurality of persons, principals to the crime are only those persons who make a contribution which is essential for the performance of the objective elements of the crime because, without it, such a performance would be disrupted.[89] There can be, however, many additional tasks which are performed at the preparatory and execution stages and which are not essential for the performance of the objective elements of the crime. For instance, confirming to the artillery squad that it can use the anticipated ammunition to shell an old mosque, or advising the artillery squad not to stop the shelling of such a mosque are just some examples of this type of tasks. According to the notion of co-perpetration based on joint control, performing such functions, even if it is in a coordinated manner with

88 See Pre-Trial Chamber I, *Prosecutor v Lubanga*, Decision on the Confirmation of the Charges, para. 342. See also Roxin, *supra* note 87, pp. 141 et seq, Jescheck & Weigend, *supra* note 87, p. 674, H. Otto, *Strafrecht Allgemeiner Teil*, 6th ed. (2000), No. 57 ("gemeinsames Innehaben der Tatherrschaft") and Perez Cepeda, *supra* note 87, p. 417. The control of each co-perpetrator over the crime is based on the division of functions without which it would be impossible to complete the objective elements of the crime. The co-perpetrators can only implement the common plan in as much as they act jointly, and each co-perpetrator may disrupt the implementation of the common plan by withholding his contribution to the crime. This key position of each co-perpetrator is the basis of their shared control of the crime. See Roxin, *supra* note 87, pp. 141 et seq, Mir Puig, *supra* note 87, p. 385 and Muñoz Conde & Garcia Aran, *supra* note 9, pp. 452-453. The key element of co-perpetration based on joint control is that, due to the division of the essential functions for the commission of the crime, none of the co-perpetrators alone controls the execution of the crime, but all co-perpetrators share such control. Therefore, they depend on one another, and only if all of them carry out their contributions in a coordinated manner, the objective elements of the crime will be completed. For instance, an old mosque would only be destroyed if an observation officer communicates to the artillery squad the necessary corrections for the next rounds. As a result, any co-perpetrator has the power to disrupt the performance of the objective elements of the crime. The value of the observation officer's corrections is null if the artillery squad stops the shelling. Likewise, should the observation officer fails to communicate his corrections to the artillery squad, the latter could continue shelling the old mosque for a week without hitting it. Thus, one can conclude that each co-perpetrator controls more than his part of the crime, but, at the same time, he only directs the commission of the crime jointly with the other co-perpetrators. In this sense, joint control of the crime is inherent to the essential function of each co-perpetrator in the implementation of the overall common plan. See Roxin, *supra* note 87, pp. 141 et seq, Kühl, *supra* note 87, No. 99, and Wessels & Beulke, *supra* note 87, No. 526. See also Pre Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of the Charges, para. 332 (iii).

89 See C. Roxin, *Autoría y Dominio del Hecho en Derecho Penal* (1998), pp. 303-333. See also H. Olásolo & A. Cepeda, 'The Notion of Control of the Crime and its Application by the ICTY in the *Stakić* Case', (2004) 4 *International Criminal Law Review* 475, 497-506.

the co-perpetrators in furtherance of a common plan, will only give rise to accessorial liability.[90]

Moreover, co-perpetration based on joint control over crime is applicable to factual scenarios in which the common plan or common agreement, although it contains an element of criminality, is not specifically directed at the comission of a crime.[91] According to PTC I, this was the case in the *Lubanga* case where the common plan, which was implemented from early September 2002 until the end of 2003, aimed at furthering the war efforts of *l'Union des Patriotes Congolais/Rassemblement pour la Paix* (UPC/RP) and of its military wing *les Forces Patriotiques pour la Libération du Congo* (FPLC) by: (i) recruiting, voluntarily or forcibly, young persons into the FPLC; (ii) subjecting them to military training; and (iii) using them to actively participate in military operations and as bodyguards to protect military objectives.[92] Hence, the agreement did not specifically aim at the commission of a crime, because it did not specifically target children under fifteen. However, it contained an element of criminality because, in spite of the fact that it did not specifically target children under the age of fifteen (it targeted young recruits in general), its implementation entailed the objective risk that it would involve such children.[93]

In the view of the author, the fact that the common plan to further the UPC/RP and FPLC war effort did not specifically target children under the age of fifteen, would have prevented the application of the notion of joint criminal enterprise or the common purpose doctrine as elaborated by the case law of the *ad hoc* tribunals.[94] The reason for this is that this notion constitutes a subjective approach to the concept of co-perpetration which gives priority to the mental state of the alleged co-perpetrators over their objective contribution to the implementation of the common plan. Therefore, it requires that they all agree on a common plan, which is specifically directed at the commission of one or more crimes, and that they all act with the aim to have the crimes encompassed by the common plan committed (*dolus directus in the first degree*).[95]

This marks an important difference to the notion of co-perpetration based on joint control, which only requires that the common plan has an 'element of criminality',

90 See Roxin, *supra* note 87, pp. 141 et seq; Muñoz Conde & Garcia Aran, *supra* note 9, pp. 452-453; Kühl, *supra* note 87, Nos. 103 and 112; Wessels & Beulke, *supra* note 87, No. 528. See also Pre-Trial Chamber I, *Proseutor v. Lubanga*, Decision on the Confirmation of the Charges, para. 347.

91 See Pre-Trial Chamber I, *Proseutor v. Lubanga,* Decision on the Confirmation of the Charges, para. 349 et seq.

92 Ibid, para. 377.

93 Idem.

94 See the ICTY Appeal Judgments in *Tadić*, para. 227; *Krnojelac*, para. 31; *Vasiljević*, para. 100; *Kvočka*, para. 81 and 96; *Stakić*, para. 64 and *Brđanin*, para. 364 and the ICTY Trial Judgments in *Simić,* para. 158 and *Krajisnik,* para. 883..

95 See the ICTY Appeal Judgment in *Tadić*, para. 228; *Krnojelac,* para. 32; *Vasiljević,* para. 101; *Kvočka*, para. 82; *Stakić*, para. 65 and *Brđanin*, para. 365 and the ICTY Trial Judgments in *Simić*, para. 158 and *Krajisnik,* paras. 879 and 883.

and that the co-perpetrators (i) be aware of the risk that its implementation could bring about the commission of one or more crimes and (ii) make peace or reconcile themselves with such a result.[96] This is because the cornerstone of this notion is the joint control that each co-perpetrator has as a result of the essential function that each of them performs in the implementation of the common plan. Hence, the fact that the common plan did not specifically target children under the age of fifteen did not prevent the application of co-perpetration based on joint control as long as its implementation entailed the objective risk that it would involve such children.

4. Conclusion

As PTC I has highlighted in its decision on the confirmation of the charges in the *Lubanga* case,[97] there is an important difference between the Rome Statute – where the distinction between principal and accessory liability is based on the notion of control of the crime and, consequently, the concept of co-perpetration is that of joint control of the crime – and the case law of the *ad hoc* tribunals, which has consistently endorsed a subjective approach to the distinction between principal and accessorial liability and has opted for a concept of concept of co-perpetration based on the doctrine of joint criminal enterprise.[98]

This is by no means the only difference between the Rome Statute and the case law of the *ad hoc* tribunals concerning modes of liability.[99] For instance, according to Articles 25 (3) (b) and (d), those participating in the commission of a crime by other persons will be criminally liable as accessories to the crime as soon as the execution stage is reached, regardless of whether the objective elements of the crime are finally completed. This marks an additional difference to the case-law of the *ad hoc* tribunals, according to which planning, instigating, ordering and aiding and abetting only give rise to criminal liability if the crimes have been completed.

In the view of the author, these differences, which are the result of the different choices made by the drafters of the Statute and the case law of the *ad hoc* tribunals, should not be seen as something necessarily negative – particularly in light of Articles 10 and 22 (3) of the Statute, which "clearly reflect the autonomy of the RS

96 See Pre-Trial Chamber I, *Proseutor v. Lubanga,* Decision on the Confirmation of the Charges, para. 349 et seq.

97 Ibid, para. 338.

98 Ibid, para. 329, 335, 337, 338 and 341. See the ICTY Appeal Judgments in *Tadić,* paras. 227-228; *Furundzija*, para. 118; *Kupreškić,* para. 772; *Čelebići*, paras. 365-366 and *Krnojelac*, para. 29. See also the ICTY Trial Judgments in *Kordić*, para. 397; *Krstić*, para. 601; *Kvočka*, para. 265; *Krnojelac,* para. 81; *Vasiljević*, para. 65; *Stakić*, para. 431 and *Simić*, para. 149 and the ICTY Appeal Decision on Jurisdiction concerning Joint Criminal Enterprise in the *Ojdanić Case*, paras. 20 et seq. See also Olásolo & Cepeda, *supra* note 89, pp. 476-478, footnote 6.

99 See in this regard the comprehensive study in H. Olasolo, *Criminal Responsibility of Political and Military Leaders as Principals to International Crimes* (2008) (in print). See also Werle, *supra* note 81, pp. 953-975.

and international criminal law concerning the content of their respective substantive provisions".[100] Quite the contrary, this shows that international criminal law is more dynamic than ever and that the part of international criminal law relating to modes of liability continues to evolve as it is usually the case at the national level.[101]

100 O. Triffterer, *Article 10*, in Commentary on the Rome Statute of the International Criminal Court, Triffterer, O. (Ed.), Nomos (1999), pp. 315-321, pp. 318-319. See also H. Olásolo, *The Triggering Procedure of the International Criminal Court* (2005), p. 25.

101 Note, for instance, how the Spanish Supreme Court, in the last twenty five years, has moved away from a subjective approach to the distinction between principals and accessories and has embraced the approach based on the notion of control of the crime. Likewise, during the same period of time, the German Federal Supreme Court has been going back and forth between both approaches. See H. Olásolo, 'Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgment', (2007) *International Criminal Law Review*, pp. 143-162, p. 151.

Crimes

Chapter 20 Identifying an armed conflict not of an international character

*Sandesh Sivakumaran**

1. Introduction

The inclusion in the Rome Statute of the International Criminal Court ('Statute') of provisions on war crimes in armed conflicts not of an international character was one of the most controversial issues arising during the diplomatic conference.[1] For some States, the inclusion of provisions on war crimes in non-international armed conflicts was considered crucial, going to the very relevance of the Court;[2] the "*raison d'être*",[3] "credibility",[4] and "integrity and rationale"[5] of the Court depended on it. Other States expressed reservations about the inclusion of such provisions in the Statute. Some did so as, in their view, the provisions did not reflect customary international law;[6] others in the fear that it would lead to interference in the domestic affairs of States.[7] Still others supported a provision based on Article 3 common to the four

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1 T. Graditzky, 'War Crime Issues Before the Rome Diplomatic Conference On the Establishment of an International Criminal Court' 5 *UC Davis Journal of International Law and Policy* 199, 208 (1999). History repeats itself; the same was true of common Article 3 at the Diplomatic Conference leading to the Geneva Conventions of 1949: *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B* (1949) 325 (USSR).

2 A/CONF.183/C.1/SR.4, para. 72 (Denmark); A/CONF.183/C.1/SR.4, para. 74 (Sweden); A/CONF.183/C.1/SR.26, para. 123 (Greece).

3 A/CONF.183/C.1/SR.26, para. 54 (Republic of Korea).

4 A/CONF.183/C.1/SR.26, para. 72 (Togo).

5 A/CONF.183/C.1/SR.26, para. 97 (United States of America).

6 A/CONF.183/C.1/SR.26, para. 102 (Islamic Republic of Iran); A/CONF.183/C.1/SR.25, para. 36 (China).

7 A/CONF.183/C.1/SR.27, para. 5 (Algeria).

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 363-380.

Geneva Conventions of 1949 ('common Article 3') but not one based on Protocol II, additional to the Geneva Conventions ('Additional Protocol II').[8]

States in favour of including provisions on war crimes in armed conflicts not of an international character prevailed. Article 8 of the Statute thus provides:

> "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:
> (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely …
> …
> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely …"

The Statute also makes clear that Article 8 (2) (c):

> "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".[9]

Article 8 (2) (e), on the other hand:

> "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".[10]

Inherent in Article 8 (2) (c) and 8 (2) (e) is the notion of an 'armed conflict not of an international character', an idea that appears in common Article 3 of the Geneva Conventions. Quite what is meant by this phrase is the subject of this chapter. Part 2 will seek to give it some meaning, using factors identified by the *ad hoc* international criminal tribunals, primarily those of the intensity of the violence and the level of organisation of the armed group. Part 3 will consider whether the threshold of Article 8 (2) (e) is the same as that of Article 8 (2) (c), or whether a higher threshold has been created as a result of the requirement in Article 8 (2) (f) that the armed conflict be 'protracted'. Regard will be had to how that requirement came to be included in the

8 A/CONF.183/C.1/SR.4, para. 76 (Sudan); A/CONF.183/C.1/SR.25, para. 59 (Azerbaijan); A/CONF.183/C.1/SR.25, para. 65 (Mexico).

9 Rome Statute of the International Criminal Court, Article 8 (2) (d).

10 Ibid, Article 8 (2) (f).

Statute and how it has subsequently been interpreted by a pre-trial chamber of the International Criminal Court.

2. Article 8 (2) (c)

Article 8 (2) (c) simply refers to an 'armed conflict not of an international character' without more. The only guidance given by the Statute is that contained in Article 8 (2) (d) which contains the material scope of application of Article 8 (2) (c). This provides that it 'does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. This may be considered superfluous as an armed conflict by definition excludes mere situations of internal disturbances and tensions;[11] indeed, Article 8 (2) (d) itself seems to accept this, in providing that Article 8 (2) (c) 'applies to armed conflicts not of an international character and *thus* does not apply to situations of internal disturbances and tensions'. It is, however, an important addition as common Article 3 contains no such statement, even if this was the view of many delegates in 1949.[12]

What, then, is an 'armed conflict not of an international character', aside from something more than internal disturbances and tensions? As Article 8 (2) (c) makes explicit reference to common Article 3, it may be beneficial to consider how that provision has been interpreted.[13] The International Committee of the Red Cross ('ICRC') has offered some guidance – 'the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country'[14] – guidance which has found favour with the International Criminal Tribunal for Rwanda ('ICTR').[15] The ICRC has also observed that the term 'armed conflict' 'introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree'.[16] This too has proven useful to the ICTR,[17] and also to the Inter-American Commission on Human Rights.[18]

11 A Zimmerman, 'War Crimes Committed in an Armed Conflict Not of an International Character', in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), 276, margin note 286.

12 Final Record, *supra* note 1, 129. See also at 10 (France) and 11 (Norway).

13 C. Kress, 'The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes', (2002) 13 *Criminal Law Forum* 409, 415.

14 J.S. Pictet (ed.), Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958), 36.

15 *Prosecutor v Rutaganda*, ICTR-96-3, para. 92 (6 December 1999); *Prosecutor v Semanza*, ICTR-97-20-T, para. 355 (15 May 2003); *Prosecutor v Kamuhanda*, ICTR-95-54A-T, para. 722 (22 January 2004).

16 Y. Sandoz, C. Swinarski & B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1319.

17 ICTR, *Prosecutor v Musema*, ICTR-96-13-A, 27 January 2000, para. 248.

18 *Juan Carlos Abella*, Case 11.137, Inter-American Commission on Human Rights, 18 November 1997, OEA/Ser.L/V/II.98, Doc. 6 rev (13 April 1998), para. 152: 'the concept of

There has also been discussion of the meaning to be afforded to the phrase in customary international law. The most prominent definition of an armed conflict was laid down by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the *Tadić* interlocutory appeal on jurisdiction: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[19] This definition has been used subsequently by *inter alia* independent experts and special rapporteurs of the United Nations Commission on Human Rights,[20] and United Nations commissions of inquiry.[21] Indeed, such is the acceptance of the *Tadić* definition that Kress considers it 'puzzling' that Article 8 (2) (c) of the Statute makes no reference to it.[22]

From all these definitions – those of the ICRC and that of the ICTY – two principal elements may be extracted: some sort of organisation on the part of the armed group and a certain intensity of violence. Indeed, in the jurisprudence of the ICTY, these two elements have been a constant refrain. For example, when the Trial Chamber in *Tadić* came to apply the definition of the Appeals Chamber to the facts before it, it stated that '[t]he test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the

armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other… Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State'.

19 ICTY, *Prosecutor v Tadić,* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

20 Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmawi, pursuant to Commission resolution 1996/57 of 19 April 1996, E/CN.4/1997/88, para. 54 (3 March 1997); Report of the Special Rapporteur on the human rights situation in the Sudan, E/CN.4/2006/111, para. 8 (11 January 2006); Report of the Special Rapporteur of the Commission on Human Rights, Mr John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, A/56/440, para. 13 and E/CN.4/2002/32, para. 18 (6 March 2002); Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K Goldman, E/CN.4/2005/103, fn 14 (7 February 2005). See also Final Report of the Special Rapporteur, Kalliopi K. Koufa, on Terrorism and Human Rights, E/CN.4/Sub.2/2004/40 (25 June 2004), fn 23.

21 Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, para. 51 (23 November 2006); Report of the International Commission of Inquiry on Darfur to the Secretary-General, pursuant to Security Council resolution 1564 (2004) of 18 September 2004, S/2005/60 (1 February 2005), para. 74; Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000, E/CN.4/2001/121 (16 March 2001), para. 39.

22 C. Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice', (2000) 30 *Israel Yearbook on Human Rights* 103, 118.

parties to the conflict'.[23] These two requirements have also been accorded particular prominence by the ICTR,[24] and the Special Court for Sierra Leone.[25]

The elements of organisation and intensity have quite a pedigree. From the latter half of the nineteenth century onwards, in considering whether an armed group should be recognised as belligerents, thus subjecting the conflict to the laws of war and third States to the duties of neutrals, regard was had to the organisation of the armed group and the level of hostilities carried out.[26] So, for example, in 1825, in the context of the Greek war of independence, the British government informed its ambassador to Greece that 'a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent'.[27] The elements of organisation and intensity are best espoused in what remains the classic statement on the requirements for the recognition of belligerency:

> "the existence of a *de facto* political organization of the insurgents, sufficient in character, population and resources, to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war…"[28]

While helpful, the elements of organisation and intensity do give rise to a whole host of questions, relating for example, to the precise level of intensity of the violence needed and the exact degree of organisation required of the parties. Although these are essentially factual matters to be decided on a case-by-case basis,[29] guidance is not lacking.

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23 ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 562. See also *Prosecutor v Limaj, Bala and Musliu*, Case No IT-03-66-T, Judgment, 30 November 2005, para. 84; *Prosecutor v Slobodan Milošević*, Case No IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 17.

24 *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Judgment, 2 September 1998, paras 620, 625; *Rutaganda*, *supra* note 15, para. 93; *Musema*, *supra* note 17, para. 256; *Prosecutor v Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 101.

25 *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-T, Judgment, 20 June 2007, para. 244; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T, Judgment, 2 August 2007, para. 124.

26 This is not to say that the *degree* of intensity and organisation required for the recognition of belligerency was the same as that required for an armed conflict. There may also have been additional requirements before the armed group was recognised as a belligerent party: see generally H. Lauterpacht, *Recognition in International Law* (1947).

27 Cited in W.E. Hall, *A Treatise on International Law* (A. Pearce Higgins, ed., 1924) 38, fn 1.

28 H. Wheaton, *Elements of International Law* (R.H. Dana ed., 1866) section 23, note 15. This was used by President Grant in his Special Message of 13 June 1870, in J.B. Moore, *Digest of International Law: Vol. 1*, 194-5. Rougier notes that 'there may be ample reason for recognition when the insurgents possess considerable material power, and when the insurgent movement is so organized as to enable the insurgents to observe the rules of war and to bear responsibility for their actions': A Rougier, *Les Guerres Civiles et le Droit des Gens* (1903), 213, cited in E. Castrén, *Civil War* (1966) 141 fn 2.

29 *Limaj*, *supra* note 23, para. 90; *Rutaganda*, *supra* note 15, para. 93.

2.1. Organisation of the parties

A certain level of organisation on the part of the armed group fighting against the government has long been considered a requirement of an armed conflict.[30] The precise level of organisation required is somewhat unclear but should not be overstated. The *Akayesu* trial judgment, for example, referred to armed forces that were 'organized to a greater or lesser extent',[31] while the *Limaj* trial chamber was of the view that 'some degree of organisation by the parties will suffice'.[32] Commentators, too, opt for 'a degree of organisation', 'a modicum of organisation',[33] or 'a minimum amount of organization'.[34] What is crucial is that the armed group be organised at such a level as to be able to carry out military operations and meet 'minimal humanitarian requirements'.[35]

In general, it may be asked whether the armed group may be considered akin to an army.[36] However, particular factors going to the exact level of organisation required can be identified. These include the presence of an official command structure,[37] internal regulations,[38] and disciplinary procedures.[39] The existence of headquarters,[40] designated zones of operation,[41] and uniforms,[42] may prove pertinent, as may the ability to procure, transport and distribute arms,[43] co-ordinate actions,[44] and recruit new members.[45] Within the group, discrete roles and responsibilities of differing en-

30 Final Record, *supra* note 1, 335.

31 *Akayesu*, *supra* note 24, para. 620.

32 *Limaj*, *supra* note 23, para. 89.

33 G. Draper, 'The Geneva Conventions of 1949', (1965-I) 114 *Rec des Cours* 63, 89-90.

34 D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979-II) 163 *Recueil des Cours* 121, 147.

35 Schindler, ibid, 147. See also G. Mettraux, *International crimes and the ad hoc Tribunals* (2005), 36.

36 *Akayesu*, *supra* note 24, para. 621.

37 *Milošević*, *supra* note 23, para. 23; *Limaj*, *supra* note 23, paras 97, 110. See also Schindler, supra note 35, 147; Mettraux, *supra* note 35, 36.

38 *Limaj*, *supra* note 23, para. 110.

39 *Limaj, supra* note 23, paras 113-117. See also P. Rowe, 'War Crimes' in D. McGoldrick, P. Rowe and E. Donnelly eds, *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 229. Elaborate disciplinary procedures are not required: Kress, 'East Timor', *supra* note 13, 417.

40 *Milošević*, *supra* note 23, para. 23.

41 Ibid, para. 23. *Limaj*, *supra* note 23, para. 95.

42 *Limaj*, *supra* note 23, para. 123.

43 Ibid, para. 124. *Milošević*, *supra* note 23, para. 23.

44 *Limaj*, *supra* note 23, para. 108.

45 Ibid, para. 118.

tities,[46] and the specific mode of communication between them,[47] may be indicia of organisation. Outside the confines of the group, undertaking negotiations with third parties,[48] and requiring permits to cross checkpoints,[49] may constitute evidence of organisation. These are, however, relative and must be considered in the context of the conditions under which the group was operating, for example if 'an underground organisation, operating in conditions of secrecy … and under constant threat of military action.'[50]

2.2. Intensity of the violence

The second element inherent in an armed conflict is a certain intensity of violence. This, too, should not be overstated.

The actual wording used by the *Tadić* appeals chamber was 'protracted armed violence', a phrase suggesting that the violence be of some duration. Thus, the appeals chamber observed that: 'Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day'.[51] From this, the element of intensity, or the threshold of violence, would seem to have been omitted.[52] To compensate for this and to incorporate the sense of magnitude, the words 'large-scale' were added to the requirement that there be protracted violence: '[t]here has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups'.[53] Over time, the requirement that the violence be of some duration has been replaced by the more general idea of intensity.[54]

As with the element of organisation, we can discern factors that go to the assessment of the intensity of the violence. These include the number of battles and the

46 Ibid, paras 100-101.

47 Ibid, para. 103.

48 Ibid, paras 125-129.

49 Ibid, para. 145.

50 Ibid, para. 132.

51 *Tadić Interlocutory Appeal*, *supra* note 19, para. 70.

52 A. Rogers, *Law on the Battlefield* (2004) 218-219.

53 *Tadić Interlocutory Appeal*, *supra* note 19, para. 70. See also *Prosecutor v Kordić and Čerkez*, Case No IT-95-14/2-A, Judgement, 17 December 2004, para. 341: '… in the time following October 1992 there was *serious* fighting for an *extended* period of time' (emphases added).

54 Rogers, *supra* note 52, 219 fn 16 considers this to have taken place in the *Tadić* trial judgment itself.

level, location and duration of the violence,[55] their spread over the territory,[56] the damage caused by them,[57] the mobilization of individuals and the distribution of weapons to them,[58] the weapons used by the parties,[59] the target of the violence,[60] any cease-fire agreements concluded,[61] and the involvement of third parties, whether the United Nations Security Council or other outside entities.[62] Of particular significance is the use of armed forces on the part of the government.[63] Intensity is, then, a much broader notion of which duration forms but part.

These indicia have a respectable provenance. Over a century earlier, in the *Prats* arbitration arising out of events taking place during the United States civil war, the Commission, noting that the violence constituted a civil war, commented on the duration of the violence, its dimensions and the number of battles fought, the territory under the control of the armed group and the number of persons involved in the fighting.[64] Similarly, the Umpire in the *Santa Clara Estates Company* arbitration spoke of the violence in Venezuela between 1900 and 1903 as a 'war in which there were in a little over one year twenty sanguinary battles, forty battles of considerable character, and more than one hundred lesser engagements between contending troops, with a resultant loss of 12,000 lives'.[65]

The elements of an armed conflict not of an international character and thereby the elements of Article 8 (2) (c) of the Statute are well-settled, even if the application

55 *Tadić Opinion and Judgment*, *supra* note 23, paras 565-566; *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No IT-96-21-T, Judgement, 16 November 1998, para. 189; *Kordić and Čerkez*, *supra* note 53, paras 337-340; *Milošević, supra* note 23, para. 28; *Limaj*, supra note 23, paras 135-167; Abella, *supra* note 18, paras 154-6. Schwarzenberger spoke of 'scale, duration and fierceness': G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Vol II* (1968) 689.

56 *Milošević, supra* note 23, para. 29.

57 *Tadić Opinion and Judgment*, *supra* note 23, paras 565-566; *Kordić and Čerkez*, *supra* note 53, paras 337-340; *Limaj*, *supra* note 23, paras 135-167.

58 *Delalić*, *supra* note 55, para. 188; *Milošević*, *supra* note 23, para. 30; *Limaj*, *supra* note 23, paras 135-167.

59 *Milošević*, *supra* note 23, para. 31; *Kordić and Čerkez*, *supra* note 53, paras 337-340; *Limaj*, *supra* note 23, paras 135-167.

60 *Abella*, *supra* note 18, paras 154-6.

61 *Kordić and Čerkez*, *supra* note 53, paras 337, 339.

62 *Tadić Opinion and Judgment*, *supra* note 23, para. 567; *Delalić*, *supra* note 55, para. 190.

63 Draper, *supra* note 33, 94; Schindler, *supra* note 34, 147; J.E. Bond, *The Rules of Riot* (Princeton University Press, 1974) 181-183.

64 *Salvador Prats v The United States,* in J.B. Moore ed., *History and Digest of the International Arbitrations to which the United States has been a Party: Vol. III* (Government Printing Office, 1898) 2886, 2887.

65 *Santa Clara Estates Company (Supplementary Claim)* 9 RIAA 455, 457-8.

of these elements to the facts of a particular conflict is rather more contentious.[66] Things become a little trickier in the context of Article 8 (2) (e) of the Statute.

3. Article 8 (2) (e)

Article 8 (2) (e) makes reference to 'armed conflicts not of an international character' without more. However, Article 8 (2) (f) which contains Article 8 (2) (e)'s sphere of application provides that it does not apply to situations of internal disturbances and tensions and continues: it applies to 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'. Article 8 (2) (f) thus contains a positive definition as well as a negative one. The negative definition has been considered already in the context of Article 8 (2) (c); what about the positive definition? In order to fully understand it and assess its impact, it is necessary to consider how it found its way into the Statute.

3.1. The drafting history

Working drafts of the Statute included serious violations of common Article 3 and other serious violations of the laws and customs applicable in armed conflicts not of an international character together under the same threshold, namely that they 'apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'.[67] Thus, there was no separation between violations of common Article 3 and violations of other provisions applicable in non-international armed conflicts; consequently there was no distinction between their respective spheres of application. This was the position as late as the Bureau discussion paper of 6 July 1998,[68] the statute being adopted some eleven days later.

There was, however, some disquiet among a number of delegations that took the view that there should be a separate threshold for those serious violations that were not of common Article 3. Certain delegations expressed their preference for a higher

66 Witness the criticism of the characterisation of the events at the Tablada military base as an armed conflict: L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002) 138; or the characterisation of Operation Storm as a police action: P. K. Rakate, 'The shelling of Knin by the Croatian Army in August 1995: A police operation or a non-international armed conflict?', (2000) 840 *International Review of the Red Cross* 1037.

67 See e.g. Decisions Taken by the Preparatory Committee at Its Session Held from 1 to 12 December 1997, A/AC.249/1997/L.9/Rev.1 (18 December 1997) 10; Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1 (14 April 1998) 21-22.

68 A/CONF.183/C.1/L.53.

threshold, along the lines of that laid down in Additional Protocol II.[69] Accordingly, the threshold of Article 1, paragraph 1 of Additional Protocol II was included in the Bureau proposal, to the effect that the provision on serious violations of the laws and customs applicable in armed conflicts not of an international character applied 'to armed conflicts that take place in a territory of a State party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations'.[70]

This led, in turn, to a response by some delegations that too high a threshold had been set out, a threshold which would exclude conflicts between armed groups and conflicts in which the armed group did not exercise territorial control.[71] In a statement conveyed by New Zealand, the ICRC observed that:

> "The reality is that more and more States are confronted with non-international armed conflicts taking place on their territory involving a number of dissident armed groups fighting against one another, or armed groups fighting against the established Government which either does not control part of the territory or does not have a proper chain of command. These types of non-international armed conflicts *must* also fall under the jurisdiction of the Court.
> A threshold such as that found in the Bureau proposal not only would represent a step back from existing law but would also be so restrictive that it would prevent the Court from dealing with the type of atrocities in conflicts which the world has witnessed over the past years."[72]

Others, however, welcomed the new threshold,[73] while still others maintained their opposition to inclusion of any provision on war crimes in non-international armed conflicts.[74]

The delegate of Sierra Leone expressed reservations about the threshold set and proposed that it be replaced with the text: 'It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.[75] This

69 A/CONF.183/C.1/SR.26, para. 115 (Egypt); A/CONF.183/C.1/SR.28, para. 64 (Sudan); A/CONF.183/C.1/SR.27, para. 21 (Bahrain).

70 A/CONF.183/C.1/L.59, p.7. See also the remarks of the Coordinator, introducing that document: A/CONF.183/C.1/SR.33, para. 7.

71 A/CONF.183/C.1/SR.33, para.14 (Austria on behalf of the member States of the European Union); A/CONF.183/C.1/SR.34, para. 60 (South Africa on behalf of the member States of the Southern African Development Community); A/CONF.183/C.1/SR.34, para. 107 (Australia).

72 A/CONF.183/INF/11, p.2 (emphasis in original). See also the statement of the Observer for the International Committee of the Red Cross: A/CONF.183/C.1/SR.36, para. 52.

73 A/CONF.183/C.1/SR.33, para. 40 (China); A/CONF.183/C.1/SR.35, para. 73 (Portugal).

74 A/CONF.183/C.1/SR.36, para. 6 (Libyan Arab Jamahiriya).

75 A/CONF.183/C.1/SR.35. See also the written proposal at: A/CONF.183/C.1/L.62.

proposal received the support of a number of States,[76] and ultimately found its way into the Statute.

3.2. The differing views

Aside from the substitution of the phrase 'protracted armed violence' with 'protracted armed conflict', the proposal of the delegate of Sierra Leone used in the Statute is the definition of an armed conflict offered in the *Tadić* interlocutory appeal. Were it not for this modification, then, it could be said without controversy that Article 8 (2) (c) and Article 8 (2) (e) have the same material scope of application. So what significance, if any, does the change have?

Arguably, the modification creates a new threshold, distinguishing the 'mere' armed conflict from the 'protracted' armed conflict. The argument may be made that the change was a deliberate one precisely so as to distinguish the material scope of application of Article 8 (2) (c) from that of Article 8 (2) (e). Armed conflicts would be differentiated from protracted armed conflicts and the provisions of Article 8 (2) (e) would apply only to the latter. Indeed, it has been said that if we adopt a literal approach, the creation of an additional threshold 'can hardly be denied'.[77] Condorelli also suggests the possibility of a new threshold being created when he queries why certain conduct 'would constitute war crimes only when the internal conflict is 'protracted', and not when it does not last long'.[78] The delegate of Bosnia and Herzegovina at the diplomatic conference would seem to share the view that the proposal of Sierra Leone established a new standard, stating as he did: 'if a different threshold had to be established, the wording proposed by the delegation of Sierra Leone would be acceptable'.[79]

There are, however, a number of reasons to suggest that the creation of a new standard was not intended. The deliberate substitution of 'protracted armed violence' with 'protracted armed conflict' makes little sense. To define an armed conflict by reference to a protracted armed conflict is singularly unhelpful. And if an armed conflict is defined, in part, as protracted armed violence, then a protracted armed conflict is simply protracted, protracted armed violence.[80] The additional 'protracted' adds little of value.

The manner in which the text came about should also be recalled. The proposal of the delegate of Sierra Leone was a response to the Bureau draft which reproduced Article 1, paragraph 1 of Additional Protocol II – in turn a reaction to the views of a

76 A/CONF.183/C.1/SR.35, para. 23 (Uganda); A/CONF.183/C.1/SR.35, para. 80 (Solomon Islands); A/CONF.183/C.1/SR.36, para. 30 (Slovenia); A/CONF.183/C.1/SR.36, para. 42 (Bosnia and Herzegovina).

77 Kress, 'East Timor', *supra* note 13, 419, who goes on to argue the contrary.

78 L. Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court' in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A challenge to impunity* (2001) 107, 112-113.

79 A/CONF.183/C.1/SR.36, para. 42.

80 K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (2003) 441.

number of States – rather than an attempt to create a new threshold. This is evident from the speech of the delegate during which the proposal was first introduced:

> *"Mr. Dabor* (Sierra Leone) said that his delegation urged that sections C and D should be included in the new Article 5 *quater*, but it had reservations, for example, regarding the *chapeau* to section D, which referred to organized armed groups that exercised 'control over a part of [a State party's] territory'. That wording was very restrictive: in his own country, for example, the rebel forces did not occupy a territory. Thus, as presently drafted, section D would exclude the type of internal conflict presently taking place in Sierra Leone. His delegation therefore proposed that the second sentence of the *chapeau* be replaced by the text: 'It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'."[81]

The delegate of Sierra Leone was thus seeking to reduce the high threshold set in the earlier Bureau draft and not introduce a threshold higher than that laid down in Article 8 (2) (c) of the Statute.[82]

Issues of language should also be noted. The French text of the speech in which the delegate of Sierra Leone introduced his proposal is identical to the corresponding portion of the *Tadić* definition. The speech reads in relevant part:

> "Elle s'applique aux conflits armés qui ont lieu sur le territoire d'un État dès lors qu'il existe *un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes*".[83]

And the relevant part of *Tadić* reads:

> "… nous estimons qu'un conflit armé existe chaque fois qu'il y a recours à la force armée entre Etats ou *un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes* au sein d'un Etat".[84]

Thus, if the French text were followed, the intention would quite clearly seem to have been to adopt the *Tadić* definition.[85] It may come down to a simple issue of translation: 'conflit' was translated as 'conflict' rather than 'violence'.

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81 A/CONF.183/C.1/SR.35, para. 8.

82 Kress, 'War Crimes Committed in Non-International Armed Conflict', *supra* note 22, 117-8.

83 A/CONF.183/C.1/SR.35, para. 8 (emphasis added). The written proposal was worded differently but to similar effect: Elle s'applique aux conflits armés qui opposent de manière prolongée sur le territoire d'un Etat les autorités gouvernementales à des groupes armés organisés ou ces groupes entre eux: A/CONF.183/C.1/L.62.

84 *Tadić*, *supra* note 19, para. 70 (emphasis added).

85 Along similar lines, Kress argues that 'the English language version of Article 8 (2) (f) of the Rome Statute … is slightly inaccurate. The French version better reflects the drafters'

The intention of other States should also be borne in mind. In light of the number of non-international armed conflicts that existed, a large number of States considered it essential to include in the Statute provisions on war crimes in such conflicts.[86] To impose a threshold that would have the effect of preventing a good number of these conflicts from falling within Article 8 (2) (e) of the Statute and the greater degree of protection it affords would seemingly have been contrary to the intention of these States.

From a *lex ferenda* perspective, to create a new threshold between armed conflicts and protracted armed conflicts is inadvisable for it is to discriminate within armed conflicts not of an international character in addition to the more traditional discrimination that exists between non-international armed conflicts and their international counterparts. And this at a time in which it is starting to be recognised that, that which is prohibited in international armed conflicts should also be prohibited in non-international armed conflicts.[87] It is also to introduce a criterion which may be particularly hard to evidence, the line between protracted and not protracted being difficult to draw.

Finally, it is not insignificant that academic scholarship tends toward the conclusion that a new threshold has not been created by Article 8 (2) (f) of the Statute.[88] More importantly, this is also the view of at least one trial chamber of the ICTY:

> "Article 8 (2) (f) of the ICC Statute adopts a test similar to the test formulated in the *Tadić* Decision on Jurisdiction. It defines an internal armed conflict by the same two characteristics, 'protracted armed conflict' and 'organised armed groups,' without including further conditions".[89]

Each of these points, may, however, be rebutted. It may be argued that the delegate of Sierra Leone was seeking to reduce the threshold of the Bureau draft precisely by introducing a new threshold, a threshold lower than that of the existing draft, but higher than that of Article 8 (2) (c) of the Statute. It may also be contended that the written proposal of Sierra Leone was drafted in English and that the official language of the *Tadić* interlocutory appeal is English, thus making the French texts of the two

intention to incorporate the test of 'protracted violence' as formulated by the 1995 *Tadić Jurisdictional Decision …*'. See Kress, 'East Timor', *supra* note 13, 419. See also Kress, 'War Crimes Committed in Non International Armed Conflict', *supra* note 22, 118.

86 See e.g. A/CONF.183/C.1/SR.25, para. 10 (South Africa on behalf of member States of the Southern African Development Community); A/CONF.183/C.1/SR.25, para. 14 (Austria on behalf of member States of the European Union); A/CONF.183/C.1/SR.25, para. 62 (Trinidad and Tobago); A/CONF.183/C.1/SR.25, para. 76 (Croatia); A/CONF.183/C.1/SR.26, para. 66 (Mali).

87 *Tadić* Interlocutory Appeal, *supra* note 19, para. 119.

88 See e.g. T. Meron, *War Crimes Law Comes of Age* (1998), 309; Kress, 'War Crimes Committed in Non-International Armed Conflict', *supra* note 22, 118-9; Rowe, *supra* note 39, 210, fn 38.

89 *Limaj*, *supra* note 23, para. 87.

less decisive. Further, it may be posited that the solution proposed, as a compromise solution, would have the effect of removing some conflicts from the scope of Article 8 (2) (e) of the Statute and that States recognised that this would be the inevitable consequence of such a compromise. Finally, it may be noted that the Statute itself does not follow through on the idea that, that which is prohibited in international armed conflicts should also be prohibited in non-international armed conflicts, given the different provisions on war crimes that apply to the two.

If it is accepted that there is no distinction as between the material scope of application of Article 8 (2) (c) and Article 8 (2) (e) and that both apply simply to armed conflicts not of an international character, there is one further point that needs to be considered. The effect of such a conclusion is that Article 8 (2) (e) contains provisions drawn from Additional Protocol II but does not use its material scope of application, opting rather to apply to any armed conflict not of an international character. Yet there are very real differences between the material scope of application of Additional Protocol II and that of an armed conflict *simpliciter*. Additional Protocol II requires the conflict to be between governmental 'armed forces and dissident armed forces or other organized groups';[90] Article 8 (2) (e), by implication, requires the violence to be between 'governmental authorities and organized armed groups or between such groups.'[91] This has two consequences. Article 8 (2) (e) applies to conflicts fought between two or more armed groups without involvement of governmental armed forces whereas Additional Protocol II does not. The term 'governmental authorities' may also be wider than the term 'armed forces,'[92] although that is itself defined broadly.[93] Additional Protocol II also requires that the armed group 'exercise such control over a part of [the High Contracting Party's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol';[94] Article 8 (2) (e), by implication, refers to 'protracted armed violence' without more.[95] This, too, has two implications. Article 8 (2) (e) covers conflicts in which the armed group does not exercise territorial control whereas Additional Protocol II does not. There may also be a difference between the requirements of 'sustained' violence and 'protracted' violence, sustained unlike protracted suggesting continuity.[96] Article 8 (2) (e) is thus considerably broader than Additional Protocol II, as indeed was the intention of its drafters.

In order to avoid the rather awkward situation whereby Additional Protocol II does not apply to a particular conflict but Article 8 (2) (e) does, all the provisions con-

90 Article 1(1), Additional Protocol II.

91 *Tadić* Interlocutory Appeal, *supra* note 19, para. 70.

92 Zimmerman, *supra* note 11, 286 margin note 337.

93 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977, Volume 10, p. 39, para. 91*bis* and p. 94. For a similar view, see *Akayesu* Trial Judgment, *supra* note 24, para 625; *Fofana and Kondewa*, *supra* note 25, para. 127.

94 Article 1(1), Additional Protocol II.

95 *Tadić* Interlocutory Appeal, *supra* note 19, para. 70.

96 Zimmerman, *supra* note 11, 285 margin note 334.

tained in Article 8 (2) (e) must be of a customary nature.[97] For its part, the ICRC, in an information circular, noted that 'it is essential to stress that many of the crimes listed under section D [which became Article 8 (2) (e)] find their legal basis under general international law, and are not only provided for in Protocol II'.[98] The need to base the crimes on customary international law was fully understood at the Rome Conference.[99] Indeed, this may be the reason for the inclusion of the phrase 'within the established framework of international law' in Article 8 (2) (e),[100] though it has been said that these words were, rather, 'intended to include implicitly considerations of the *jus in bello* such as military necessity and proportionality'.[101] Regardless, the view has been expressed that all the provisions of Article 8 (2) (e) do have customary status.[102] It should be stressed that it does not follow from this that Additional Protocol II can be applied *qua* treaty without the fulfilment of the conditions for its material scope of application.[103]

3.3. The Interpretation: Prosecutor v Lubanga

The proper scope of Article 8 (2) (e) has now been considered by a pre-trial Chamber of the International Criminal Court. In the case of *The Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I had to decide whether or not to confirm the charges

97 The situation is potentially awkward as the Rome Statute is not simply a treaty regime between States parties, given the possibility and practice of Security Council referral of a situation in a non-party State.

98 A/CONF.183/INF/11.

99 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol I, A/51/22, para. 54. See also D. Robinson & H. von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute', (1999) 2 *Yearbook of International Humanitarian Law* 193, 194 and 208; D Momtaz, 'War Crimes in Non-International Armed Conflicts Under the Statute of the International Criminal Court', (1999) 2 *Yearbook of International Humanitarian Law* 177, 179.

100 A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Law* 144, 151.

101 M. H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22, 33.

102 See R. Cryer, *Prosecuting International Crimes* (2005) 281-283; J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (2005), 590-603.

103 Paras. 88-89 of the *Limaj* Trial Judgment, *supra* note 23, must be treated with caution. The defence submitted that 'in order for Additional Protocol II to apply it must be established that the insurgent party … was sufficiently organised to carry out continuous and persistent military operations and to impose discipline on its troops, that it exercised some degree of stability in the territories it was able to control and had the minimum infrastructure to implement the provisions of Additional Protocol II.' The trial chamber responded that it 'does not share this view', noting that the 'two determinative elements of an armed conflict' are the 'intensity of the conflict and level of organisation of the parties'.

brought against Lubanga, the relevant charges being conscripting children under the age of 15 into the *Forces Patriotiques pour la Libération du Congo* (FPLC), enlisting children under the age of 15 into the FPLC and using children under the age of 15 to participate actively in hostilities, all punishable under Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) of the Statute.[104]

In considering whether there was an armed conflict not of an international character during the period at issue, the Pre-Trial Chamber quoted Article 1, paragraph 1, of Additional Protocol II and observed that it lays down criteria to differentiate non-international armed conflicts from internal disturbances and tensions. While true this is hardly the purpose Article 1, paragraph 1 seeks to serve. At any rate, these criteria were considered by the Pre-Trial Chamber to go to the nature of the violence – 'the violence must be sustained and have reached a certain degree of intensity' – and the characteristics of the armed group. The armed groups must:

> "i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and
> ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations."[105]

The Pre-Trial Chamber then noted that the definition of a non-international armed conflict laid down in *Tadić* reflects the two criteria of Additional Protocol II but decouples territorial control from the ability to carry out sustained and concerted military operations.[106] On the element of organisation, the Pre-Trial Chamber commented: '[i]t follows that the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character'.[107]

Having considered the composite elements of Additional Protocol II and the *Tadić* definition, the Pre-Trial Chamber turned its attention to Article 8 (2) (f) with its reference to 'protracted armed conflict between … organized armed groups'. In the view of the Pre-Trial Chamber, this 'focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time'.[108] This sentence is important for it mirrors the Pre-Trial Chamber's understanding of the *Tadić* definition but goes on to add the words 'for a prolonged period of time'. At first sight, this addition suggests that a new threshold has indeed been created for the application of Article 8 (2) (f), with duration playing a greater role.

104 Pre-Trial Chamber I, *Prosecutor v Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06; Pre-Trial Chamber I, *Prosecutor v Thomas Lubanga Dyilo*, Warrant of Arrest, 10 February 2006, ICC-01/04-01/06.

105 Ibid, para. 232.

106 Ibid, para. 233.

107 Ibid, para. 233.

108 Ibid, para. 234.

Closer inspection, however, may suggest that there is no greater focus on duration than there was in the *Tadić* interlocutory appeal. This is so for two reasons. The original, French, text of *Lubanga* refers to 'prolongée', the same word used in the French text of *Tadić*,[109] the English original of which was 'protracted'. So 'protracted' was translated as 'prolongée', which was translated back as 'prolonged'. Thus, for these purposes, the words 'protracted' and 'prolonged' were considered interchangeable and as has already been seen, the *Tadić* definition contains an element of protraction, albeit as part of the broader notion of intensity.

More important is the precise meaning attached to the test by the Pre-Trial Chamber, best observed through consideration of its application of the test to the facts before it. Upon turning to the facts, the Pre-Trial Chamber considered the matter just as trial chambers of the *ad hoc* tribunals had before it, focusing on the elements of the intensity of the violence and the organisation of the armed groups.[110]

On the issue of the intensity of the violence, the Pre-Trial Chamber found that 'an armed conflict of a certain degree of intensity and extending from at least June 2003 to December 2003 existed on the territory of Ituri'.[111] In reaching this conclusion, the Court had regard to the 'many armed attacks [that] were carried out during that period' and the 'many victims' that they caused.[112] The Court also noted that 'at the time, the Security Council also adopted a resolution under Chapter VII of the Charter of the United Nations and was actively seized of this matter during the entire period in question'.[113] The focus of the Pre-Trial Chamber was squarely on intensity broadly defined, of which the protracted or prolonged nature of the violence in the durational sense formed but part rather than as a separate element of the definition. This is similar to the approach of the *ad hoc* tribunals and the factors used by the Pre-Trial Chamber are again reminiscent of those used by the ICTY and ICTR.[114]

On the matter of organisation, the Chamber found there to be substantial grounds for believing that the armed groups in question 'were in fact organised armed groups within the meaning of Article 8 (2) (f) of the Statute'.[115] In coming to this conclusion, the Court referred to the fighting that took place, the territory controlled by the armed forces and the political statements they signed.[116] On the basis that the groups were organised for the purposes of the Statute, the Court held that they were capable of carrying out military operations: 'Thus, it seems clear that the FNI was capable of carrying out large-scale military operations for a prolonged period of time'.[117]

109 *Tadić* Interlocutory Appeal, *supra* note 19, para. 70.

110 *Lubanga*, supra note 104, paras 235-237.

111 Ibid, para. 235.

112 Ibid, para. 235.

113 Ibid, para. 235.

114 See *supra* sections 2.1 and 2.2.

115 *Lubanga*, *supra* note 104, para. 237.

116 Ibid, para. 236.

117 Ibid, para. 237.

The approach of the Pre-Trial Chamber to the facts suggests that it accepted that the definition contained in Article 8 (2) (f) of the Statute is similar to that laid down in *Tadić*. What does seem to have changed, advertently or otherwise, is the placing of the duration element. Whereas *Tadić* and Article 8 (2) (f) saw duration as linked to the actual armed violence, the *Lubanga* Pre-Trial Chamber sees it as going to the ability of the armed group to carry out the armed violence.[118] This is likely due to the Chamber's starting point of Additional Protocol II, which makes similar reference to the armed group being capable of carrying out the hostilities rather than the actual conduct of hostilities.[119] However, just as Additional Protocol II has subsequently been interpreted as requiring the actual conduct of hostilities,[120] so it is likely that the *Lubanga* statement will be interpreted as requiring the actual existence of military operations for a prolonged period of time, taking us back to *Tadić*.

4. Conclusion

Identifying an armed conflict not of an international character has become a lot easier. For many years, an accepted definition proved elusive. Today, the intensity of the violence and the organisation of the parties are accepted as being the key features of a conflict, regardless of precisely how the two criteria are phrased. Guidance on identifying these two elements has been provided by the *ad hoc* tribunals, which have laid down a number of factors that may help identify intensity and organisation. This is not to say, of course, that there will always be agreement on whether a particular factual situation actually is an armed conflict.

The Rome Statute did not contribute to this ease of definition, containing as it did no mention of the now-classic *Tadić* definition. Indeed, as has been seen, it confused matters somewhat with its use of different words in the different provisions of Article 8 (2), suggesting, at least at face value, the creation of a new threshold. Further inspection, however, suggests that no new standard was created or intended to have been created. Resolution of the issue is still awaited from the Court, with its first judgment to deal with the matter not being a model of absolute clarity. All signs, though, point to *Tadić*.

118 Whereas *Tadić* (para. 70) refers to 'protracted armed violence' and Article 8 (2) (f) to 'protracted armed conflict', *Lubanga* requires the armed groups 'to have the ability to plan and carry out military operations for a prolonged period of time' (para. 234).

119 Article 1(1) of Additional Protocol II provides in relevant part that the armed group 'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.'

120 *Akayesu*, *supra* note 24, para. 626. See also S. Junod, 'Additional Protocol II: History and Scope', (1984) 33 *American University Law Review* 29, 37.

Chapter 21 Can the "Elements of Crimes" narrow or broaden responsibility for criminal behaviour defined in the Rome Statute?

*Otto Triffterer**

1. Introduction: Defining crimes by emphasizing their specificities or by describing the material and mental elements required separately for each of them in a comprehensive and exhaustive fashion?

Crimes punishable under national or international law may be defined either in one of the two modes mentioned in the heading or alternatively, by mixing advantages and/or disadvantages of both.[1] The Rome Statute uses various types of acknowledged definitions for crimes in this respect.

Genocide by "killing members of the group … with the intend to destroy, in whole or in part, a …. group, as such" is, for instance an "*Erfolgsdelikt*" ('result crime')

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1 For some of the issues presented here, I refer to my former publications, in particular 'Command Responsibility, Grundstrukturen und Anwendungsbereiche von Art. 28 des Rom Statutes. Eignung, auch zur Bekämpfung des Internationalen Terrorismus?', in C. Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen zum 70. Geburtstag am 2. Mai 2002* (2002); Kriminalpolitische und Dogmatische Überlegungen zum Entwurf Gleichlautender "Elements of Crimes" für alle Tatbestände des Völkermordes', in B. Schünemann *et al.* (eds.), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (2001); 'Ius in bello: Eskalation durch "Kollateralschäden" wie durch Kriegsverbrechen? Anmerkungen zu dem Bewaffneten Konflikt Zwischen Israel und der Libanesischen Hizbullah Miliz', in R. Moos *et al.* (eds.), *Festschrift für Roland Miklau zum 65. Geburtstag* (2006); 'Command Responsibility – *crimen sui generis* or participation as "otherwise provided" in Article 28 Rome Statute?', in J. Arnold et al. (eds.), *Festschrift für Albin Eser zum 70. Geburtstag* (2005); 'Command Responsibility, Article 28 Rome Statute, an Extension of Individual Criminal Responsibility for Crimes Within the Jurisdiction of the Court – Compatible with Article 22, nullum crimen sine lege?' in O. Triffterer (ed.), *Gedächtnisschrift für Theo Vogler* (2004); 'The new International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility', (2001) 32 *Thesaurus Acroasium (Schriftenreihe Thessaloniki)*, 'The Object of Review Mechanisms: Statutes' Provisions, Elements of Crimes and Rules of Procedure and Evidence' in R. Bellelli (ed.), Conference on International Criminal Justice, Turin, 14 – 18 May 2007 (2008).

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with *überschießender Innentendenz*.[2] In the context of crimes against humanity, "[p]ersecution against any identifiable group or collectivity" (Article 7 (1) (h))[3] and "disappearance of persons" (Article 7 1 (i)) may serve as examples. Persecution is explained rather shortly in Article 7 (2) (g). Enforced disappearance is based on a short definition, but followed by a rather complicated explanation in paragraph (2i). Crimes against humanity may therefore serve as examples that the two modalities mentioned in the heading are used in the Statute whenever there was need for an additional explanation. Short concepts like murder, extermination, enslavement or torture were complemented by a more detailed description in paragraph (2) ("[f]or the purpose of paragraph 1"). Paragraph (3) contains, in addition, a generalizing description with regard to the term "gender", "[f]or the purpose of this Statute".

Similar comprehensive or referring definitions can also be found in Article 8 (2) (b) (iv) for the "War crime of excessive incidental death, injury or damage"[4] respectively in (xx) for the "War crime of employing weapons, projectiles or materials or methods of warfare listed in the Annex to the Statute".[5]

When evaluating the elements contained in the definitions and the corresponding Elements of Crimes, it has to be taken into consideration that "*Erfolgsdelikte*" are typically structured and shaped by the general visual harm caused by the behaviour of the perpetrator. This behaviour does not need to be "strictly construed" within the definition to satisfy the requirements of Article 22 (2). Rather any discretionary volitive behaviour, able to cause the described consequences, may fulfil this requirement. For that reason, definitions structured in this way are called "*reine Verursachungsdelikte*" (pure 'causation crimes'). With regard to this type of definition, the principle of legality is sufficiently guaranteed by the exact description of the harm and, if needed, elements for its accountability, to the act and thereby to the person in question.[6]

"*Tätigkeitsdelikte*" ('conduct crimes'), on the contrary, typically lack such a consequence and, therefore, need a precise description of something else, which generally is the relevant behaviour; they (as well as a few equally structured "*Erfolgsdelikte*", in particular crimes against the environment, with a similar description of behaviour) are therefore, called "*Verhaltensgebundene Delikte*".[7]

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2 For the various types of modalities, see for instance O. Triffterer, *Österreichisches Strafrecht: Allgemeiner Teil*, 2nd ed. (1994), 61, tablet no. 3b therein; for explanations to the different types of definitions see chapter 3 II. 1. a) bb), margin no. 82.

3 Articles without any further indication are those of the Rome Statute of the International Criminal Court, hereinafter Rome Statute or the Statute.

4 The title quoted here is used for the corresponding Elements of Crimes, reprinted in Annex II, in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, 1st ed. (1999); 2nd ed. forthcoming in Mai 2008).

5 See *supra* note 4.

6 With regard to the accountability see for instance O. Triffterer, Allgemeiner Teil, *supra* note 2, at 98 *et seq.* and *ibid.*, B. Schünemann *et al.* (eds.), *supra* note 1, at 1414 *et seq*.

7 See O. Triffterer, Allgemeiner Teil, *supra* note 2, at 60 *et seq.* and also *ibid.*, in B. Schünemann *et al.* (eds.), *supra* note 1, at 1414 *et seq*.

Since the Rome Statute prefers these two major models of structuring definitions of crimes and, in addition, a few others, the need for clarifying, understanding and acceptance of definitions shape the intensity of the description of one or more elements, required for the various alternatives defined in Articles 6, 7 and 8.

The requirement of "strictly construed" definitions imposes therefore with regard to all modalities available a double requirement: the complete definition as such must be sufficiently clear, and it must be specified what precisely triggers criminal responsibility. In addition to this requirement (i.e. being understandable as a whole), there is another aspect which is of particular importance with respect to every single one of those elements, in particular with regard to the specificities of the defined crimes and their characterizations: The fact that all elements do not necessarily need to be equally "strictly construed" with the same intensity has to be taken into consideration when interpreting and applying the complete definition.

The Elements of Crimes describe all the material and mental elements required for each of the alternatives defined in Articles 6, 7 and 8 exhaustingly and comprehensively, thereby giving equal importance to every single one of them. But these descriptions are not decisive, because the Elements enjoy lower rank than the Statute and, must therefore follow the Statute's definitions.

Elements of Crimes are concurring and partly or completely overlapping with the elements of crimes which are (expressly or conclusively) listed in the definitions of crimes in Articles 6, 7 and 8. What counts in the context of this analysis is, at the end of the day, whether the definitions and the Elements of Crimes contain the same material and mental requirements for the crime in question. The two descriptions have to be *in summa* congruent (*"deckungsgleich")* because both must, in order to be applicable, express the same degree of clarity required by the principle of legality (Article 22) in order to allow prosecution of the crime.

Given that these requirements follow from the Rule of Law, it is surprising that some of the Elements of Crimes (which were elaborated by the Preparatory Commission and unanimously adopted by the First Assembly of States Parties in September 2002 without any discussion) do not correspond in wording and even less in their scope and notion to the material or mental elements contained in the definitions of crimes enumerated in Articles 6, 7 and 8, to which the Elements are directed and to which they expressly refer. A convincing example of such a deviation is the change of expressions concerning the war crime of "denying quarter",[8] Article 8 (2) (b) xii); the wording in this definition "declaring that no quarter *will* be given", has been changed in the Elements into the much more authoritative formulation: "declared or ordered that there *shall* be no survivors".[9]

Although the Elements are merely meant to "assist the Court in the interpretation and application of Articles 6, 7 and 8", this proposal tries to narrow the applicability of this definition considerably: it changes the structure of this war crime (which is

8 For the Heading and Elements see *supra* note 4.

9 Element no. 1, see for the Elements of Crimes http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf (16.04.2008) and Annex II, in O. Triffterer (ed.), *Commentary, supra* note 4. Emphasis added.

originally relevant to all combatants) into a "leadership crime", by limiting the circle of potential perpetrators to those holding a commanding position. This is expressly mentioned in Element number 3:

> "The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed."[10]

In cases of such an obvious deviation, the definition in Article 8 (2) (b) (xii) ought to have priority, because the Assembly of States Parties, which "accept[ed]" the Elements for the mere purpose of assisting the Court, has no further competence, in particular no legislative power, with regard to substantive criminal law.

Does the Court, as the main addressee of the Elements, have the possibility to apply such clearly deviant proposals? It might be considered, at least, in cases of ambiguity, to "accept" the Elements in cases in which they are more favourable to the suspect. This might be desirable and acceptable in circumstances where the Elements narrow the original concept for good reasons.

The following lines are meant to draw attention to, and will analyse such and similar changes, which deviate from the definitions of crimes in the Statute. In addition, I will evaluate their permissibility as well as their justification in the interests of justice. However, one may ask whether is it not equally warranted by the interests of justice to take all measures, including a broad interpretation (as long as it does not amount to an extension of responsibility "by analogy" prohibited by Article 22 (2)), in order to put an end to impunity for the crimes defined in the Statute, and thus to contribute to the prevention of future crimes, Preamble Rome Statute, paragraph (5)? In this sense I mainly raise questions and may not offer solutions.

2. Article 9 Rome Statute, a political compromise to cope with reservations, hesitating agreements or the acceptance of definitions of crimes in Articles 6, 7 and 8?

The Rome Statute has not created direct criminal responsibility under international law for those crimes enumerated and defined in Articles 6, 7 and 8. This can be shown, for instance, by reference to the various alternatives of genocide, which are all already punishable by virtue of the Genocide Convention of 1948. The *chapeaux* of Article 8 (2) (a) and (b) may also serve as examples. The first one refers to the "grave breaches of the Geneva Conventions" for "acts against persons or property protected", while the second one, under (b), refers to "other serious violations of the laws and customs of war … within the established framework of international law" as the original source of the criminal responsibility described in the various alternatives.

Against this background, it does not come as surprise that the idea of elaborating further "strictly construed" definitions for these and for all other crimes enumerated in the Statute (including a description of the complete material and mental elements required for each alternative) appeared rather late in the drafting process of the Rome

10 Element no. 3, see also *supra* note 9.

Statute.[11] Such an approach was originally disregarded, because it was assumed that the Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission would take sufficient care of Article 22 (2). The idea for such a comprehensive description received, however, more attention, when sporadic doubts were raised, as to whether all definitions enumerated in Articles 6, 7 and 8 were equally "strictly construed" and in accordance with the requirement of the principle of legality under Article 22 (2).

In addition, the discussions in the *ad hoc* Committee for the Establishment of an International Criminal Court and in the Preparatory Committee made it obvious, how difficult it was to reach an agreement among delegates to define what is already generally and beyond reasonable doubt acknowledged and accepted as a crime directly punishable under international law by the international community as a whole. Moreover, the drafting process of crimes against humanity had shown that it was not an ideal solution to define such crimes, either by repeating already existing definitions (like those of the Apartheid Convention) or by distilling their essence with reference to clearly understandable and applicable words, which however needed to be explained in sub-paragraph 2 of Article 7. It was agreed that individual difficulties concerning some of the alternatives defined in Articles 6, 7 and 8 should be addressed by way of the adoption of different modalities, which are suited to accommodate these difficulties.

The drafters of the Rome Statute used different modalities existing in national laws and adapted them to the practical needs and political possibilities to be realized. Most frequently, they decided to use primarily generalizing standards for describing specific elements and structures of each crime; it was deemed superfluous to repeat all self-evident elements of the respective crime in all definitions, like for instance the mental side, which was defined in Article 30 for all definitions of crimes (insofar as the definition itself does not "provide otherwise"). Even though words like "killing" or "wilful killing" demonstrate the desire to be as short as possible, other expressions like "deliberately" or "wilfully" and even "intentionally" are repeated several times in Article 8 (2) (a) and (b) and demonstrate the endeavour to define "strictly construed" elements.

Article 6, with its rather short definitions, follows the first model. This approach could be used because everybody understands the meaning of genocide after the experience of the Holocaust.[12] Article 8, however, uses more complicated explanations and refers in some alternatives to modes of warfare, which are already punishable and should now fall within the jurisdiction of the Court.

The difficult challenge to provide transparency, brevity and clearness is demonstrated by Article 8 (2) (b) (xx), which makes reference to "a comprehensive prohibi-

11 For detailed documentation of the historical development, including the here following information, see E. Gadirov, Article 9 margin no. 1 et seq., in O. Triffterer (ed.), Commentary, 1st ed., (1999), completely reprinted and revised by R. S. Clark in the 2nd ed. (2008), *supra* note 4.

12 See for instance W. A. Schabas, *Genocide in International Law: The Crimes of Crimes* (2000).

tion" which ought to be included in "… an Annex to this Statute by an amendment". Another example is Article 5 (2). With respect to aggression, no uniform or majority opinion on defining at least one or two alternatives of this crime could be reached. The task was postponed, even though there was an agreement by the overwhelming majority that aggression is one of the most serious crimes of concern to the International Community as a whole, and it is already now a crime falling within the jurisdiction of the Court. But this jurisdiction can only be exercised when "such a definition" has been accepted by the States Parties and when "the conditions under which the Court shall exercise jurisdiction with respect to this crime" are defined.[13]

During the discussion at the Rome Conference about what was already generally accepted "beyond reasonable doubt" and how it could be defined, it was finally suggested to accept the proposed definitions enumerated now in Articles 6, 7 and 8, in order to avoid danger to the whole project, and to formulate later, in addition, and separately for each of them, all elements necessary to establish criminal responsibility and accountability.

The US proposed a draft similar to the present Article 9 of the Statute. This draft was presented on the 16 July 1998, i.e. the day before the end of the Rome Conference. The proposal was guided by the idea to reassure those delegates, who shared doubts that all definitions were equally strictly construed and that all possibilities for sufficient clarity had been exhausted. It was based on the assumption that further corrections and amendments of unsatisfying descriptions could be undertaken by the Preparatory Commission via Article 9 even after the adoption and the entry into force of the Rome Statute. The idea as such contained already a compromise, namely to deal with reservations and objections against proposed definitions later on a separate level and thus to fulfil not only individual preferences of a few delegations, but also the requirements of one of the basic principles, shaping the scope and the notion of the rule of law: fair trial.

It was finally agreed not to overload the Statute but to present these Elements of Crimes as a separate "annex" to the Statute. The authority to contribute in this way to the interpretation of (at least by and large) strictly construed definitions was assigned to the Assembly of States Parties.

Until present, the Elements of Crimes which are available to the Court comprise only those, which have been elaborated by the Preparatory Commission at the request of the Rome Conference and which were presented to and adopted by the First Assembly of States Parties. No amendments have been presented to the Assembly yet and one will see, whether there is need for discussion on this issue at the First Revue Conference which is to be convened in 2009 and which will take place in 2010.[14]

Whether the final goal, namely to meet the requirements of legality, may be reached more easily through the Elements, has to be evaluated before this background. This approach appears to be an acceptable compromise, even though those who are de-

13 A two third majority is also sufficient here because the Assembly of States Parties does not create, but only accepts what beyond reasonable doubt can be defined and shall come within the competence of the Court.

14 See http://www2.ohchr.org/english/issues/racism/DurbanReview/index.htm (16.04.2008).

manding a repetition of all elements in every single alternative definition may not be content. But it would have been an unnecessary exercise to repeat in every definition, for instance, that the relevant behaviour needs to be committed with intent and knowledge, or to clarify what defences under Article 31 have to be investigated.

The compromise was thus accepted as a way to make the law more understandable and not less precise. Delegates placed trust in the fact that the Court would not only give due consideration to any doubts raised by the Elements, but also consider all relevant Elements themselves, when interpreting and applying the definitions contained in Articles 6, 7 and 8. The proposal may have also satisfied the concerns of the United States, although many delegates and observers, when elaborating the "Elements of Crimes" by the Preparatory Commission, had the (correct) impression, that the wording ("shall assist") of Article 9 did not provide these provisions with the normative force that the US may have originally desired.

3. Scope and notion, function and limits of the Elements of Crimes

In its Final Act, the Rome Conference assigned the Preparatory Commission with the task to elaborate "Elements of crimes" and present them to the Assembly of States Parties.[15] The Assembly adopted the proposal at its First Session in September 2002 without discussion.[16] According to Article 9 (1) in connection with paragraph (2) (a), the Assembly can accept any amendments to these Elements by a two third majority, even if a proposal is presented only by one single States Party. Amendments encompass not only additions, but may also contain changes or eliminations in what ever direction. Until present, no such amendment has been proposed by any of the competent organs.

Both groups of elements, the original body and amendments thereto, "shall assist the Court in the interpretation and application of Articles 6, 7 and 8". But any such influence is placed under a condition: the Elements must be "consistent with this Statute".

Elements of crimes are "consistent" with the Statute, if they correspond to the elements, which are expressly or silently mentioned in the relevant definitions contained in Articles 6, 7 and 8, irrespective of whether they concern the material or the mental side.

The scope and notion of all these Elements are dominated by their points of reference. These are: the structure and notion of what should be "the crime" and the definitions accepted and expressed by Articles 6, 7 and 8. The task of the elements is primarily to provide clarification in cases in which definitions are not sufficiently transparent or understandable, or to confirm the material or mental requirements of crimes, which are not described in a completely satisfactory fashion in Articles 6, 7 or 8. The Elements thus serve as guidelines, which, though not binding, have to be

15 For this aspect, see O. Triffterer, in 32 *Thesaurus Acroasium (Schriftenreihe Thessaloniki)*, *supra* note 1, at 639 et seq.

16 For further information especially the Report of the Preparatory Commission for the Assembly of States Parties see http://untreaty.un.org/cod/icc/asp/first.htm (16.04.2008).

taken into consideration before the Court decides on an issue for which the Elements may be relevant.

This obligation to (at least) consider the Elements when interpreting relevant definitions is confirmed by Article 21 (1) (a), according to which "[t]he Court shall apply

> "(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence".

This wording "shall apply" means no more than 'has to consider', because the norm to be applied does not express more, and does not want to be more, than a guideline. The Element is assessed in light of the question, whether or not it may be useful for the interpretation and application of the specific definition of a certain crime.

In addition, the above-mentioned wording obviously expresses a difference between three bodies of law: "*this* Statute, *Elements* … and *its* Rules …". This differentiation appears to be of minor importance at first sight. But it may, at the end of the day, be interpreted as a reference to the applicability of all articles of the Statute and all Rules of Procedure and Evidence to those Elements, which the Court accepts and may usefully need for the interpretation and application of a definition of crimes in a specific case.

Is this already a hint to consider every single Element with due care, first in respect to whether it refers at all to one of the defined crimes in the Statute? The Court is independent and may, therefore, freely select Elements to be accepted or refused. The application or non-application of Elements does therefore not fall under the guarantees of the rule of law and can only in limited circumstances be the object of an appeal.

The wording of the law marks the indispensable borderline for every interpretation and application of acknowledged definitions of crimes in the Statute, and, therefore, also for "the Elements", which deal with the interpretation and application of every single element of these definitions. The first question must always be: Is this Element at all relevant, and is it needed for the interpretation of a certain definition, or does it propose a new definition, perhaps by silently or indirectly amending the original definition of the crime?

"Elements" which deviate from the wording of the Statute should therefore be analysed with special care, in particular if or when the proposals tend to narrow responsibility. Such "narrowing elements" may be desirable in the interest of the rule of law to limit unjustified investigation, prosecution and sentencing. But they may, at the same time, support impunity for crimes within the jurisdiction of the Court. This is not (always) "in the interest of justice" because the Elements do not to contribute to the prevention of crimes within the jurisdiction of the Court in this way, but rather disguise their existence and appearance.

Do the regulations concerning participation in the crime and attempt, for instance, also belong to these points of reference? According to the wording of Article 9, such descriptions are not included in the task assigned to the Elements by the Final Act. Article 9 mentions neither Articles 25 and 28, nor Article 25 (3).

However, some aspects of the modalities of individual responsibility are occasionally addressed in the Elements. Examples include describing qualifications of perpetrators, which change an ordinary general crime to a "leadership crime", or patterns of behaviour which as such do not represent more than an attempt to violate legally protected values, but do create such a high abstract danger that they have to be treated as a completed crimes in order to be more easily prevented, like genocide (e.g. "[d]eliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part" or "[i]mposing measures intended to prevent births within the group", Article 6 (c) and (d); the completion of these crimes does not need to result in this consequence, "calculated" or "intended").[17]

The direct function of the Elements is described in Article 9, namely to assist the Court, but only when interpreting and applying the definitions of crimes contained in Articles 6, 7 and 8; the possibilities and limits of the interpretation and application of the Elements depend on the interpretation of Article 9 as well. This factor has to be taken into consideration as well, when deciding whether participation and attempt too have particular appearances of crimes, which may be shaped by the Elements.

Elements of crimes can be reviewed or amended, as already mentioned above. New, additional Elements may have to be drafted when aggression is defined, depending on the quality of the definition accepted to be included into the Statute. The same question arises also, "once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute" (Article 8 (2) (b) (xx)).

In both situations, however, there is only a need for Elements at all, if a definition as such is not sufficiently "strictly construed", or when other reasons require additional clarification.

I will try to exemplify these considerations about concept and notion, function and limits of the Elements by a few examples.

4. Examples allegedly "consistent with this Statute"?

The examples which I deal with here are neither comprehensive nor exclusive. They represent different modalities to define crimes falling within the jurisdiction of the Court and their elements. They shall also highlight various aspects which may be relevance to a review and amendment of the Statute and the Elements. Insofar, they serve as an indicator to illustrate what is possible and what should be avoided. My intention, therefore, is not to offer solutions, but to make proposals or merely to raise questions, in order to inspire further independent considerations.

I structure my considerations according to the enumerations of the crimes listed in Articles 6, 7 and 8, in order to facilitate the identification of different examples among the list of more than 70 alternatives.

On another occasion, I have already proposed to interpret the wording of *genocide* verbally with respect to the "intent to destroy … a … group".[18] It then describes an

17 See also below under 4.

18 See O. Triffterer, 'Genocide, its Particular Intent to Destroy in Whole or in Part the Group as Such', (2001) 14 *Leiden Journal of International Law* 399.

"ordinary", general, though in its structure particular intent in the sense of Article 30; no qualification in the sense of a higher or lower degree of this mental element, such as the differentiation between *dolus directus* and *dolus eventualis,* is therefore required.[19]

But the Elements propose for every single alternative of Article 6, always at the end, a "contextual Element" besides the genocidal intent which requires that

> "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".

This is a material element, requiring either a "circumstantial" context or a certain quality of the act of genocide; and it remains open whether, and how far, the perpetrator has to include this Element in his intent.

For this and for a few other reasons, I believe that this "contextual Element" should be reconsidered at the First Review Conference. It needs to be clarified, whether an individual acting alone may commit genocide, in case he has the required genocidal intent, or whether further material circumstances are needed in order to qualify his or her conduct in such a way, that the conduct "could itself effect such destruction". Would the last requirement, for instance, be fulfilled, if someone kills the charismatic leader of a protected group in the expectation that this loss will finally lead to the destruction of the whole group?

Since no point of reference can be found in or deduced from the wording of Article 6 for the first alternative of this element, and since the second one concerns the question, whether the genocidal intent – as required – has to be directed towards the realization of something that can be achieved at all and that is not only the product of the imagination of the perpetrator, it merely describes a self-evident qualification of genocidal intent. I therefore repeat in this regard my earlier proposal to review Element number 4, so that it would describe this general intent as follows:

> "[t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such".

> "[s]uch an intent exists in particular, when the conduct should take place in the context of a manifest pattern of similar conduct directed against that group or should itself effect such destruction; in all cases is sufficient that the perpetrator acts with general intent".[20]

In this context, it ought to be considered as well, whether it is possible to prosecute "genocide without a genocidal intent"? This, of course, requires, that at least two persons "cooperate" to commit this crime and that one fulfils this requirement.

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19 *Ibid*. See also J. Trahan, 'Why the Killing in Darfur Is Genocide?', (2008) 31 *Fordham International Law Journal* 390 *et seq.*

20 See for more details O. Triffterer, in B. Schünemann *et al*. (eds.), *supra* note 1, at 1441 *et seq.*; see also *ibid*., *supra* note 18, in particular at 408.

The provisions on participation, which are generally accepted in the different legal systems of the world, can be divided according to the lines of the two major theories: "*Einheitstäterschaft*" ('unified perpetrator model') and "*Teilnahmelehre*" ('accessory liability model').[21] The first one is, though uncompletely, expressed in Article 25 (3) (a) by the sentence "regardless of whether that other person is criminally responsible".[22]

The main principle of the "*Einheitstäterlehre*" is based on the premise that every individual who contributes to the commission of a crime, commits the crime. All conditions are considered as equal contributions with regard to the completion of the crime, although they may have different impact on the sentencing according to Article 76. Of course, every "contributor" can only be held responsible for the completed crime if all elements required are fulfilled, though perhaps with the support of several persons.[23] According to this theory, it is sufficient for participation in the crime of genocide to know that the principal perpetrator is acting with the genocidal intent, though the "contributor" may have been motivated exclusively by, for instance, a financial award received and may even in principle oppose such a discrimination as expressed by the crime.[24] What is decisive is that he wants to contribute to the crime in question.

A similar approach is relevant with regard to superior responsibility according to Article 28. If one holds the view that the superior, by failing to control properly, must have caused and thus contributed to the commission of genocide by his subordinate, it appears sufficient that he has the intent to omit proper control, as a result of which, any of the crimes within the jurisdiction of the Court may be committed; he, therefore, does not need to have genocidal intent. Rather, it suffices that he fails to control properly while knowing and accepting that even genocide may be committed by his subordinates.

These aspects also have to be taken into consideration with regard to the second type of failure addressed by Article 28: non-objection against the crime which is about to be committed and, therefore, non-intervention. It is sufficient that the superior knows that a crime within the jurisdiction of the Court is about to be committed by his subordinates, though he may not be able, because of insufficient information, to decide, whether it is a crime against humanity or genocide; he just keeps passive because he does not care and thus agrees to both possibilities, one of which is definitely being committed by his subordinates. In such circumstances, the Court can decide on the basis of "*Tatsachenalternativität*" and base its sentence on one of the two foundations.[25]

The questions raised here may have been left open partly, in order to leave their answers up to the discretion of the Court. However, in case of a review of the Ele-

21 *See* O. Triffterer, *Österreichisches Strafrecht*, *supra* note 2, in particular at 386 et seq..

22 See for instance Kai Ambos, Article 25 margin nos. 7 *et seq.*, in O. Triffterer (ed.), Commentary, *supra* note 4.

23 See for instance O. Triffterer, *Österreichisches Strafrecht*, *supra* note 3, at 386 et seq.

24 *Ibid.*, at 395 *et seq*.

25 See K. Schmoller, *Alternative Tatsachenaufklärung im Strafrecht: Wahlfeststellungen, Stufenverhältnisse, "Freispruch Zweiter Klasse"* (1986).

ments, in particular for genocide, it may be helpful to discuss these questions in the interest of justice and the rule of law.

The Elements referring to Article 6 have two further weaknesses. With regard to the alternative defined under (c), the Elements merely repeat the essence of the definition by requiring that "the conditions of life were calculated to bring about the physical destruction of that group, in whole or in part". In footnote 4, it is further explained that

> "[t]he term 'conditions of life' may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes".

This is an amendment interpreting an Element, which by itself shall assist the Court to interpret the definitions. This amendment provides a "not necessarily restricted" list of examples, but leaves open, what has to be excluded and what may be included. This uncertainty is to be regretted and may violate Article 22 (2), but it is not the sole objection.

It is decisive that it is also left open, whether and to what extent such a calculation needs to be established as a material element and form part of the intent of the perpetrator. The Introduction to the Elements for Article 6 does not offer much help in this regard by stating

> "that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis".

Whether the "calculat[ion] to bring about" dangerous conditions is only a material element or whether it needs to be included into the intent should not "be decided by the Court on a case-by-case basis". The answer shapes the scope and notion of this crime, which should be "strictly construed". "Calculated" refers to the dangerousness of the behaviour and its circumstances, to the "bad acts", and "intent" to the "evil mind"; and both aspects need to be fixed in advance whether they are both constituent elements of the crime, and not *ad hoc* or merely be considered in the sentencing process.

This lack of certainty raises the question how to deal with cases in which the perpetrator defends himself in a convincing way by claiming that he inflicted deliberately certain conditions but did not understand that they were or could become dangerous because objectively "calculated to bring about" one of the consequences described in Article 6 (c)?

This open question gains even more importance, if one compares Article 6 (c) with Article 6 (d): "Imposing measures intended to prevent birth". For the last alternative, Element number 4 repeats the mental element of the definition in Article 6(c), "the measures imposed were intended to prevent births within that group". Obviously, mere capability in the sense of "calculat[ing] to bring about" the "evil act" is not sufficient for this alternative. Or does the word "intended" merely serve to clarify what is anyhow meant in Article 6 (d)? If this is correct, the difference between (c) and (d) is

not convincing, neither in the definition nor in the Elements. Both should be treated equally, because they deal with "conditions" respectively "measures" which are particularly dangerous for the protection of the group "in whole or in part". The Elements list the requirements for the mental side of each of them under number 3. While the first refers, in addition, only to "were calculated to bring about", the second uses the words "intended to prevent births".

If one compares both formulations, "calculated to bring about" represents more of a material element, while "deliberately inflicting" includes and requires not only the knowledge, but expressly the intent to bring about what is strictly prohibited, because it is dangerous for the group and the individual attacked. Someone who creates such a danger "accidentally" does not act deliberately; and someone who deliberately inflicts comparable conditions, but does not even think about the fact that they are capable of causing such a danger, should also be absolved from criminal responsibility.

With regard to (d), the situation is clear and the Elements have separated between material and mental elements. After mentioning for each alternative the particular intent to destroy, they require under number 4 that "[t]he measures imposed were intended to prevent …". This ranking and formulation was necessary because of the wording in this definition: imposing measures accidentally and thus intending to prevent birth is impossible. Therefore, the definition requires the perpetrator to have knowledge about the capability of the measures to achieve this effect. Otherwise the prevention of births could not be intended. It is perhaps for this reason that the drafters of the Rome Statute required an additional intent concerning the measures and their calculation to prevent births besides the genocidal intent.

However, the use of unified language for (c) and (d) would be helpful. Otherwise the Court has to decide whether the material element must be comprised by the intent in both cases or whether it is structured as a merely objective condition which triggers the competence of the Court. The identity of these alternatives with those listed in the Genocide Convention must be taken into consideration in this decision. But whether a definition of a crime requires only "bad acts" or also "an evil mind" has to be clearly expressed in the wording and should not be left to the interpretation of the judiciary.

With regard to crimes against humanity the situation is a little different. The alternatives of these crimes are listed in Article 7 (1) (a-k), partly with additional alternatives, such as "[i]mprisonment or other severe deprivation of physical liberty", (e). But the drafters of the Rome Statute obviously thought it was indispensable to clarify nine of these elements by amending descriptions in sub-paragraph 2. They included "attack" from the *chapeau* and eliminated "murder" as well as "imprisonment and other deprivations of liberty", because for the last two no further explanation was deemed necessary, as well as for (k), "[o]ther inhumane acts of a similar character". The last alternative, however, appears to be a rather weak description which would have deserved to be "more precise and strictly construed", even though it represents great progress in comparison to the definitions contained in the Statutes for the ICTY and the ICTR.[26]

26 Under the Statute of the tribunals (Article 5 respectively 3) "other inhumane acts" are mentioned without any further specification.

As helpful as the explanations in Article 7 (2) may be, they often demonstrate where the sources for the punishability of these crimes are to be found, in particular with regard to torture and apartheid. They also show that basic laws are missing where mostly needed, like for "other inhumane acts". The requirement "of a similar character intentionally causing …" describes an "*Erfolgsdelikt*" which as such is specified by the harm required: "great suffering, or serious injury to body or to mental or physical health". Not any act causing such a consequence fulfils by itself the requirements of this definition; it must be "inhumane". Or is an act causing the described harm as such inhumane and not in need of any additional requirement? But what is then harm of a "similar character"? Is it an objective evaluation covering the legally protected value violated or do aspects of personal guilt also play a role in this context?

Even more review may be required in the area of war crimes. With regard to Article 8, it is particularly obvious that the Elements deviate from the original wording of the relevant definitions and, by narrowing their application, contribute to impunity for criminal behaviour, which otherwise would fall within the jurisdiction of the Court. I recall examples already mentioned above,[27] as well as the fact that elements requiring a value judgement (such as "inhumane", "serious", "not justified by military necessity" (a negative element), "unlawfully" or "lawfully") are quite often contained in the definitions of Article 8 (e.g. Art. 8 (2) (a)) and interpreted by the Elements.[28] Here again, I will limit my considerations on a few crimes, instead of mentioning all relevant Elements.

With regard to the war crime of "denying quarter", Article 8(2) (b) (xii), I will just add a few additional remarks to what I have pointed out above. It is obvious that the Elements deviate from the definition by substituting will be by "shall be".

What is the background of this provision? In the front row, not only in the First World War but also in the Second and until now, the fear of being killed may be so overwhelming, that every smallest sign of mercy vanishes. Killing for the purpose not to be killed prevents not only the taking of prisoners of war, but may also lead to mutual escalation increasing cruelties. This was the basis on which Article 8 (2) (b) (xii) was originally established.

The methods of warfare may have changed and increased anonymity. But reports on military attacks in counter-terror operations indicate that there is no room left, not even for denying quarter. Mercy is not an issue to be aimed at, even when capturing would be sufficient to achieve the military advantage anticipated, as long as killing is the most "secure" alternative and remains unpunished.

This issue leads us to the war crimes listed under Article 8 (2) (b) (iv) for which the situation is even more complex. This provision has to be reviewed before the background that the number of civilian victims has tremendously increased compared with victims of traditional warfare. In the First World War, the number of civilian victims was below 10 per cent of all victims. In the Second World War, it increased to about 20 per cent; and by now more than 90 per cent of all victims in

27 See above under 1, 2 and 3.

28 For the Elements see in particular *supra* note 9.

belligerent struggles are civilians, sometimes transmitting even the border of 95 per cent. Accordingly, the scope and notion of "collateral damages" as a war crime has tremendously changed. Originally, it was meant to describe loss arising by accident out of military activities aiming at military objects. Because of this definition, it was by and large identical to "friendly fire", although the latter entailed legal consequences typically only at the national military level. The common feature of both is that the activity did not hit the targeted object, but rather an object that was not aimed at. The typical situation was the following: collateral damages were unexpected, because the combatants were concentrating to achieve military advantages and were not careful enough in the hasty moments of the battle in selecting to destroy what appeared to be dangerous for their own security.

One might have expected that "collateral damages" would diminish with increasing high-technology for more precise weapons. However, as already mentioned above, the opposite became true if one takes into account the number of military and civilian victims.

It is remarkable that it was not the original scope and notion of "collateral damages" which shaped the war crimes listed in Article 8 (2) (b) (iv), but rather the endeavour to protect combatants, even in cases where they act "in the knowledge that such attack will cause incidental loss of life or injury to civilians". According to this new tendency and corresponding definition, combatants are only held responsible when such loss "would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". Because of this formulation, it may still be surprising, but there is no great protest, if it is reported that operation "Enduring Freedom" and the activities to eliminate alleged terrorists in Afghanistan and Iraq caused much more loss on civilians than on military personal.[29]

This tendency became already obvious in the belligerent struggles in the last years, including those between Israel and the Hezbollah militia operating in the south of Lebanon in fall 2006, where collateral damages were more frequent and greater than military advantages achieved. As I mentioned already at another occasion,[30] and this is typical for the situation at that time, a media report emphasized that a couple of Israeli soldiers were hit by surprise when standing at a bus station and waiting to go on leave. This was the first and for a long time only "military advantage" reported at all in this context.

It also has to be recalled in this context that Israel claimed that it hit a UN Observation Station and killed three UN observers merely "incidentally", although the investigating commission found out that the Israeli military command had been asked to stop the attack by several urgent warnings from the Station, because the operation

29 See Triffterer, in Bellelli, *supra* note 1, under 4.E. therein.

30 See O. Triffterer, 'Ius in bello: Eskalation durch "Kollateralschäden" oder Kriegsverbrechen und ihre Beweisbarkeit und Vermeidbarkeit, Anmerkungen zu dem Bewaffneten Konflikt zwischen Israel und der Libanesischen Hizbullah Miliz' in R. Moos (ed.), *Strafprozessrecht im Wandel: Festschrift für Roland Miklau zum 65. Geburtstag* (2006), at 557 *et seq.*

became more and more dangerous for the lives of the officers serving in the peacekeeping mission at that station.

This present situation, which continues to prevail until present, leads me to conclude what I have explained more detailed on another occasion: the definition in (iv) and the relevant Elements for this definition prevent almost any prosecution for "collateral damages".[31]

In the meanwhile, most recent reports about these military activities admit that the number of civilians killed or hurt in the context of attack against armed groups suspected of terrorism is higher than the number of successful arrests or killing of persons searched.

It is also astonishing that aspects involving value judgement have been increased both in the definitions listed in Article 8 and in the corresponding Elements, as already mentioned with regard to the expressions "inhumane", "severe" and "not justified by military necessity".[32]

In how far does the war crime listed in Article 8 (2) (b) (iv) ("[i]ntentionally launching an attack in the knowledge that such attack" may (or may not) achieve "the concrete and direct overall military advantage anticipated", while knowing that it will (perhaps or for sure) "cause … clearly excessive" collateral damage[33]) contain an Element involving a "value judgement"? In case it does, the question arises as to whether the suspect can invoke an error as a defence when his evaluation is objectively wrong in concluding that the damage would be "not excessive"?

Does the formulation "knowledge that such attack will … cause … loss of the life or injury" exclude cases in which such a loss is caused "incidentally"? Should such a consideration have been included into the Elements, if not (primarily) for the Court, then for State Parties when exercising their subsidiary judicial power under the complementarity regime?

Someone who "knew" that his behaviour would cause collateral damage and nevertheless launches the attack, has agreed to its consequences and therefore had at least *dolus eventualis* with regard to that damage.

Requiring a value judgement of the perpetrator makes it easy for a suspect to defend himself by arguing that he would not have launched the attack in a situation where he was aware of the factual circumstances that establish the excessive nature of the damage, but evaluated these facts as evidence denying the excessive character of the loss in light of the military advantage anticipated.

Moreover, the "concrete and direct overall military advantage" anticipated is known and decided by the military before the attack. The Court evaluates the information given by the military and has to investigate, whether the alleged anticipated advantage has been adapted after the occurrence of the collateral damage in a way which denies its excessive nature. This has to be decided on a case-by-case basis, but nonetheless, false information then may lead to impunity.

31 For details see Triffterer, in Moos, *supra* note 30, at 557 *et seq.*

32 See above p. 394.

33 Brackets added.

In light of all these "inconsistencies", the definition of this war crime may require additional interpretation before being applied. The existing Elements increase the uncertainty caused by the lack of the definition, which is not sufficiently "strictly construed". By using the words "knew … that such death … would be of such an extent as to be clearly excessive in relation to …" in number 3, the Elements propose to require a value judgement of the suspect, or do, at least, leave the possibility of such a requirement open. Does this Element require a correct value judgement which would lead to impunity when being absent or evaluated wrongly?

Footnote 37 of the Elements to this war crime supports such an interpretation. It states that "[a]s opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein". The drafters added that "[a]n evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time". The last part of the quoted sentence does not make this situation any better. It only states that awareness of the factual circumstances is required (argument: "must be based"), without providing information as to what is and what is not sufficient.

For another war crime (Article 8 (2) (b) (xx)), the Assembly of States Parties may, or even has to, amend the Statute by an Annex. It cannot be predicted when and to what extent there may be a "comprehensive prohibition" to be included into the Annex. Anyhow, since the Annex has to contain all those weapons etc., the employment of which is especially and unusually dangerous, the question arises, as to whether there will be need to adopt the Elements corresponding to the enumerations in this Annex?

With regard to the crime of aggression, the situation is similar: the competence of the Court is established by Article 5 (1) (d) and dependent on the condition that "a provision is adopted in accordance with articles 121 and 123 defining the crimes and setting out the conditions …" (Article 5 (2)). In the case of Article 8 (2) (b) (xx), the exercise of jurisdiction is contingent on the fact that "that such weapons … are the subject of a comprehensive prohibition and are included in an annex to this Statute …".

According to the reports of the Special Working Group on Aggression, it is not certain that a definition will be presented to the Assembly of States Parties at its First Review Conference in 2010. However, the following aspects should be taken into consideration for purposes of future development:

- Aggression may become a "leadership crime" which means that only those who have the power to initiate or to order aggressive acts are qualified to commit the defined acts and are therefore responsible as principal perpetrators. However, this should not exclude that persons "cooperating" as non-leaders may be held responsible for participation in such crimes.
- To what extent Article 33 ("Superior orders and prescription of law") may then be applicable, is a question to be decided later. According to general acknowledged principles, all aggressive wars are illegal. The crime of aggression is therefore independent of any national or even international regulations justifying the situation. It may be different, when the Security Council has taken a decision "consistent with the relevant provisions of the Charter of the United Nations".
- Elements may be adopted for aggression, but should be established only for those approaches, which cannot be included into the definition. Perhaps the so-

lution of Article 8 (2) (b) (xx) may be helpful: listing aggressive acts in an annex to the Statute and leave the interpretation as a disputed element to the Court in its competence according to Article 21.

The conditions mentioned in Article 5 (2) are not Elements in the sense of Article 9. When fulfilled, they trigger the jurisdiction of the Court and may otherwise bar its proceedings. However, the existing Article 9 which refers to Elements assisting the Court in interpreting and applying the definitions contained in Articles 6, 7 and 8 will have to be extended to include the new provision, which is likely to contain the crime of aggression (e.g. a new Article 9). It may then be extended to conditions mentioned in the current Article 5 (2) as well. The common basis for this extension is that there are conditions and elements which cannot be clearly defined. One may therefore need Elements as guidelines, also to unburden the definitions and to make them clearer and easier to understand. However, in general, newly defined crimes should not automatically be complemented by Elements, unless these elements facilitate a clearer definition of these crimes and make them more easily compatible with the requirements of the rule of law and a fair trial.

5. Future perspectives

The Court faces a dual challenge with respect to the Elements of Crimes. The Court has to take notice of all Elements, their structure and their alleged consistency with the Rome Statute. By accepting or denying the interpretation proposed through the Elements, the Court may correct the definitions of crimes, in whatever direction is permissible in the framework of Article 22 (2).

The second challenge is that the judges may find it necessary to amend and thus review the Elements, for instance by confirming the definition in Article 8(2) (b) (xii) in the sense of the Elements or by denying the relevance of the character as a "leadership crime". In the latter case, a decision of the absolute majority of the judges is needed according to Article 9 (2) (b). Corrections by such decisions are possible but not mandatory. Article 21 (2) provides that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions". This means that the Court does not have to do so.

When the Court considers Elements in order to decide, whether and to what an extent they may offer assistance in interpreting and applying definitions, the Court may bear in mind specific issues which have been covered in its considerations or in the general discussion about scope and notion, function and limits of the Elements. The Court is empowered to propose amendments by virtue of Article 9 (1) and (2) (b). Such a proposal may concern an amendment of existing Elements or the inclusion of new Elements.

The way in which the Court uses its right to initiate amendments is at its discretion. Instead of using the possibilities provided in Article 9, the Court may well decide to adopt any other modalities to achieve what is desired or to bring about consistency with this Statute, according to the law.

It is an open question, whether and to what an extent the jurisdiction of the Court may or should be broadened. The task assigned by the Rome Conference to the Preparatory Commission is to consider the inclusion of international terrorism and trafficking of illicit drugs. But this situation is different from the one described above with regard to aggression and Article 8(2) (b) (xx), where the crime is already within the jurisdiction of the Court, but cannot be exercised yet because a constituent part of the definition is still missing.

This is not the place to discuss these questions in detail. But before I come to the end of my analysis I wish to recall that the core crimes listed in Article 5 (1) do not represent a closed shop, but do represent "the most serious crimes of concern to the International Community as a whole". To include (merely) serious crimes of such concern may diminish the reputation and importance of the Court.

In addition, it has to be considered that the legitimation of the *ius puniendi* of this community depends on violations of legally protected values, which are inherent in this community and listed in the paragraph 5 of the Preamble of the Rome Statute: peace, security and well-being of the world. Only grave violations should be the concern of the Court, and some abstention is therefore advisable. But once appearances of criminal behaviour endanger these just mentioned values, the world community should not hesitate to include them into the crimes within the jurisdiction of the Court. Until then, mutual assistance and cooperation between states on the horizontal level is required to combat these crimes successfully. One should not only differentiate between individual and state terrorism, but also take into consideration that national jurisdiction is and should remain – by itself and under the complementarity regime – an effective tool to prosecute such criminal behaviour, which is of interest, but not always of concern to the International Community as a whole.

If the Assembly of States Parties decides by a two-third majority to include further crimes within the jurisdiction of the Court and defines them in a future Article 9, the situation with regard to the Elements is the same as in the case of Article 8 (2) (b) (xx) and aggression.

6. Addendum

International criminal jurisdiction, which is exercised by way of a direct enforcement model, requires the assistance of states, as provided in Part 9 Rome Statute. This is true, irrespective of whether the court is a permanent institution (like the ICC) or of an *ad hoc* character (like the ICTY and the ICTR), or whether such an institution is limited with regard to its competence *rationae materiae*. The President of the ICTY, Antonio Cassese has expressed this need already convincingly in 1994 in his First Report from the *ad hoc* tribunal to the General Assembly.[34]

But it should be kept in mind that direct enforcement models, in whatever form they may appear, and regardless of their dependence on national enforcement authorities, do not derive their competence from a transfer of state sovereignty. The

34 For the First Report to the General Assembly see http://www.un.org/icty/rappannue/1994/AR94e.pdf (24.04.2008).

ICTY and the ICTR are the best examples. The Security Council established these tribunals on the basis of the inherent *ius puniendi* of the international community as a whole, partly without the consent or even against the will of former Yugoslavia and the new states on its former territory. The Security Council has not created the applicable substantive law, but merely specified according to which definitions the Tribunals shall apply the already acknowledged law.[35] Many, but not all of the Members of the UN had made proposals for the law to be applied and the structure of the Tribunals, either individually or collectively. But none of them has transferred part of its sovereignty or jurisdiction to the ICTY or to the ICTR.

The situation is similar with respect to the Rome Statute. In this case, however, it was not the Security Council, but the first 60 States Parties which helped establish the Court through ratification and entry into force of the Statute.

With respect to command responsibility, it should be mentioned and emphasized again, that the difficulties to prove the causation of the first failure of the superior to control properly should not lead to an abandoning of the verbally clear formulation in Article 28 Rome Statute and a corresponding narrowing of its application. It should be acknowledged, in light of the rule of law and the character of international criminal law as the criminal law within the legal order of the nations, that Article 28 is an *Erfolgsdelikt* by an omission.

It would be unacceptable to qualify superior responsibility as a non-intentional crime. Since the superior is responsible "as if he had committed a crime himself" (that means for genocide or one of the other core crimes committed by his or her subordinates[36]), accountability requires at least an intentional omission to trigger such a severe form of responsibility. "Knew" or "should have known" respectively "consciously disregarded information which clearly indicated …" are as such not sufficient. They all merely describe alternatives for the intellectual component of the mental element, defined in Article 30 and thus do not represent the second decisive part of *mens rea*, the volitive element.[37]

In addition, if such a complete "intent" would not be required for the first omission (i.e. not controlling properly) the elements on the mental side would be lower than those required for active or passive participation of a commander in the crime of his subordinates. Further, the responsibility of a superior for failure to control properly should not be "lower" construed than the responsibility of a principal perpetrator, be it a military colleague or a subordinate. This responsibility is anyway based on a lower level of intent. Participation requires the intent to support a specific crime. For Article 28, however, it is sufficient that the superior agrees to the commission of any crime within the jurisdiction of the Court.[38]

35 See http://www.un.org/depts/german/sr/sr_93u94/sr827.html (24.04.2008).

36 For pending cases before the ICTY see www.un.org/icty/cases-e/index-e.htm (24.04.2008).

37 See Triffterer, in Prittwitz *et al.*, *supra* note 1, at 437 et seq., *ibid.* in Triffterer, *supra* note 1, at 413 et seq. and *ibid.* in Arnold *et al.*, *supra* note 1, at 901 et seq.

38 For details, see Triffterer, in Triffterer, *supra* note 1, at 213 et seq.

V Procedural Law

Pre-trial

Chapter 22 A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC

*Simon De Smet**

1. Introduction

The creation of the Pre-Trial Chamber by the Rome Statute has been hailed as an innovation in international criminal procedure. The reasons for creating this new body were manifold[1] and the Pre-Trial Chamber has been given a long list of responsibilities. To get a flavour of the variety of tasks the Pre-Trial Chamber is asked to perform, one only has to consider that, apart from performing the typical pre-trial judicial functions of acting as "*juge des libertés*"[2] and as indictment chamber,[3] the Pre-Trial Chamber is responsible for important issues such as challenges concerning jurisdiction and admissibility;[4] preserving evidence which may otherwise be lost;[5]

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1 According to Fourmy, the creation of the Pre-Trial Chamber was a response to three basic concerns: 1. "the permanence of the ICC and its Statute which required that due account be taken of the prerogatives of the States Parties to the treaty; 2. The Prosecution's initiative capacity, since it would generally be considered that the Prosecutor should have the power to investigate and the power to prosecute; 3. Developments in the *ad hoc* Tribunals' Rules of Procedure and Evidence, as well as practice, which emphasised the need for better organisation and management at the pre-trial phase." See O. Fourmy, Powers of the Pre-Trial Chambers, in A. Cassese, P. Gaeta & J. Jones, (eds.) *The Rome Statute of the International Criminal Court: A Commentary,* Vol. II (2002), at 1208.

2 Article 58; Article 60 (2): "A person subject to a warrant of arrest may apply for interim release pending trial".

3 Article 61.

4 Articles 15 (3) et seq.; 18 (2) and 19 (6): "prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber".

5 Article 18 (6): "Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity

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protecting the victims and witnesses during the investigation phase[6] and protecting national security information.[7] The Pre-Trial Chamber may also seek cooperation of States to take protective measures for the purpose of forfeiture at a later stage for the benefit of the victims[8] and it may be asked to authorise the Prosecutor to take specific investigative steps directly within the territory of a State Party without having secured its cooperation.[9] Moreover, in certain circumstances the Pre-Trial Chamber has an important role in reviewing decisions of the Prosecutor whether or not to open investigations or initiate prosecutions.[10] Whilst carrying out all these tasks, the Pre-Trial Chamber is also asked to "issue such orders, including measures such as those described in Article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person [who has been arrested or has appeared pursuant to a summons] in the preparation of his or her defence."[11]

From this jumble of functions, the Court itself has distilled three main roles for the Pre-Trial Chamber:

> "As one of the judicial bodies of the ICC, the role of each Pre-Trial Chamber is essentially threefold: it must act as a check on the powers of the Prosecutor as regards his investigation and prosecution activities; it must guarantee the rights of suspects, victims and witnesses during the investigation phase; and it must assure the integrity of the proceedings".[12]

Whether or not this characterization of the Pre-Trial Chamber's brief is accurate,[13] it can hardly be called precise. Unfortunately neither the Rome Statute nor the Rules of Procedure and Evidence provide clear guidance as to how all these respective functions are to be exercised or how they relate to the powers and responsibilities of

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to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."

6 Article 57 (3) (c), Article 68 (1) *juncto* Rules 86-88 of the Rules of Procedure and Evidence.

7 During any phase of the proceedings, States may apply to the Court for protection of their national security information. See Articles 72 and 57 (3) (c).

8 Article 57 (3) (e).

9 When a State Party is unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system, the Prosecutor may apply to the Pre-Trial Chamber to seek authorisation to take specific investigative steps on the territory of that State directly. Article 57 (3) (d), Rule 115.

10 See Article 53.

11 See Article 57 (3) (b).

12 International Criminal Court, '*The Role of the Pre-Trial Chamber,*' ICC Newsletter, October 2004, available at <www.icc-cpi.int/library/about/newsletter/files/ICC-NL2-200410_En.pdf>.

13 Marchesiello attributes three main goals of the Pre-Trial Chamber, namely "filtering, safeguarding and pushing ahead", M. Marchesiello, Proceedings before the Pre-Trial Chambers, in Cassese, *et al.*, *supra* note 1, at 1238.

the other organs of the Court. It is thus fair to say that the Pre-Trial Chamber is left somewhat in the dark about exactly how far its powers and responsibilities extend.

Perhaps the most obscure aspect of the Pre-Trial Chamber's mandate is the nature and level of its involvement in the fact-finding process of the Court. This essay is an attempt to unravel the mysteries surrounding the role of the Pre-Trial Chamber with regard to fact-finding and to evaluate its potential to expedite this process. However, it is impossible to explain the role of the Pre-Trial Chamber without a clear comprehension of the basic characteristics of the ICC's procedural system as a whole.

Each system of criminal procedure is based on a set of basic assumptions about the role of the judges and how they must deal with issues of facts and evidence. To understand how these matters are dealt with in the Rome Statute, it is crucial to be aware of the fundamental differences in approach that underlie the various procedural models that exist in domestic jurisdictions. Therefore, the first part of the essay will propose a method for analysing fact-finding procedures based on a systematic examination of the major traditions of criminal procedure. In the light of this analysis it will be easier to assess the role of the Pre-Trial Chamber in the context of the procedural framework of the ICC and to evaluate how it has performed thus far in the preparation of the first case for trial.

2. Putting the ICC's procedure in context

The procedural system as laid down by the Rome Statute and Rules of Procedure and Evidence of the International Criminal Court does not align itself with any single existing domestic or international system of criminal procedure. It is neither a purely common law accusatorial nor a civil law inquisitorial system; nor is it a mixed or hybrid system as can be found in certain national jurisdictions. Instead, the procedural system of the ICC is a "fundamental compromise formula";[14] the result of lengthy and difficult diplomatic negotiations[15] during which no consensus was reached on many key questions.[16] As a consequence of this diplomatic deadlock, the drafters of the Rome Statute and Rules of Procedure and Evidence had to resort to the 'technique' of "constructive ambiguity".[17] That is to say, rather than resolving the contentious issues, either by favouring one standpoint over the other or by adopting a clearly defined third way,[18] the drafters used language whose meaning could vary considerably

14 C. Kress, 'The procedural law of the International Criminal Court in outline: anatomy of a unique compromise', (2003) 1 *JICJ,* at 605.

15 S. Fernandez de Gurmendi, The Process of Negotiation, in R. S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute,* 1999, 217-227.

16 As Judge Orie rightly pointed out, it is easier to understand the role of those who develop rules of international criminal procedure "if one takes into account their geographical origin of their legal roots". See, A. Orie, Accussatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC, in Cassese *et al.*, *supra* note 1, at 1440.

17 Kress, *supra* note 14, at 606.

18 See e.g., Marchesiello, *supra* note 13, at 1235.

depending on the interpretation.[19] The implicit hope was, of course, that the judges would resolve the issues. However, at the first opportunity to start giving direction to the ICC's procedure, namely the drafting of the Regulations of the Court, the judges were also unable to reach agreement on any of the difficult issues and left them to be resolved by the jurisprudence of the Chambers. As the task of cutting the many procedural Gordian knots has now been left to the discretion of the smallest possible forum, namely three judges, acting under the control of five other judges of the Appeals Chamber, it seems to have become a matter of some urgency to re-evaluate the fundamental choices that are involved.

2.1. Two fundamental choices any system of criminal procedure has to make

This is not the place to enter into a detailed argument about comparative criminal procedure and where the ICC's procedure fits in.[20] Nevertheless, it may be helpful for our analysis to highlight two elements from comparative law that pertain directly to the question of judicial fact-finding and the role of judges in the different procedural phases.

2.1.1. First Choice: the type of adjudicator

The first choice to be made by the drafters of any system of fact-finding in criminal procedure is the role of the judge.[21] Broadly speaking, there are two ways of approach-

19 E.g. the provisions of the Statute with regarding the relation between the Pre-Trial Chamber and the Trial Chamber have been described as "amazingly vague", see Fourmy, *supra* note 1, at 1227.

20 This has already competently been done elsewhere, see, e.g. Orie, *supra* note 16, 1439 ff.; K. Ambos, 'International criminal procedure: "adversarial", "inquisitorial" or mixed?', (2003) 3 *International Criminal Law Review*, 1. A number of useful books on comparative criminal procedure in the English language are e.g. M. Delmas-Marty, & J. Spencer (eds.), *European Criminal Procedures*, 2002; J. Hatchard, B. Huber, & R. Vogler (eds.), *Comparative Criminal Procedure* (1996); C. Bradley (ed.), *Criminal Procedure, A Worldwide Study* (1999); F. Pakes, *Comparative Criminal Justice* (2004); P. Fennell, C. Harding, N. Joerg & B. Swart, *Criminal Justice in Europe – A Comparative Study,* 1995; M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', (1973) 121 *University of Pennsylvania Law Review* 506; M. Damaska, *The Faces of Justice and State Authority* (1986).

21 It would also be possible to discuss this issue from the standpoint of the parties and focus on their role and responsibilities. There is, obviously, a very strong correlation between the role of the judge and that of the parties. They are, as it were, inextricably linked to each other as two sides of a coin. However, as this article is written from an institutional/organisational point of view, it is warranted to concentrate on the role of the judge, as it is his/her mandate and powers that are most clearly determined in the constituting documents.

ing this issue, which correspond to the archetypical common law accusatorial and civil law inquisitorial models.[22]

2.1.1.1. The archetypical common law adjudicator: the tabula rasa judge

In the accusatorial ethos, the adjudicator's task is to establish the facts on the basis of what the parties have presented, challenged, examined and cross-examined during the trial hearings. The pure accusatorial model does not allow the adjudicator to take any independent steps to ascertain the truth.[23] When a party presents incomplete evidence, this is nevertheless the only basis upon which the adjudicator may rely for his/her judgment, even if he/she suspects that additional evidence might be available.[24]

In short, although nominally in charge of the proceedings, the adjudicator in the accusatorial system is in the first place an observer and an umpire. The common law judge must view the case "from a peak of Olympian ignorance"[25] with no preconceptions or prior knowledge about either the parties or the facts. He or she is there to listen to what the parties have to say, to evaluate their evidence and to uphold the balance and fairness of the proceedings. As the hearings are primarily intended to give the parties an opportunity to present their case, the adjudicator's main role at trial is to observe and draw conclusions. However, the presiding judge also has the important task of assuring the proper course of the hearings and especially the interrogation of witnesses.[26] As the parties have the initiative, the judge's job is to make sure that they stay within the rules of fair conduct and, more generally, do not need-

22 It is true that this bipartite distinction is outdated and no longer accurate as a description of existing procedural systems in a modern world. D. Salas, *The role of the judge*, in Delmas-Marty & Spencer *supra* note 20, at 489. However, for analytical purposes it is still useful to juxtapose the two approaches, as this allows greater conceptual clarity. See also on this point, Ambos, *supra* note 20.

23 Most modern common law systems today do not strictly abide by this rule anymore. See, e.g. Rule 614 of the U.S. Federal Rules of Evidence: "The court may, on its own motion, or at the suggestion of a party, call witnesses, ... the court may interrogate witnesses, whether called by itself or by a party." However, such provisions remain an exception to the general principle rather than a changed judicial policy.

24 A general exception to this rule is the power to take judicial notice of notorious or adjudicated facts, see Rule 201 of the United States Federal Rules of Evidence.

25 The phrase is borrowed from one of the classic texts about fact-finding in common law criminal procedure by a noticeable U.S. Federal judge. Although his characterisation may seem slightly caricatural to some, it has the benefit of being clear and it has served as a point of reference in the debate on this topic ever since it was published. See M. Frankel, 'The Search for Truth: An Umpireal View', (1975) 123 *University of Pennsylvania Law Review* 1042.

26 See e.g., Rule 611 (a) of the U.S. Federal Rules of Evidence: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

lessly waste time or otherwise pervert the course of justice, through dilatory tactics, intimidation of witnesses or misleading the jury etc.

In essence, the common law judge must be a complete *tabula rasa* at the start of the trial. This means that in the archetypical accusatorial trial, the judge starts hearing a case totally unprepared[27] and ignorant about the evidence s/he will be asked to evaluate.[28] As a consequence of this ignorance and lack of preparation, the judge's control over the hearings must necessarily be reactive rather than active. This position of initial ignorance and lack of initiative has two important consequences:

First, if the judge is to be a *tabula rasa* arbiter between the parties, this presupposes that the parties can take charge of the proceedings. It would not be workable to have a passive adjudicator as well as passive parties. Therefore, when parties are given the task to drive the litigation forward, especially from a fact-finding perspective, they must be given the procedural tools to do so. This means that they must have the power and the means to conduct their own investigations and the right to compel evidence before the court.[29]

Second, as parties cannot be expected to present evidence that goes against their interests, trials become a forum where partisan versions of the facts are portrayed as the truth. To come to a reasonable assessment, the adjudicator (who has no independent knowledge about the available evidence) must therefore allow the parties to contradict and undermine each other's evidence. The presentation of evidence must, in other words, be confrontational.

2.1.1.2. The archetypical inquisitorial judge: the managerial judge

In contrast to the common law approach, the figure of the judge is vital for the inquisitorial fact-finding model. Indeed, the judge plays a central and active part in the entire fact-finding process and is instrumental in the collection of evidence before trial. Fact-finding is concentrated in the pre-trial phase, where evidence is collected

27 This unpreparedness serves two different purposes. On the one hand, it ensures that the judge has no preconceived ideas about the case before he/she hears the first evidence. On the other hand, it makes it a lot less likely that the judge will take over the initiative from the parties. Any initiative on behalf of the judge would most likely be misguided, since he or she has no understanding of any of the issues, let alone any knowledge about the relevant details. Without any preparation, the judge is said to be like "a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times." Frankel, *supra* note 25, at 1042-3.

28 An important precondition for having a *tabula rasa* judge is that the adjudicator is shielded from the evidence until the start of the hearings on the merits. In a pure accusatorial system, the adjudicator should hear about the existence of every piece of evidence for the first time at trial. Whatever judicial involvement there is during the pre-trial phase must be limited to procedural issues and may never expose the adjudicator to the content of any evidence.

29 "In common law systems, the parties, (through their counsel) perform a number of activities that are intrinsic to the office of the judge on the Continent." See Damaska (1986), *supra* note 20, at 101.

by a judge[30] with a specific and broad investigative mandate to find all information that could lead to the truth.[31]

The fact that a judge is formally in charge of the proceedings has an important consequence, namely that the investigation is considered to have been carried out in an unbiased and impartial fashion. Evidence is therefore considered neutral in the sense that its primary function is to enlighten the adjudicator about the truth, not to support or undermine the case of one of the parties.

Naturally, when a judge is in charge of pre-trial fact-finding, the parties need fewer powers to uncover evidence.[32] In pure inquisitorial systems, parties are limited to making requests to the judge in charge of preparing the litigation to take certain investigative steps.[33]

Once the charges are confirmed, the dossier of the investigation is passed on to the judge who will hear the case on the merits. This cannot be the same judge who was in charge of the investigation.[34] The judge on the merits (the trial judge) will then use the dossier as the basis for organising the trial and especially the calling of evidence.[35] Crucially, the trial judge, who has a legal duty to look for the truth, has the power to summon additional evidence during the hearing and to order additional investigative steps.[36] This has led one commentator to characterise the difference between the

30 In the purest inquisitorial systems, such as French and Belgian criminal procedure, a *juge d'instruction* is formally in charge of the investigation and, in theory at least, investigates the facts in person. See, e.g., Articles 55 and 56 Belgian *Code d'instruction criminelle.* Importantly, it is also the judge, or the police on his/her behalf, who questions witnesses and appoints experts.

31 See e.g., Article 81 of the French Code de procédure pénale, « Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge». See also Article 56 (1) of the Belgian *Code d'instruction criminelle.*

32 Damaska (1986), *supra* note 20, at 54.

33 See, e.g., Article 82-1 of the French *Code de procédure pénale* and Article 61 *quinquies* of the Belgian *Code d'instruction criminelle.* In those systems that allow full victims participation, a similar right may be given to the victims.

34 This separation of the investigating and the adjudicative function is a relative recent phenomenon, mainly inspired by the jurisprudence of the European Court of Human Rights. See, e.g. ECHR *De Cubber v. Belgium* (1984) 7 EHRR 236.

35 In the inquisitorial tradition, it is the presiding judge who calls all the evidence for the benefit of the court, not the parties in support of their side of the case. Of course, most modern systems allow parties to make suggestions to the presiding judge, while others even give them a limited right to submit their "own" evidence (with permission of the bench), in addition to whatever evidence has already be called by the court.

36 See, e.g. Article 310 of the French Code de procédure pénale, « Le président [de la cour d'assises – SDS] est investi d'un pouvoir discrétionnaire en vertu duquel il peut, en son honneur et en sa conscience, prendre toutes mesures qu'il croit utiles pour découvrir la vérité ». In Germany, which has a mixed procedural system, the role of the court is nevertheless defined very clearly as having to search for the truth and to take all necessary investigative steps to that end; see Section 244, para. 2 of the German Code of Crimimnal

judicial function in the common and civil law systems as follows: "in an accusatorial system, there is a clear division between the function of investigating and the judging, whereas in an inquisitorial system they are blurred."[37]

As will be plain from the above, party involvement in inquisitorial fact-finding is qualitatively different from the accusatorial model. As judges take the lead both in the pre-trial investigation and during the trial hearings,[38] where they are the ones to question witnesses,[39] the parties are limited to reacting to what is being said and drawing attention to those elements in the case file that support their case.

2.1.2. Second choice: the way in which evidence is processed and evaluated

The second major choice that the drafters of any system of fact-finding in criminal procedure must make is how evidence is brought to the attention of the adjudicator.

2.1.2.1. The immediacy principle

The immediacy principle[40] requires that an adjudicator may decide a case only on the basis of evidence that he/she has seen with his/her own eyes. The purpose is, of course, to guarantee that the adjudicator has personally evaluated the evidence.[41] Applied in its purest form, the immediacy principle demands that evidence must be presented in its most unadulterated form before the adjudicator.[42] Consequently, it

Procedure ("Das Gericht hat zur Erforschung der Wahrheit die Beweisaufnahme von Amts wegen auf alle Tatsachen und Beweismittel zu erstrecken, die für die Entscheidung von Bedeutung sind").

37 J. Spencer, *Introduction*, in Delmas-Marty & Spencer, *supra* note 20, at 25.

38 See e.g., Article 309 (1) of the French Code de procédure pénale, "Le président a la police de l'audience et la direction des débats".

39 See e.g., Article 936 of the Belgian *Code Judiciare*, which forbids parties to interrupt a witness or to address her directly – all communication with the witness must go through the judge.

40 The terminology "immediacy principle" is more common in civil law jurisdictions than in common law jurisdictions, which seems to lack a comprehensive concept. Perhaps the clearest manifestation of the immediacy principle in the common law terminology is the rule against hearsay evidence, see Damaska (1973), *supra* note 20, at 517.

41 The underlying assumption of the immediacy principle is that the adjudicator can only evaluate the credibility of the evidence properly if he/she observes it firsthand. There is thus a distinction between the content of the evidence and its credibility. To be informed of the content of the evidence, i.e. the raw information, (e.g. in the case of witness testimony, the actual statements of the witness), the adjudicator does not necessarily require to hear the testimony in person. However, under the assumptions of the immediacy principle, the adjudicator does need to personally observe the witness in order to assess the credibility of the information (e.g. the demeanour of the witness, his/her tone of voice etc.). As a consequence, testimony by deposition or affidavits are not admissible under the immediacy principle, even if both parties had the opportunity to (cross-)examine the witness, because the judge was not present at the taking of the evidence.

42 The immediacy principle is sometimes confused with the principle of orality. See e.g., J. Lebre de Freitas, La Preuve dans l'Union Européenne: Différences et Similitudes, in

excludes the taking of evidence through intermediaries. Either the adjudicator must be actively involved in the pre-trial fact-finding, or, as is normally the case, the adjudicator stays out of the preparatory phase and waits for the evidence to be presented during trial.[43] This implies that the parties will do most of the fact-finding and exchange the information between themselves before the start of the trial (i.e. disclosure), without involvement of the adjudicator. Although a pre-trial dossier is not necessarily excluded, it can never replace the need for the adjudicator to hear witnesses or visit sites etc. in person. The only way to make pre-trial testimony admissible is to record it in the presence of the adjudicator and the parties. However, it then becomes hard to differentiate the pre-trial from the trial phase, since the actual process of taking the evidence (prior or during formal trial hearings) is identical.[44]

2.1.2.2. Dossier approach

Mention of the dossier has already been made in relation to the managerial judge. A dossier in a criminal justice context is a file compiled principally from materials from the police investigation and reports of interviews conducted by the investigating magistrate, which can be a judge or a prosecutor. Whenever suspects or participating victims offer evidentiary materials (e.g., when a potential suspect is questioned, he/she may offer evidence of his/her innocence or alibi), they are added to the file. All the evidence in the dossier thus becomes "communal", in the sense that it is belongs to the court and is shared by the parties. Every party can rely on all elements contained in the file, regardless of who deposited it in the dossier.[45]

When the dossier approach is employed, it does not matter which judge "processes" the evidence, as long as the information is properly reflected in the dossier. In other words, there is no requirement of immediacy in the evaluation of the evidence. The dossier approach therefore raises important issues about the evaluation of the credibility of the evidence, since the judge adjudicating the case may never have had any direct contact with the source of the information. On the other hand, with a

J. Lebre de Freitas, (ed.), *The law of evidence in the European Union* (2004), at 25. Applied in all its rigour, the principle of orality requires that even documentary evidence is presented orally, i.e. read out in court during the hearing. However, whereas the main purpose of the orality principle relates to the public nature of the trial hearings, the immediacy principle is in the first place an obligation on the adjudicator to take first-hand cognisance of the evidence. The immediacy principle as such does not preclude the use of documentary evidence, as long as this is the original form of the evidence.

43 This is a consequence of the fact that in most traditional common law systems, the question of factual guilt or innocence is determined by a jury, which is obviously not available during pre-trial, since the jury is only convened after the confirmation of charges.

44 Therefore, most systems which adhere to the immediacy principle foresee an exception to it for when evidence must be taken before trial because it might otherwise be lost. See e.g. Rule 15 of the United States Federal Rules of Criminal Procedure.

45 See, e.g., D. Mougenot, *La Preuve en Droit Belge,* in Lebre de Freitas, *supra* note 42, at 85. In a strict dossier approach, parties cannot rely on evidence outside the dossier, although they of course have the right to ask for the inclusion of evidence which is relevant and pertinent to the case.

dossier the adjudicator is more detached and less influenced by first impressions or his/her mood on the day of the hearing. The dossier also has the added benefit of giving the adjudicator a complete overview of all the evidence right from the start, which allows him/her to evaluate each individual piece of evidence in the context of the entirety of the case. Moreover, once the evidence is in the dossier, it is 'frozen' and can no longer get lost or be tampered with.[46]

Thus, essential to the dossier approach is that the adjudicator receives a complete file of the case, before the start of the trial hearings, containing all the written arguments of the parties, a summary of all the investigatory and procedural steps that were taken as well as all the evidence. It is on the basis of this file that the judge will then prepare him/herself to conduct the hearings. The trial hearings are then used to allow parties to focus the adjudicator's attention on particular points of contention or to highlight the importance of certain elements in the file. As there is no need to (re)produce uncontested issues from the pre-trial investigation, or indeed to explain what the case is about, the discussion about evidence at trial can focus on the most contentious issues.[47] This allows the court to deal with even complicated cases in a minimal amount of trial hours. The downside of this system is of course that it comes at a price as far as the public nature of the trial is concerned, since the public will not have access to the file.

2.2. The need for internal coherence of procedural systems

2.2.1. It is possible to mix as long as the result is coherent

In theory, the archetypical common law accusatorial model is a combination of the *tabula rasa* judge with the immediacy principle, whereas the archetypical civil law inquisitorial model unites the dossier approach with a managerial judge. However, it is clear that the archetypes described here do not reflect any existing systems. Indeed, most modern systems of criminal procedure have borrowed extensively from each other in a wide variety of ways. This process has reached such a level that some argue that "the two model system has broken down".[48]

However, a distinction should be made between efforts to mitigate the sharp edges of the archetypical common and civil law procedural models, and systematic variations that fundamentally alter the internal coherence of a given system. Alternative models of criminal procedure that cannot be categorised as purely civil or common law oriented have developed, which are usually referred to as "mixed" or "hybrid" systems.[49] As this typification suggests, however, the systems in question simply combine elements from the civil and common law models and offer no fundamentally different approach towards the role of the judge or the treatment of evidence. They

46 Damaska (1973), *supra* note 20, at 519.

47 See Orie, *supra* note16, at 1444.

48 C. Bradley, *Overview,* in Bradley, *supra* note 20, at xxii.

49 See e.g. B. Huber, *Germany,* in Hatchard *et al., supra* note 20, at 100.

are thus not a genuine third category, although their character may differ considerably from the archetypes.

But whether we are looking at a modified version of one of the archetypes or a genuine mixed system, what matters is that the resulting system is coherent and systematically sound. For example, when trial judges are asked to be more managerial, they must be given the tools to do so, in particular by providing a mechanism by which they can obtain the necessary information to take charge of proceedings in a knowledgeable fashion. Conversely, when the judge is supposed to be a *tabula rasa*, there is no point in creating a dossier for him/her as s/he cannot look at it. In other words, all elements of the procedure, especially the precise role and power of all the procedural players (judges as well as parties), both in the pre-trial and the trial phase, must be finely in tune with each other in order for the system to work efficiently.

As this contribution deals primarily with the role of the ICC's Pre-Trial Chamber, a few more comments about the structural correlation between the pre-trial and the trial phase are warranted.

2.2.2. The structural correlation between the pre-trial and the trial phase

The pre-trial phase is, as the word suggests, the preliminary phase of the judicial proceedings, during which the actual trial is prepared. The nature of the pre-trial phase and the extent of judicial involvement in it depend on the type of trial the system aspires to. For example, when the immediacy principle is strictly adhered to during trial, there is no real need for any judicial involvement in the fact-finding at the pre-trial stage. This can be left to the parties as all the evidence must be produced before the trial judge anyway.[50] There is thus a structural correlation between the type of trial and the role, if any, performed by judges in its preparation. Any analysis of pre-trial procedures thus requires an understanding of the nature of the trial it is supposed to prepare.

As far as fact-finding is concerned, the pre-trial stage culminates in a process that is most aptly described with the French terminology of *mise en état.*[51] The concept of *mise en état* refers to the finalisation of all preparations before the commencement of the trial so that all players are ready to perform their role during the hearings. What is meant by a case being "trial-ready" differs according to the procedural model. A common law case is *en état* when the parties have all the evidence in support of their side of the argument, whereas a civil law case is ready for trial when the trial judge has all the information s/he needs (in the dossier) for conducting the formal search for the truth.

In the archetypical accusatorial system (*tabula rasa* judge and immediacy principle), the *mise en état* procedure is known as "disclosure" and basically involves the

50 In some systems, such as in Germany, the prosecutor has the obligation to investigate *à charge et à décharge*. See e.g., B. Huber, Germany, in Hatchard *et al., supra* note 20, at 96 ff.; T. Weigend, *Germany*, in Bradley, *supra* note 20, at 187 ff.; R. Juy-Biermann, The German system, in Delmas-Marty & Spencer. *supra* note 20, at 292 ff.

51 The most accurate translation is perhaps 'bringing the case into a state of readiness for adjudication', which is obviously rather cumbersome.

parties exchanging information *inter se*.[52] In the civil law inquisitorial model (managerial judge and dossier), the *mise en état* is primarily in the hands of the investigating judge, who must ensure that all the required information is present in the dossier. In the common law tradition, disclosure occurs after the confirmation of charges, whereas in the civil law systems, the file is formally declared *en état* by the judge who confirms the charges.[53]

Again, it is essential that the *mise en état* procedure is adjusted to the rest of the proceedings. For example, Italy, which rather recently replaced a French-inspired inquisitorial model with a more accusatorial trial system, has a system of "double dossiers"; one for each of the parties (who conduct their own independent investigations) and another (considerably thinner) one for the trial judge.[54] Before the commencement of the trial, the defence and the victims (who are full-fledged participants) have the right to read and take copies of the prosecutor's dossier in order to prepare themselves. However, the judge, who is bound by the immediacy principle, does not have access to the prosecution file and has only a very limited dossier.[55] As a consequence, the judge is thrust in a pseudo-*tabula rasa* position.

2.2.3. Need for conceptual clarity about the epistemological aspirations of the system

Systems of criminal procedure come in many variations and there is a lot of room for procedural creativity, as long as the resulting model is internally coherent. Whoever determines the structure of a given procedural system must thus always make sure that the role of each player is fully coordinated with that of the other participants in the proceedings and that there is overall conceptual clarity about the basic objectives of the system.

As far as fact-finding is concerned, this requires a clear conception about the epistemological aspirations of the judicial process. Perhaps the most fundamental difference, in terms of fact-finding, between the common law accusatorial trial and the civil law inquisitorial trial is their epistemological starting point.

The prototypical civil law model assumes that there is an objective truth, which can be discovered by the judge (as long as sufficient evidence can be collected), with or without the parties' direct involvement. The task of the judge is to make every effort to find that truth and the parties' interests are subordinate to this goal.

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52 The extent of this exchange of information and evidence differs considerably among systems. Naturally, in the criminal context the main burden of disclosure is on the prosecution.

53 This follows from the fact that in civil law systems the judge who must confirm the charges has the power to require additional evidence before committing the case for trial.

54 See, A. Perrodet, The Italian system, in Delmas-Marty & Spencer, *supra* note 20, at 348 ff.; W. Pizzi, W. & L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation', (1992) 17 *Yale Journal of International Law* 1-39.

55 Containing only such evidence as was collected in the presence of a pre-trial judge because there was a risk that it might not be capable of being reproduced at trial.

By contrast, in the quintessential common law trial the truth belongs to the parties. They control which evidence is submitted to the adjudicator and how it is presented.[56] The truth is thus conceived as something relative, which can only be discovered, if at all, from whatever evidence the parties present during trial.[57] In the criminal law context, this boils down to the question of whether or not the prosecution has been able to satisfy the standard of proof beyond reasonable doubt. One might of course argue that if something is proved beyond a reasonable doubt, this approximates the truth as much as anything and that the outcome of criminal proceedings in both systems, in terms of the epistemological value of the judgment, is therefore more or less equal.[58] However, the crucial difference is that the judge in the common law system is restricted to the limited evidential base submitted by the parties, whereas the civil law judge has an obligation to actively search for additional evidence if s/he suspects that there more relevant information is available.

In other words, a judge in the common law system will only get to the truth if the parties offer him/her sufficient evidence. The civil law judge, on the other hand, is him/herself responsible for gathering sufficient evidence before rendering judgment. The dynamic is thus fundamentally different, even though the end-result will often be the same.

3. Structural analysis of the Pre-Trial Chamber's role in fact-finding

There are usually many reasons why a given system of procedure has evolved the way it has. Sometimes this will be a fundamental change of policy,[59] but more often it will be a combination of factors that influence the design of a system of criminal procedure. Moreover, procedural systems change constantly,[60] in a never-ending effort to come to terms with the basic question of how to balance maximum procedural fairness with maximum efficiency.

56 However, today even the most ardent common law systems have a more nuanced approach. See, e.g., Rule 611 (a) of the United States Federal Rules of Evidence: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

57 For a discussion about why this proposition may be problematic, see D. Nance, 'Missing Evidence', (1991), 13 *Cardozo Law Review* 831-882.

58 See, on this point, Ambos, *supra* note 20, at 21, who argues that "[I]t is a widespread misconception among civil lawyers that the adversarial procedure does not pursue the truth. In fact, the search for truth is a common feature of both systems, and only the method of arriving at the truth is different. One may argue that common law follows a more liberal concept of the truth – a kind of procedural rather than material truth."

59 The most dramatic example of this is perhaps the French revolution and how it changed French criminal procedure See, e.g. Spencer, Introduction, in Delmas-Marty & Spencer, *supra* note 20, at 10.

60 Spencer describes this as a "state of 'perpetual revolution'", ibid., at 20.

As far as the ICC's procedural system is concerned, the most decisive factor in its genesis is probably that it is the result of a diplomatic compromise. As a consequence, it sometimes lacks the conceptually clarity referred to earlier. It may be helpful to keep this in mind when reading the ensuing paragraphs.

3.1. The point of reference – The nature of trials before the ICC

The discussion of the trial model of the ICC draws upon the analytical model developed above. However, as will soon become clear, the most important features of the ICC's procedural system do not adhere to any neat theoretical categories.

3.1.1. Role of the judge

From the language of Articles 64 and 69 of the Rome Statute, it is clear that the Statute does not envisage the Trial Chambers to behave as *tabula rasa* adjudicators. Article 64 (6) (b) provides that "In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: ... Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute". Article 69, paragraph 3 clarifies that this power is bestowed on the Chamber in order to allow it to determine the truth.[61] From an epistemological point of view, then, the Statute appears to subscribe to the civil law tradition, which requires the judge to look for the objective truth.

The fact that the Trial Chamber has the power to "require" the production of evidence on its own motion, even before the start of the hearings, strongly suggests that the judges are expected to take a managerial posture. This also follows from the power of the Trial Chamber to convene so-called status conferences in order to prepare the trial in coordination with the parties.[62] However, during the actual trial hearings the initiative remains with the parties, as the Statute makes it in the first place their responsibility to present evidence.[63]

Schematically, the role of the trial judges with regard to fact-finding, as envisaged by the drafters, seems to be as follows:

61 "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*". Emphasis added.

62 Article 64 (3) (a) *juncto* Rule 132 (2). The detailed powers of the Trial Chamber during status conference are spelled out in Regulation 54 (Status conferences before the Trial Chamber*)*.

63 This follows from the method for *mise en état* that the Statute adopted, which is modelled on the common law disclosure system (see below *Mise en État* of the Case). Moreover, the language of Article 64 (6) (d), which allows the Trial Chamber to "Order the production of evidence *in addition* to that already collected prior to the trial or presented by the parties [emphasis mine]" seems to confirm this interpretation.

- The ultimate purpose of the trial is to determine the truth;
- The parties are in charge of the presentation of the evidence and they drive the debate at trial, which is largely adversarial;
- Nevertheless, the Statute gives the presiding judge the power to "give directions for the conduct of proceedings" and, although the parties have the right to "submit evidence in accordance with the provisions of the Statute", they have to do so "[s]ubject to any directions of the presiding judge";[64]
- At any stage the Trial Chamber may order the production of additional evidence.

As far as the control over the conduct of the hearings is concerned, the picture is rather chaotic.[65] The presiding judge has a broader mandate than a purely *tabula rasa* judge, but it is not as decisive as that of a managerial judge. Rather, it seems that control over the courtroom debate is shared between the parties (who can agree on a certain conduct of the trial) and the presiding judge,[66] with the former having primary responsibility for presenting the arguments and evidence for their case and the latter having the power to intervene at any point as he or she sees fit.[67]

From a systematic point of view, then, the role of the Trial Chamber is neither entirely passive nor purely managerial. With regard to fact-finding and the search for the truth, the judges' role is supplementary.[68] It is only when the parties do not

64 Article 64 (8) (b).

65 See F. Guariglia, The Rules of Procedure and Evidence for the International Criminal Court: A New Development in international adjudication of individual criminal responsibility, in Cassese et al., *supra* note 1, at 1132.

66 This shared responsibility was said to promote "the development of original or innovative judicial practices ... and promote genuine procedural consensus by the judges and the parties." F. Terrier, Powers of the Trial Chamber, in Cassese et al., *supra* note 1, at 1268

67 See Rule 140: "Directions for the conduct of the proceedings and testimony:

1. If the Presiding Judge does not give directions under article 64, para. 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.
2. In all cases, subject to Article 64, paras. 8 (b) and 9, Article 69, para. 4, and rule 88, sub-rule 5, a witness may be questioned as follows:
   (a) A party that submits evidence in accordance with Article 69, para. 3, by way of a witness, has the right to question that witness;
   (b) The prosecution and the defence have the right to question that witness about relevant matters related to the witnesses testimony and its reliability, the credibility of the witness and other relevant matters;
   (c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b);
   (d) The defence shall have the right to be the last to examine a witness.
3. ...

68 It should be noted that the authority to call additional evidence is known also in most modern accusatorial systems. See, e.g. Rule 614 of the United States Federal Rules of Evidence.

provide the Chamber with sufficient factual elements that the Chamber will take the initiative to solicit more evidence,[69] either from the parties or directly from another source of information.[70] In other words, despite its independent fact-finding powers and the clear epistemological objective of Article 69 (3), the Trial Chamber is not supposed to be actively steering the search for the truth.[71]

When it comes to characterising the role of the ICC Trial Chamber, as it is defined in the legal texts, the conclusion must be that it is neither fish nor fowl. It is certainly unusual for any system of criminal procedure to make it the epistemological aim of the trial to establish the objective truth – proactively pursued by the judges – in combination with providing party autonomy in the presentation of the evidence. As the first trial hearings still have to commence at the time of writing, it is too early to make any evaluation, however tentative, of the soundness of the system. What is clear, however, is that the Statute and Rules of Procedure and Evidence do not provide an obvious procedural framework and that the judges of the first Trial Chamber will to a large extent have to define their role themselves.

3.1.2. Approach towards evidence

The approach towards the treatment of evidence is equally equivocal. It seems that here as well the drafters could not agree on a clear model. The key provision with regard to evidence already reveals this ambiguity. Article 69 (2) reads:

> "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."

In other words, the Statute establishes the immediacy principle – the testimony shall be given in person[72] – but the article immediately waters down its strict application by allowing the Court to accept transcripts. The criteria for allowing such pre-recorded evidence are spelled out in Rule 68 and are mainly concerned with the op-

69 See Terrier, *supra* note 66, at 1290.

70 The language of Article 64 (6) (b) leaves it open whether the Chamber can enter into contact directly with a potential source of information (e.g. a witness) or whether it should always go through the system of state cooperation envisaged in Part 9 of the Statute.

71 According to Ambos, there is no duty on the Trial Chamber to search for the truth, only a right for it to do so if it so wishes. See Ambos, *supra* note 20, at 21.

72 In allowing for audio or video link, the drafters were careful to stipulate that this is only acceptable insofar as "such technology permits the witnesses to be examined by the Prosecutor, the defence, and the Chamber itself, at the time that the witness so testifies.", see Rule 67. This seems to be an affirmation of the immediacy principle.

portunity for the parties to (cross-) examine the witness.[73] There is no requirement that any judge or judicial officer be present during the recording of the evidence.[74] The main purpose of the immediacy principle, namely the first-hand observation by the adjudicator of the evidence, is thereby considerably diluted.

There are other elements in the text of the Statute and Rules of Procedure and Evidence which could indicate a further departure from the immediacy principle.

For example, depending on how it is interpreted in practice, Article 56[75] could be the legal basis for the introduction of a lot of evidence that was taken during the pre-trial phase.[76] When Article 56 is interpreted broadly, it may be possible for the Pre-Trial Chamber to "freeze" a lot of evidence for trial, either on the request of the parties or *proprio motu*.[77] However, the extent to which an extensive interpretation of Article 56 is possible depends on how one interprets Article 74 (2), which requires that "[t]he Court may base its decision only on evidence submitted and discussed before it at the trial".[78]

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73 "When the Pre-Trial Chamber has not taken measures under Article 56, the Trial Chamber may, in accordance with Article 69 (2), allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

> "If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
> If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings".

74 Note that pursuant to Rule 111 a record must be made of all "formal statements made by any person who is questioned in connection with an investigation or with proceedings". This record must be signed by the person making the statement. Moreover, interrogation of suspects must in all cases be audio- or video recorded.

75 Article 56 regulates the role of the Pre-Trial Chamber in relation to a unique investigative opportunity and gives it the authority to order specific measures to ensure the 'efficiency and integrity of the proceedings' and to protect the rights of the defence. See, F. Guariglia, Article 56, in O. Trifterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2000.

76 See *infra* Pre-Trial Chamber's role with regard to unique investigative opportunities.

77 See for an argument to that effect, Kress, s*upra* note 14, at 608: "It is obvious that the potential to reduce the length of the trial constitutes a powerful incentive to make broad use of Article 56 powers to take evidence in advance of the trial – a practice which, by the way, is known to most legal systems".

78 Note that the English text refers to "the Court" and not to the Trial Chamber, which could imply that also evidence *submitted* to the Pre-Trial Chamber and *discussed* before the Trial Chamber could be taken into consideration. The French version of the Article makes no such distinctive word use: "Elle [i.e. la décision] est fondée exclusivement sur les preuves produites et examinées au procès." The term "procès" could refer to the entirety of the proceedings, rather than to the trial phase alone, thus supporting a broader interpretation of Article 56.

Furthermore, an argument could have been advanced that the record of the proceedings before the Pre-Trial Chamber could serve as a quasi-dossier. Under such an interpretation, most of the evidence heard by the Pre-Trial Chamber would not have to be resubmitted during trial.[79] This would obviate the need to recall witnesses who have already testified during pre-trial or to reopen the question of admissibility of evidence admitted by the Pre-Trial Chamber. However, as is explained below, such an interpretation is now rather unlikely to have any practical significance, in light of two recent decisions by the Trial and Appeals Chamber.

In sum, the approach towards evidence is leaning heavily towards the immediacy principle, but the Statute and Rules leave a lot of scope for mitigation. The potential is there, at least in theory, to alleviate the Trial Chamber from part of the fact-finding burden, but this will depend on how the judges interpret the relevant provisions. As discussed below, the current tendency seems to be more towards the immediacy principle rather than away from it.

3.2. The role of the Pre-Trial Chamber in fact-finding

The lack of clarity about the trial model is regrettable, as it makes it harder to interpret the norms regulating the role of the Pre-Trial Chamber in regard to fact-finding, which are, if possible, even more ambiguous.

The only thing that is clear is that the Pre-Trial Chamber is not supposed to perform a function akin to that of an investigating judge. The main responsibility for gathering evidence during the pre-trial phase rests squarely with the Prosecutor, whose duty it is to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally";[80] crucially, he must do so "in order to establish the truth."[81]

This last requirement is interesting, as the duty to search for the truth is traditionally reserved for a judge.[82] This implies that the Prosecutor, in his capacity as investigator, must act as an officer of justice and "forget" that his other task is prosecuting those suspected of international crimes.[83] This means that the Prosecutor must change hats, depending on which function he is primarily serving at any given

79 See *infra Mise en État* of the Case.

80 This duty is not exceptional, even in modern common law accusatorial systems. See, e.g. United Kingdom, Paragraph 3 (5) of the Code of practice under Section 23 (1) of the Criminal Procedure and Investigations Act 1996: "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect".

81 Article 54 (1) (a).

82 See e.g. Article 310 of the French Code de procédure pénale; Section 244 of the German Strafprozessordnung. As Miragila point out, Article 54 does not make the Prosecutor a *"super partes"* organ, see M. Miraglia, 'The first decision of the ICC Pre-Trial Chamber: international criminal procedure under construction', (2006) *4 JICJ*, at 194.

83 See, Kress, *supra* note 14, at 608.

moment. Although such a duality of functions is not unique to the ICC,[84] such concentration of potentially conflicting responsibilities can raise concerns.[85]

It is therefore all the more surprising to find that the Rome Statute and the Rules of Procedure and Evidence have given no supervisory role to the Pre-Trial Chamber in order to safeguard the impartiality and objectivity of the investigation.[86]

Astonishingly, there is even no explicit requirement for the Prosecutor to get permission from the Pre-Trial Chamber to carry out any specific investigative steps, even when they are intrusive of the rights and privacy of those involved.[87] There is, in other words, no systematic judicial oversight over the direction or execution of the investigation by the Prosecutor, nor is there any judicial control over the investigative measures employed by the Prosecutor.

Nevertheless, the Pre-Trial Chamber can potentially play a significant role in the fact-finding process of the ICC. First, the Pre-Trial Chamber can be asked by the defence to "issue such orders, including measures such as described in Article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence."[88] Second, the Pre-Trial Chamber may, as already mentioned, take measures to preserve evidence on its own initiative.[89] Third,

84 See e.g., para. 160 of the German Code of Criminal Procedure.

85 See e.g. J. de Hemptinne, 'The creation of investigating chambers at the International Criminal Court: an option worth pursuing?', (2007), 5 *JICJ,* at 410 ("Is it reasonable to expect a prosecutor who indicts and prosecutes alleged perpetrators of war crimes and crimes against humanity to conduct investigations and participate in proceedings objectively and impartially? Certainly a prosecutor should never overlook the rights of the accused, but it would be unreasonable to think that he might act as an ally to the defence when in reality he is their opponent").

86 This has led one commentator to argue that the Pre-Trial Chamber's role "is akin to an 'umpire' that should intervene only to a very limited extent in the merits of investigations and prosecutions". See Miraglia, *supra* note 82, at 191.

87 Despite the existence of Article 57 (3) (a) ("At the request of the Prosecutor, [the Pre-Trial Chamber may] issue such orders and warrants as may be required for the purposes of an investigation") there is no explicit provision requiring the Prosecutor to seek authorization of the Pre-Trial Chamber to take any investigative measures. E.g. the Prosecutor does not need permission from the Pre-Trial Chamber to conduct a house search or to tap the telephone of a suspect. This hiatus may be explained by the fact that the Prosecutor can, in principle, only investigate with the assistance or at least the concurrence of the state on whose territory the investigative measure is carried out. See Article 54 (2) and (3) and Part 9 of the Statute. The assumption seems to be that the local authorities will safeguard that the investigative measures do not unduly violate the rights of those involved. See Article 99 (1) "Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State." This interpretation is reinforced by the language of Article 57 (3) (d), which requires the Prosecutor to obtain authorisation of the Pre-Trial Chamber to carry out 'specific investigative steps' on the territory of such states where no local partner is available.

88 Article 57 (3) (b).

89 Article 56 (3) and 57 (3) (c).

an argument can be advanced that the Pre-Trial Chamber is the proper forum for making definitive factual findings on the material elements of the crimes.

3.2.1. The Pre-Trial Chamber's role in assisting the Defence

Despite the heavy bias in favour of a Prosecution-led investigation, the Statute does not rule out independent fact-finding by the Defence. As a matter of principle, the Defence is of course always free to conduct its own investigations in its private capacity, but the Statute foresees the possibility for the defendant to seek the assistance of the Pre-Trial Chamber.[90]

However, before the Pre-Trial Chamber issues any orders for the collection of evidence by the Defence, it is encouraged to seek the views of the Prosecutor.[91] The reason for this coordination with the Prosecutor is presumably to ascertain whether the latter has already collected the information or whether he has any legitimate objections against the investigative measure. As the Defence has no right to access to the Prosecutor's investigation files,[92] it cannot know which information is already available. Moreover, as it is in principle the Prosecutor's responsibility to collect *all* the necessary evidence,[93] it should technically also fall onto him to carry out such investigative measures as are requested by the defence.[94] In theory, the Pre-Trial Chamber should thus never have to issue any orders at the request of the Defence as the Prosecutor should take the initiative and make the collected information available to the Defence. The Statute does not, however, give the power to the Pre-Trial Chamber to instruct the Prosecutor to carry out investigations for the benefit of the Defence, so if the Prosecutor refuses to take specific investigatory steps the Pre-Trial Chamber may have to authorise the defence itself to investigate.

The system whereby the Pre-Trial Chamber is encouraged to coordinate with the Prosecutor before issuing orders for the benefit of the Defence is a clear departure from the pure accusatorial pre-trial scheme, where parties conduct their own inves-

90 Article 57(3) (b) "Upon the request of a person who has been arrested or has appeared pursuant to a summons under Article 58, [the Pre-Trial Chamber may] issue such orders, including measures such as those described in Article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence."

91 Rule 116 (2): "Before taking a decision whether to issue an order or seek cooperation under Article 57, para. 3 (b), the Pre-Trial Chamber may seek the views of the Prosecutor."

92 Although the Defence claimed such a blanket right (*"Observations de la défense concernant le système de divulgation, requis parles décisions du 23 et 27 mars 2006",* ICC-01/04-01/06-68), this was rejected by the Pre-Trial Chamber. See Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision on the Defence Request for Unrestricted Access to the Entire File of the Situation in the Democratic Republic of the Congo, 17 May 2006, ICC-01/04-01/06-103.

93 Presumably, evidence to establish the truth should encompass all the evidence which the prosecution or the defence might ever need for their purposes. This seems an even broader obligation than merely searching for incriminating and exculpatory evidence.

94 See e.g., Zappala, who suggests that this is a right of the accused. See S. Zappala, The Rights of the Accused, in Cassese *et al., supra* note 1, at 1352.

tigations in total independence from each other. As far as fact-finding is concerned, the centre of gravity in the ICC's procedural framework lies with the Prosecutor. All the other participants to the proceedings, although nominally independent and free to conduct their own investigations, are somehow beholden to the Prosecutor and his Investigation Division. In a way, the Prosecutor, in his function of investigator performs a role very similar to that of the inquisitorial investigating judge.

Moreover, it is important to note that questions still exist about the extent of the defendant's right to conduct his or her own investigations. Although the ICC's legal aid scheme does foresee some funds for independent investigation by the Defence, they are rather limited, especially when compared to those of the Prosecutor.[95] The Registrar had to develop this scheme in something of a legal vacuum as there is very little guidance in the Statute, Rules or Regulations of the Court.[96] None of these documents contain an unequivocal legal basis for the appointment of defence investigators.[97] Nevertheless, the drafters of the Regulations of the Registry assumed that the Defence must have the right to conduct its own investigations, as they included a number of provisions dealing with criteria for the selection of professional investigators.[98]

It should be borne in mind, in this respect, that it is far from self-evident that defence counsel would automatically have the right to conduct investigations on the territory of any of the states involved in the situations before the ICC. Notably, the key Article on state cooperation does not contain any reference to the Defence: "States Parties shall, ... cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[99]

Moreover, the basic legal structure for ICC investigations is, in theory at least, that the Prosecutor cooperates with local authorities to carry out investigations.[100] Since

95 The legal aid scheme developed by the Registrar and approved by the Assembly of States Parties foresees funds for one investigator investigating 90 days. See *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16) Update to Annex 2: Payment details of the ICC legal aid scheme*, 31 October 2006, ICC-ASP/5/INF.1, available at <www.icc-cpi.int/library/asp/ICC-ASP-5-INF1_English.pdf>.

96 The current legal aid scheme was developed by the ICC's Registrar after extensive consultations with a range of practitioners and NGOs and particular attention was given to the experiences of the ICTY, ICTR and Special Court for Sierra Leone. See *Report to the Assembly of* States Parties on options for ensuring adequate defence counsel for accused persons, 17 August 2004, ICC-ASP/3/16, available at <www.icc-cpi.int/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf>, Para. 3.

97 Articles 57 (3) (b) and 67 (1) (b) would seem the most likely legal basis, but neither provision contains any express language to that effect.

98 Regulations 137-139. The Regulations of the Registry have been approved by the Presidency of the ICC (See Rule 14 of the Rules of Procedure and Evidence).

99 Article 86. It is hardly sustainable to argue that the term 'the Court' includes independent defence counsel.

100 Part 9 of the Statute foresees an elaborate system of international cooperation and judicial assistance. The Sefence is not mentioned in it. Moreover, Article 100 specifies that the "ordinary costs for execution of requests in the territory of the requested State shall

even the Prosecutor does not automatically have the right to investigate on the territory of a State Party, it is hard to see how the defence would have such a right, in the absence of any specific or implicit provision to that effect.[101] Moreover, since defence investigations in criminal matters is not a universally known concept, especially in jurisdictions which adhere to the inquisitorial model, it is far from self-evident that all states would simply allow defence teams to investigate on their territory. Furthermore, there is the additional problem of guaranteeing the security of investigators, which is highly problematic in situations of ongoing armed conflicts.[102]

To summarise, it seems fair to say that the system of pre-trial fact-finding has not yet found a proper place for defence investigations and that the Pre-Trial Chamber's role in this regard needs further refinement.

3.2.2. The Pre-Trial Chamber's role with regard to unique investigative opportunities

The role of the Pre-Trial Chamber with regard to collecting evidence during the pre-trial phase has already been alluded to.[103] Article 56 provides a mechanism for taking evidence ahead of trial that may no longer be available by the time the actual trial proceedings start, with a maximum guarantee of objectivity and involvement of the (prospective) parties. By adopting such measures as are necessary to comply with the requirements of a fair trial, the Pre-Trial Chamber in effect 'freezes' the evidence until such time as it may become relevant in a future trial.

be borne by that State". It is thus hard to see how the defence fits into this scheme, without express authorisation.

101 See, Ambos, *supra* note 20, at 36, who points out that defence counsel was several times refused permission to even enter the territory of Rwanda and the Republika Srpska.

102 From a formal point of view, defence investigations can only fall within the framework of the Statute if they have been authorised by the Pre-Trial Chamber under Article 57 (3) (b). Only when this authorisation has been obtained can the Court take responsibility for providing protection etc. to defence investigators. This of course does not take away the right of the Defence to make its own 'private' arrangements and travel to the region, but this would have to happen on the own responsibility of the Defence and without institutional support (with the possible exception of financial aid) from the Court.

103 There are three different ways in which such measures can be initiated: first, the Prosecutor can request the measures from the Pre-Trial Chamber (Article 56 (1) (b)); second, the defence can request them (Article 57 (3) (b)) and, lastly, the Pre-Trial Chamber may take the measures on its own initiative when it considers that the evidence would be essential for the defence at trial (Article 56 (3) (a)). The last scenario applies mainly when the defendant has not yet been arrested or has not appeared voluntarily pursuant to a summons.

Such a procedure is far from unique,[104] but the nature of the situations being investigated by the ICC render it particularly relevant.[105] In the context of the ICC, where witnesses are often victims of very serious crimes, situations where evidence "may not be available subsequently for the purposes of a trial"[106] may occur with far greater frequency than one would expect in a domestic setting.[107] Moreover, the fact that ICC investigations are often very lengthy and frequently commence several years after the events took place, provides another argument for using Article 56 to 'freeze' witness testimony at an early stage. It is well-known that witness recollection of relevant detail diminishes considerably over time. Moreover, the risk of extraneous influence on the witness is increased when he or she has to wait for several years before testimony can be given. In other words, although the witness may be able to testify at trial, the quality of his or her testimony may be severely reduced by the passage of time. If one interprets Article 56 to mean that evidence may no longer be available in optimal form, the scope for its application increases considerably. The role of the Pre-Trial Chamber would then be not only to ensure that evidence is preserved but also that it is captured when the quality is still good.

However, such a reading of Article 56 has so far not been adopted by any of the Pre-Trial Chambers in the ongoing investigations. A practical limitation is that the Pre-Trial Chamber does not have any independent information about the situation on the ground and is thus in no position to become aware of unique investigative opportunities as they arise.[108] Moreover, it should be stressed that in the current institutional setup the Pre-Trial Chamber does not have any independent investigative capacity and has no authority to instruct the Prosecutor's Investigation Division. Lastly, the question of which evidence must be preserved for trial depends to a large extent on the Prosecutor's strategy.[109] Indeed, it would be rather pointless for the Pre-Trial

104 See e.g. Rule 15 of the United States Federal Rules of Criminal procedure, which allows parties to ask to the Court to depose prospective witnesses in order to preserve testimony for trial. Needless to say, this question only arises in jurisdictions that do not use the dossier approach.

105 According to Guariglia, the discussions about Article 56 were among the most controversial ones among delegates, see, F. Guariglia, Investigation and Prosecution, in R. S. Lee, (ed.), *The International Criminal Court: the Making of the Rome Statute (*1999), at 233-238.

106 Article 56 (1) (a).

107 E.g. victims of sexual violence are often infected with HIV Aids.

108 However, nothing prevents participants to the proceedings to bring to the attention of the Pre-Trial Chamber when a unique investigative opportunity arises. See, e.g. Pre-Trial Chamber III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01-05-6, which refers to a request by the government of the Central African Republic for the Pre-Trial Chamber to take measures under Article 56 (3) to preserve evidence.

109 It has been argued that the wording of Article 56 "evidence, which may not be available subsequently for the purposes of a trial" makes the link between the Pre-Trial Chamber's authority to preserve evidence and the Prosecutor's discretionary strategy, see e.g. O. Fourmy, Powers of the Pre-Trial Chambers, in Cassese et al., *supra* note 1, at 1218.

Chamber to go around "freezing" evidence for cases which the Prosecutor has no intention of ever prosecuting.[110] However, in the absence of any structural exchange of information between the Prosecutor and the Pre-Trial Chambers, it is hard to see how this difficulty can be overcome.

It is therefore reasonable to conclude, at least provisionally, that Article 56, although potentially wide in its application, it is not at present being used as the important fact-finding tool it could be.

3.2.3. Factual determinations by the Pre-Trial Chamber

Lastly, brief mention should be made of the status of the factual findings of the Pre-Trial Chamber, especially in the decisions on the confirmation of charges. Again, the Statute and the Rules provide almost no guidance. And as there is only one case thus far in which a confirmation decision has been rendered, the following observations must necessarily be tentative.

It is beyond dispute that the confirmation hearing does not serve as a "mini-trial" of the accused. The confirmation stage is designed to serve as a protection for the accused against unsubstantiated accusations, not as a preparatory condemnation. The role of the Pre-Trial Chamber is thus in the first place to scrutinise the case of the prosecutor, rather than the guilt of the accused. The factual findings of the Pre-Trial Chamber that lead the Chamber to believe that the person has committed the crimes charged are thus preliminary and cannot affect the judgment of the Trial Chamber.

With that important *caveat* in mind, there is nothing to prevent the Pre-Trial Chamber from engaging in substantial fact-finding at the confirmation stage with regard to other aspects of the case, as indeed it did in the case against Mr. Thomas Lubanga Dyilo.[111] Broadly speaking, the Chamber's decision contains two types of factual findings:

First, it contains findings about the historical, military and political situation in which the events that form the basis of the charges took place, i.e. the so-called material elements of the crime. One important such finding is the determination by the Pre-Trial Chamber that Uganda was involved in the conflict in eastern DRC and that for the duration of that involvement the conflict was an armed conflict of an international character.[112]

110 This is confirmed by the language of Article 56, which grants the Pre-Trial Chamber *proprio motu* powers to "preserve evidence that it deems would be essential for the defence at trial".

111 Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision on the confirmation of charges (public redacted version), 29 January 2007, ICC-01/04-01/06-803. This decision is almost 160 pages long and contains a wealth of factual findings by the Pre-Trial Chamber.

112 Pre-Trial Chamber I, ICC-01/04-01/06-803, *supra* note 111, para. 220: " On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army."

Second, it contains findings about the occurrence of specific international crimes falling within the jurisdiction of the ICC and the personal involvement of the defendant.[113]

It is clear that as far as the second category of facts is concerned, the Pre-Trial Chamber's findings are preliminary. They pertain directly to the question of criminal guilt and it falls on the Trial Chamber to determine whether they are proved beyond a reasonable doubt. However, it is not self-evident that the same logic necessarily applies to the first category of facts. There are a number of important legal and policy reasons that could militate in favour of a different approach towards such findings.

3.2.3.1. The Pre-Trial Chamber's findings about the material elements do not relate to the guilt of the accused

First, the material elements[114] are a precondition for the existence of an international crime falling within the jurisdiction of the ICC (of which the defendant is accused) and therefore act as a bar against their prosecution in case they are not proved.[115] However, as such they say nothing about the individual guilt or innocence of the accused.

Indeed, even if all the allegations against the accused can be proved, it must still first be established that they occurred in the context of an armed conflict. Accordingly, the nature of the armed conflict as international or non-international or indeed the existence of the armed conflict as such are not matters that must be proved against the accused.[116] Rather, these are questions of fact about which the Court must satisfy itself *before* entertaining the question of individual guilt.

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113 See e.g., Pre-Trial Chamber I, *supra* note 111, para. 383.

114 I use the same terminology as the Pre-Trial Chamber here (Pre-Trial Chamber I, *supra* note 111, para. 167 et seq.). It should be stressed, however, that this does not refer to the *actus reus* element of the actual crimes.

115 Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 49: "The Trial Chamber has concluded that this is a necessary ingredient of the first group of three charges in the sense that, as they are framed, in order for there to be a conviction the prosecution would need to establish, inter alia, that the relevant conduct took place in the context of and was associated with an international armed conflict. If the prosecution fails to establish that element the first three charges, as they currently stand, would fail".

116 This is confirmed by the introduction to Article 8 in the Elements of Crimes, ICC-ASP/1/3 (part II-B) which provides as follows: "There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international". There is, however, a requirement that the "perpetrator was aware of the factual circumstances that established the existence of an armed conflict". However, the question of awareness, which must be proved against the accused, is distinct from the question of whether there was an armed conflict to begin with, a matter of fact that logically precedes the other one.

3.2.3.2. The type of evidence and the standard of proof are different

It follows that the sort of the facts that must be proved in relation to the material elements of the crimes are qualitatively different from the type of facts that must be proved to establish the defendant's guilt or innocence. The former pertain to the wider political and military background of the situation and provide the legal backdrop against which the facts that are directly attributed to the accused took place. It would therefore seem impossible to apply the standard criminal law dichotomy of *actus reus* and *mens rea* to such facts. Accordingly, the kind of evidence that will be used to establish these material elements is qualitatively different from that employed to establish the guilt of the defendant.

Given this important distinction, it may be asked what the appropriate standard of proof should be for such facts. As they do not pertain directly to the criminal responsibility of the accused, it does not seem warranted to apply the strict "beyond all reasonable doubt" standard.[117] Moreover, it would seem quite absurd to apply the presumption of innocence – which is inextricably linked with the 'beyond a reasonable doubt' standard – with regard to the material elements.[118] Indeed, whereas a person is presumed not to have committed the crime of which s/he is accused, there cannot be any presumptions, one way or the other, about the existence or nature of an armed conflict.

In other words, it seems that the Statute does not require that material elements of the crime should be proved according to the "beyond a reasonable doubt" standard. The question then is, of course, which standard does apply and, in particular, whether the "substantial grounds to believe" of Article 61 is the appropriate standard. Judging from the wording of Article 61 (5), the "substantial grounds" standard applies only to the question of the personal criminal responsibility of the accused.[119] Since what must be established is the legal character of certain historical events, but not who is responsible for them, it would seem that it is not necessary to formulate a specific standard of proof.[120] The judges can rely on their "*intime conviction*", the standard

117 This is supported by the jurisprudence of the Appeals Chamber of the ICTY and ICTR, which has repeatedly held that only facts on which the accused's conviction is based must be proved beyond reasonable doubt, see, e.g. ICTR, *Prosecutor v. Ntagerura et al.,* Appeals Chamber Judgment of 7 July 2006, ICTR-99-46-A, para. 175; ICTY, *Prosecutor v. Blagojević and Jokić*, Appeals Chamber Judgment of 9 May 2007, IT-02-60-A, para. 226; ICTY *Prosecutor v. Halilović,* Appeals Judgment of 16 October 2007, IT-01-48-A, para. 111 et seq.

118 This is supported by the wording of Article 66 (3), which requires that in order to convict the accused "the Court must be convinced of the *guilt of the accused* beyond reasonable doubt." Emphasis added.

119 "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." Emphasis added.

120 Apart from the specific question of state responsibility for genocide, the International Court of Justice has refrained from formulating a precise standard of proof with regard to determinations about armed conflicts. See, e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ

of proof applied in most civil law countries, or define the appropriate standard of proof themselves. Considering the difficulty of proving conclusively what happened in complex historical events, it would seem appropriate to bear in mind the admonition of Judge Lauterpacht in the *Norwegian Loans Case*, that "the degree of burden of proof … ought not to be so stringent as to render the proof unduly exacting".[121]

3.2.3.3. It is more efficient to deal with these questions as early as possible

As the material elements of the crime are a precondition for prosecution, it would be appropriate for the Pre-Trial Chamber to determine conclusively whether they are sufficiently established at the confirmation hearing. This would take away a lot of uncertainty about the factual basis for the qualification of the charges and it would relieve the Trial Chamber from the duty of having to hear evidence on this matter all over again, allowing it to concentrate on its core task: determining the guilt or innocence of the accused. Indeed, in order to avoid the risk that the Trial Chamber may have to dismiss certain charges at the end of the trial because of lack of proof for the elements of crime, it would seem more expedient if the Pre-Trial Chamber made an authoritative ruling on the material elements when it confirms the charges, i.e. before the large expense for the international community and the hardship for the defendant and witnesses, which are inevitably involved in an international trial, are incurred.

The Pre-Trial Chamber is well-placed to make such rulings and it is hard to see any argument why the matter should be postponed until trial. As the Prosecutor must be prepared to convince the Pre-Trial Chamber that the material elements are established before the charges can be confirmed, all the necessary evidence on this point must in principle be available before the Pre-Trial Chamber and there is no reason why it should not be qualified to make a binding ruling on the matter, subject of course to possible appeals.

However, it seems that the Pre-Trial Chamber I implicitly rejected this interpretation of its mandate. In the *Lubanga Dyilo* case, Pre-Trial Chamber I made a factual determination about the character of the armed conflict as being of an international character. However, this determination went beyond the document containing the charges of the Prosecutor, who had characterised the conflict as one "not of an inter-

Reports 2004, p. 136; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, available at <icj-cij.org> See also the Separate Opinion of Judge Buergenthal in the Oil Platforms case, in which he laments the lack of clear standards of proof by the Court. See, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p. 161.

121 ICJ, *Norwegian Loans Case,* 1957 ICJ Reports, Separate Opinion of Judge Lauterpacht, pp. 39-40 See also C. Amerasinghe, *Evidence in International Litigation* (2005), at 232 et seq.

national character"[122] and both the Defence and the Prosecutor sought leave to appeal the Pre-Trial Chamber's decision.[123]

However, the Pre-Trial Chamber denied the leave to appeal on the grounds that "there is nothing to prevent the Prosecution and the Defence from requesting that the Trial Chamber *reconsider* the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the chamber".[124] This interpretation was confirmed by the Trial Chamber, which, after rejecting a motion by the Prosecutor to reverse the Pre-Trial Chamber's decision on the characterisation of the armed conflict, ruled that "the prosecution should be prepared to call, and the defence should be in a position to address, all the available evidence (which is not considerable) on the issue of whether the relevant conduct took place in the context of, and was associated with, an international armed conflict".[125] This clearly affirms the Trial Chamber's intention of considering the issue *de novo.*[126]

In other words, it seems that a useful role for the Pre-Trial Chamber in the ICC's fact-finding process has been foreclosed. Whether this was a conscious decision of the Pre-Trial Chamber and Trial Chamber or a consequence of decisions made for other reasons is hard to ascertain at this stage. However, the matter will undoubtedly arise again in the future and the Pre-Trial Chamber will thus have another chance to reflect on its position and function in the fact-finding process of the Court.

3.3. Mise en État *of the case*

As far as the preparation of the cases for trial is concerned, the Rome Statute and the Rules of Procedure and Evidence have adopted a system modelled on the accusatorial approach, but with important modifications. In line with the preference for the immediacy principle at trial, the principal mechanism for *mise en état* of the case is a

122 *Prosecutor v. Lubanga Dyilo,* Submission of the Document Containing the Charges pursuant to Article 61 (3) (a) and of the List of Evidence pursuant to Rule 121 (3), lCC-01/04-01/06-356-Conf-Anxl, p. 25. See on the qualification of the conflict also the contribution by S. Sivakumaran in Ch. 20 of this volume.

123 Interestingly, the Prosecutor argued that the reason for its request was that it did not have sufficient evidence capable of "supporting a finding *beyond a reasonable doubt* of the existence of an armed conflict of an international conflict". See *Prosecutor v. Lubanga Dyilo,* Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "Décision sur la confirmation des charges", ICC-01/04-01/06-806, para. 9. However, the issue was not picked up by the Pre-Trial Chamber or the Trial Chamber.

124 See Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, para. 44 [Emphasis added].

125 Trial Chamber I, *supra* note 115 , ICC-01/04-01/06-1084, Para. 50.

126 The Trial Chamber declined to review the Pre-Trial Chamber's decision on the confirmation of charges, ICC-01/04-01/06-1084, *supra* note 115, Para. 43 and 44.

complicated system of disclosure[127] which imposes extensive obligations on the parties to exchange all the necessary evidence.[128]

However, the disclosure rules also stipulate that the parties must "communicate" all the evidence they have disclosed to each other "for the purposes of the confirmation hearing" to the Pre-Trial Chamber.[129] In practice, this means that the parties must file all the evidence on which they intend to rely at the confirmation hearing in the record of the case.[130] In addition, the Prosecutor must file the names and statements of all the witnesses on whose testimony he intends to rely at the confirmation hearing (whether by oral testimony or by using their statement or a summary thereof).[131] Moreover, the Pre-Trial Chamber requires that the parties submit a report on their inspections of each other's "materials"[132] as well as a report on the disclosure by the Prosecutor of exculpatory[133] evidence to the defence.[134] This must ensure that the Pre-Trial Chamber has a complete overview of all the evidence that circulates among the parties.

Crucially, however, the Pre-Trial Chamber decided that there is no obligation on the parties to file in the record of the case "potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing."[135] In other words, if the Defence prefers to postpone raising an alibi or another defence until the trial hearing, it is entitled to do so and as

127 See Articles 61 (3); 67 and 68 (5) of the Statute; Rules 76 to 84 and 121 and 122 of the Rules of Procedure and Evidence. The Pre-Trial Chamber has already had the chance to rule on this highly technical system for the purposes of a confirmation hearing, see Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision on the final system of disclosure and the establishment of a timetable, 16 May 2006, ICC-01/04-01/06-102.

128 The ICC's disclosure system has been described as adopting an "all cards on the table approach". See F. Guariglia, The Rules of Procedure and Evidence for the International Criminal Court: A New Development in international adjudication of individual criminal responsibility, in Cassese et al., *supra* note 1, at 1111-1136.

129 Rule 121 (2) (c).

130 See Pre-Trial Chamber I, *supra* note 127.

131 Ibid.

132 The system of inspection in Rules 77 and 78 foresees that "any books, documents, photographs and other tangible objects" held by one of the parties, may be 'inspected' by the other party, inasmuch as they are:

- Material to the preparation of the defence;
- Intended to be used by the party [holding the evidence] as evidence "for the purposes of the confirmation hearing or at trial";
- Obtained from or belonged to the defendant.

133 Article 67 (2) requires the Prosecutor to disclose to the defence all evidence which the Prosecutor 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."

134 See See Pre-Trial Chamber I, *supra* note 127.

135 See See Pre-Trial Chamber I, *supra* note 127, Annex I: *Discussion of the decision on the final system of disclosure*, para. 56.

a consequence the evidence concerning any alibi or defences will not be contained in the case record.[136] The record may thus be incomplete, at least as far as the defence case is concerned, if the defendant decides to remain passive during the confirmation proceedings.

As far as prosecution evidence is concerned, however, there could be a reasonable expectation that in practice the record will contain most, if not all,[137] of the inculpatory evidence, at least in summary form.[138] Moreover, the Pre-Trial Chamber has the right to request the Prosecutor to provide further evidence or conduct further investigations before confirming the charges,[139] allowing for any gaps in the record to be filled.

At the end of the confirmation proceedings, there will thus be a fairly comprehensive "case record", which is transmitted to the Trial Chamber.[140] The question arises, of course, what purpose this record serves.

Two functions are beyond dispute:

– First and foremost, the pre-trial record will serve as the basis for the organisation of the trial hearings by the presiding judge of the Trial Chamber. As was pointed out above, the Trial Chamber is supposed to conduct the trial in a moderately managerial fashion, but in order to do so, it needs to have all the relevant information. The pre-trial record provides some of this information[141] and will thus be the starting-point for the trial judges in the preparation of the trials.
– Second, the record will be the primary basis for the publicity and transparency of the ICC's proceedings.[142]

136 Ibid., para. 53 However, if the Defence does raise the issue at the confirmation stage, it must file the evidence in support in the pre-trial record, in accordance with Rule 121 (2) (c).

137 The Prosecutor is not under an obligation to disclose *all* the evidence in relation to the case he has in his possession. This follows from the language of Article 61 (5), according to which the Prosecutor must support the charges with "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged." As the standard of proof is lower at the confirmation stage it would, strictly speaking, not be necessary for the Prosecutor to submit his 'best' evidence until trial. However, as the Prosecutor has an interest in having the charges confirmed, it is hard to see which interest he would have in holding back evidence from the Pre-Trial Chamber.

138 At the confirmation stage the Prosecutor is entitled to rely on documentary or summary evidence and must not call the witnesses he expects to testify at trial. See Article 61 (5) *in fine*.

139 Article 61 (7) (c) (i).

140 See Rule 121 (10) and Rule 130.

141 As was pointed out earlier, the evidence for the defence may not be in the pre-trial record yet.

142 See generally Rule 15 (1) entitled "Records", which provides that "The Registrar shall keep a database containing all the particulars of each case brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data. Information on the database shall be available to the public in the working languages of the Court". See also Article 64 (10) and Rule 137.

What seems clearly excluded, on the other hand, is that the case record could serve as a dossier in the original sense described above. This follows from Article 74, paragraph 2, which requires that the judgment of the Trial Chamber must be based "only on evidence submitted and *discussed* before it *at the trial*."[143] In a pure dossier approach, the judge may rely on evidence from the dossier, even if it has not been expressly discussed by the parties. However, this limitation does not exclude the possibility that the pre-trial case record could potentially serve other useful purposes in the fact-finding process.

For example, the case record could serve as the central repository for all the admitted evidence. As Rule 64 (1) postulates the principle that "issues relating to relevance or admissibility [of evidence] must be raised at the time when the evidence is submitted to *a* Chamber",[144] it can be argued that once evidence has been admitted by the Pre-Trial Chamber, it acquires the status of admitted evidence for the remainder of the case. After that, it would no longer be allowed to raise the issue of admissibility or relevance again, except under special circumstances.[145] Any additional evidence submitted at the trial stage could then simply be added to the case record, so that all the participants in the proceedings[146] know exactly which evidence is 'in' at any given point in time. This is different from a real dossier approach, as the evidence would still have to be discussed at trial. However, having a case record with all admitted evidence is extremely important for victims who are allowed to participate in the proceedings,[147] as they have no other source of information about the evidence in the case. More generally, having a central evidence repository would assist in keeping the large volume of evidence surveyable and accessible.

Related to this, the case record could also serve as a tool for the *mise en état* of the prosecution case. Rather than requiring two separate disclosure stages (i.e. one before the confirmation hearing and another before the trial hearing), which seems like an undesirable duplication of efforts, the case record could serve as the disclosure vehicle as far as prosecution evidence is concerned. This would of course not relieve the Prosecutor from having to disclose potentially exculpatory or other relevant evidence to the Defence. But at least in terms of the case against the accused (i.e. the incriminating evidence), there would be a clear understanding of what evidence is being relied upon and provide an initial cut-off point for the Prosecutor to stop add-

143 Emphasis added. See also the discussion of Article 74, *supra* note 78.

144 Emphasis added.

145 Rule 64 (1).

146 See Rule 131:

> "1. The Registrar shall maintain the record of the proceedings transmitted by the Pre-Trial Chamber, pursuant to rule 121, sub-rule 10.
>
> 2. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91".

147 Article 68 (3).

ing further evidence.[148] This would assist the accused in organising his/her defence ahead of trial and avoid delays caused by last-minute disclosure of large volumes of evidence, after the confirmation hearings.[149]

There is thus some potential for using the case record as a time-saving device. However, two important decisions have severely diminished this potential utility of the pre-trial record.

First, the Trial Chamber ruled out the use of the pre-trial case record as the central evidence repository in the case. In its decision of 13 December 2007,[150] the Trial Chamber, after hearing both parties and the victims' representatives, held that the "statutory and regulatory framework undoubtedly establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber."[151]

As regards the evidence already considered by the Pre-Trial Chamber, the Trial Chamber held that:

> "Generally, there is agreement that subject to the operation of specific provisions such as Rule 68 (a) (which provides for the introduction of prior recorded testimony if particular criteria are met), evidence before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, de novo. Therefore, the record of the pre-trial proceedings (and all the evidence admitted for that purpose) transmitted to the Trial Chamber by virtue of Rule 130 is available mainly to be used as a "tool" to help with preparation and the progress of the case. Nonetheless, the parties (and where relevant, the participants) can agree convenient mechanisms for the introduction of undisputed evidence".[152]

This is a clear rejection of anything approximating the dossier approach. Nevertheless, the Trial Chamber did express its intention to "follow" the Pre-Trial Chamber

148 This would of course be without prejudice to the discretion of the Trial Chamber to allow the Prosecutor to submit additional evidence (or indeed to request it itself in accordance with Article 64 (6) (d)) prior to the commencement of the trial hearings, in accordance with Rule 84. However, this would not be an automatic right for the Prosecutor and the Trial Chamber would exercise control over the balance between the need for adding additional evidence, the rights of the Defence and the expeditiousness of the proceedings.

149 Article 67 (1) (b) guarantees the right of the Defence to have "adequate time" for the preparation of the defence. Each time important additional evidence is added, this automatically gives the right to the defendant to ask for extra time to prepare himself to respond to the new elements.

150 See Trial Chamber I, *supra* note 115.

151 Ibid., para. 5.

152 See Trial Chamber I, *supra* note 115, para. 8.

"unless that would be an inappropriate approach".[153] The main reason given by the Trial Chamber for this voluntary deference towards the Pre-Trial Chamber is "judicial comity"[154] and not any argument about the structural relationship between the Pre-Trial Chamber's function and the work of the Trial Chamber.

The Trial Chamber left open the possibility to devise mechanisms for introducing "undisputed" evidence from the pre-trial phase, but this is under the precondition that the parties agree to it. Such an approach is of course at odds with a dossier regime. What exactly the Trial Chamber meant by its description of the pre-trial record as a "tool" is not entirely clear[155], but it clearly does not mean that it considers the pre-trial record as the evidentiary 'spinal cord'[156] of its proceedings.

The second decision restricting the usefulness of the pre-trial record was made by the Appeals Chamber. In its decision of 13 October 2006,[157] the Appeals Chamber overruled a decision by the Pre-Trial Chamber that the Prosecutor should stop investigating for further evidence as soon as the charges are confirmed.[158] The Appeals Chamber held that the Prosecutor has the right to continue investigating after the confirmation of charges, even with regard to the facts contained in the confirmed charges.[159] The main reason given by the Appeals Chamber is that:

> "The duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth".[160]

The decision of the Appeals Chamber can be understood in light of its concern for having the maximum amount of information available for trial, especially if poten-

153 Ibid. para. 6. The Trial Chamber immediately went on to say that it would not consider itself bound by the Pre-Trial Chamber's decision on witness proofing. See Trial Chamber I, *Prosecutor v. Lubanga Dyilo,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049 ("the Trial Chamber agrees with Pre-Trial Chamber I's conclusion that the ICC Statute and Rules do not expressly provide for the possibility of parties preparing witnesses for testimony, and further finds no provision in the texts to justify the practice").

154 Trial Chamber I, *supra* note 115, para. 6.

155 Presumably, the pre-trial record will assist the Trial Chamber in preparing the trial hearings and specifically to assess whether it wants to exercise its powers to request the submission of additional evidence prior to the commencement of the trial hearings.

156 Cf. Damaska (1986), *supra* note 20, at 183.

157 Appeals Chamber *Prosecutor v. Lubanga Dyilo,* Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568.

158 Pre-Trial Chamber I, *supra* note 127, further elaborated in *Prosecutor v. Lubanga Dyilo,* Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, 23 June 2006, ICC-01/04-01/06-166.

159 Appeals Chamber, *supra* note 157.

160 Appeal Chamber, *supra* note 157, para. 52.

tially exonerating evidence would become accessible only after the confirmation of charges.[161] However, the implication of the Appeals Chamber's ruling is that the *mise en état* of the case is postponed until the start of the trial phase, and that an additional round of disclosure becomes necessary for the evidence gathered by the Prosecutor since the confirmation hearings.

The combined effect of the decisions by the Pre-Trial Chamber (that the Defence must not submit exonerating evidence at the confirmation stage), the Trial Chamber (that the evidence admitted by the Pre-Trial Chamber has no formal status before it and must be re-submitted) and the Appeals Chamber (the Prosecutor's right to continue investigating after confirmation of charges) leads to the conclusion that the Pre-Trial Chamber has no significant role in the *mise en état* of the cases.

4. Conclusion

The arranged marriage in the Rome Statute of the two great traditions of criminal procedure has not, as some might have hoped, brought forth a more streamlined, synergetic system of fact-finding comprising the best of two worlds. Rather, it appears that the progeny of this imposed union is a confused procedural model, which lacks a clear conceptual sense of direction and therefore risks getting lost in the intricacies of its complex heritage. This is perhaps best illustrated by the complicated sequence of transfers of evidence between the parties and the chambers. Indeed, one may wonder about the utility of having a "neutral" investigation for the truth, led by the Prosecutor, which presumably results in a complete evidentiary dossier *à charge et à décharge,* when this comprehensive body of evidence is subsequently split up among the parties in order to allow them to present partisan versions of the truth. This seems slightly artificial, especially given that, immediately after pre-trial disclosure, the parties must file the same evidence with the Pre-Trial Chamber in a pre-trial record, which must enable the judges to prepare the hearings – in search for the truth. However, almost as soon as it has been created, the pre-trial record may again be ignored by the trial judges, as it is denied any evidentiary value. Instead, it is followed by a second round of disclosure.

Whilst it is much too early to draw any definitive conclusions about the ICC's procedural system, it nevertheless seems that on balance, the ICC's criminal procedure is not turning out to be a great innovation where fact-finding is concerned. A structural analysis of the first judicial decisions on matters related to fact-finding shows that the unique new system, which was to have incorporated the best of both worlds, is in practice increasingly turning into another variation on a common law accusatorial theme, albeit a rather complicated one.

161 Appeals Chamber, *supra* note 157, para. 54: "The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing".

Arguably, of the provisions that suggest that ICC procedure has adopted a truly novel approach towards fact-finding, most relate to the Pre-Trial Chamber. But in practice the Pre-Trial Chambers have thus far not been able to assert a meaningful role in this respect. To be fair, it was clear from the beginning that the Pre-Trial Chamber's role in this regard was insufficiently defined in the Statute and Rules and that everything would depend on the interpretation of the judges.[162] However, so far, little of the potential has been realised. What is perhaps most troubling about this trend is that most decisions about the Pre-Trial Chamber's fact-finding role have been made more by implication than by design, without much structural analysis about the Court's overall procedural system. This is regrettable because it does not provide the clarity about the ICC's procedures that is so sorely needed. Moreover, it obscures the full implications of the adopted system, both in terms of procedural fairness and efficiency.

Be that as it may, there are still a number of important issues that have not been decided yet and which therefore warrant urgent attention:

– In the first place, the question of how Article 56 should be interpreted must be resolved in a clear and transparent manner. So far it has been underused and it may be feared that its utility will slowly be forgotten. On the other hand, the current uncertainty about the Article's scope may equally raise expectations which the Court is not prepared to fulfill. It would behoove the Court, therefore, to give Article 56 some fresh attention.
– Second, the relationship between the Prosecutor's investigation and the Defence's investigatory needs must be reassessed. The current state of affairs is insufficiently clear and it would be no surprise if at some point disputes between the defence and the Registrar on this issue will come before the Chambers. If that happens, the Pre-Trial Chamber will have to reflect on its relationship with the Prosecutor in his investigating role. The judges of the Pre-Trial Chamber may face the policy choice of whether or not they should assert the power to instruct the Prosecutor to carry out specific investigations on behalf of the Defence, or whether they should systematically issue orders to allow the defence to conduct its own investigations, with all the legal, financial and logistical consequences that entails.
– Lastly, a fundamental debate should take place within the Court about the status of the Pre-Trial Chamber's findings with regard to the material elements of the crimes. Within the procedural setup of the Court, these factual issues can be dealt with at the pre-trial stage, and this makes sense both from a legal and a practical point of view. However, Pre-Trial Chamber I's decision to refuse leave to appeal on its findings about the nature of the armed conflict in the DRC, in favour of a "review" by the Trial Chamber, seems to indicate a lack of confidence in the status of its own factual findings in this regard. Future decisions may revisit this question in the light of ongoing procedural developments and adopt a more confirmatory approach.

162 See Fourmy, *supra* note 1, at 1129.

In short, the Court still has to resolve a number of important unsettled procedural issues, which it inherited as part of the Rome Statute and the Rules of Procedure and Evidence. This situation was perhaps inevitable, given the compromise-oriented nature of the drafting process of the Rome Statute, which is, after all, a multilateral treaty. However, as the internal coherence and economy of the ICC's procedural system are at stake, it is now for the Court to complete the effort of the States Parties and further develop the system, by making principled choices about how the fact-finding process is to be organised. It is essential that when making these choices, the overall coherence of the system is put before the immediate interests of different procedural actors and that the desire to steer a middle course between the different procedural traditions does not override the importance of adopting a system that is structurally sound and as efficient and flexible as possible.

Chapter 23 Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings

*Ekaterina Trendafilova**

1. Introduction

Fairness and expeditiousness are the pillars of criminal justice. Though distinct principles, they are closely related and mutually dependent. Expeditiousness secures the fairness of proceedings. Justice within a reasonable time respects the rights of the accused, is crucial to the case of the Prosecutor, best serves the interests of the victims, and observes the public interest in the timely prosecution of crimes within the jurisdiction of the International Criminal Court (the "ICC" or the "Court").

The ICC's pre-trial proceedings necessarily implicate the principles of fairness and expeditiousness. These principles are of particular relevance to the disclosure of evidence and the hearing on the confirmation of charges. Their specific application to the pre-trial proceedings should be conceived and analysed in light of the nature of these proceedings and the specific tasks of the Pre-Trial Chamber as compared to those of the Trial Chamber.

Although intertwined and equal contributors to the outcome of the criminal proceedings, the trial and the pre-trial stages are distinct in nature and task. The Trial Chamber decides the core issues of the criminal proceedings and determines the guilt or innocence of the alleged perpetrator. The responsibilities of the Pre-Trial Chamber are altogether different. Its proceedings are the forum in which the Prosecutor prepares his case for testing by the Pre-Trial Chamber. This stage never results in a decision of guilt or innocence. Consequently, the hearing on the confirmation of charges is not intended as a "mini-trial". Its task is only to filter the matter for trial. Thus, the confirmation hearing neither replaces nor overtakes the mandate and powers of the trial. The Pre-Trial Chamber's task, pursuant to Article 61 (7) of the Rome Statute (the "Statute"), is to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Its standard of proof is consequently lower than that of the Trial Chamber, which must decide the guilt or innocence of the accused "beyond a reasonable doubt", pursuant to Article 66 (3).

* Judge, International Criminal Court. I would like to thank Gail Soonarane for her contribution in respect of linguistic corrections.

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Judges and the parties in the pre-trial proceedings should be mindful of their nature when approaching disclosure and confirmation of charges. The purpose of these proceedings is to scrutinize and refine the Prosecution's case and should expeditiously advance the case to the central, core stage of the criminal proceedings.

2. Disclosure proceedings

2.1. The system of disclosure

Before contemplating some issues of disclosure in the ICC's pre-trial stage, it should be recalled that there are two major systems of disclosure: the "dossier", typical for the Romano-Germanic (civil law) inquisitorial system, and the "disclosure", as conducted in the common law adversarial system.

In an inquisitorial system the dossier (usually) contains all the information gathered during pre-trial investigation. This information is made available to the Defence and other participants (victims), as well as to the judge(s) who may rely on these results in preparing and conducting the trial proceedings.[1]

In the context of ICC proceedings, a dossier approach could have certain advantages. It forces the Prosecutor to disclose all the evidence related to the case and not only that evidence supporting the charges. Such a system of disclosure could benefit the Defence because it accesses all the exculpatory and mitigating evidence collected during investigation. The "dossier" system could also serve the *proprio motu* powers of the Chamber, and assist its control of the Prosecutor's obligation to disclose evidence of an exculpatory nature crucial to the Defence and the truth finding process.

However, the dossier approach to disclosure in ICC proceedings is absent any basis in the statutory documents. Neither the Statute nor the Rules of Procedure and Evidence (the "Rules") make provision for the constitution of a pre-trial dossier in the course of the investigation conducted by the Office of the Prosecutor. Some provisions specify obligations for establishment of a record of the proceedings only before the Pre-Trial Chamber. Rule 121 (10) of the Rules states that the "[r]egistry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber". Rule 130 of the Rules further specifies that this "record of the proceedings" shall be transmitted to the Trial Chamber" after the confirmation of charges. However, neither the Statute nor the Rules require the Prosecutor to introduce all documents and results of the investigation into the record of pre-trial proceedings.

Thus, the Pre-Trial Chamber should follow the second approach to disclosure, typical to adversarial systems and in apparent accordance with the statutory instruments. They contain detailed and specific disclosure obligations for both parties to disclose evidence and materials to each other. At the pre-trial stage these disclosure obligations are focused on the confirmation hearing. If the drafters intended the

1 See A. Orie, Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC, in A. Cassese, P. Gaeta & J. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1439, at 1451.

constitution of the pre-trial dossier employed in inquisitorial systems, these detailed provisions would be wholly redundant.

This approach has also its advantages. It relieves the Pre-Trial Chamber and the pre-trial proceedings of material that is redundant and useless to the confirmation hearing. It streamlines the disclosure process in its focus on the charges and the relevant evidence thereto. Thus, it might contribute to expeditious pre-trial proceedings. However, one should be as mindful of a possible disadvantage to the system: pursuant to this approach, it is difficult for the Pre-Trial Chamber to verify the Prosecutor's compliance with his disclosure obligations related to exculpatory and mitigating evidence under Article 67 (2) of the Statute and Rule 83.

2.2. The reasonable time standard

Disclosure begins with the decision of the Chamber at the initial appearance setting the date of the confirmation hearing (Rule 121 (1)). When setting the date, the Chamber should comply with the reasonable time standard recognised by human rights instruments and interpreted by human rights bodies (Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). This standard requires that the Court proceeds expeditiously, but without prejudice to the accused's right to adequate time and means to prepare for trial. The Article 6 standard is risked in any proceedings that are either unduly delayed or so rushed as to deny the accused the right to prepare the defence.[2] Thus, the Chamber must find a balance between the two objectives of the reasonable time standard and have due regard to circumstances likely to complicate the development of disclosure (including the number of suspects, the number of counts, the number of witnesses and documents expected, the number of expert reports expected, the nature of the crimes alleged, and etc.).

When scheduling the date of the confirmation hearing the Chamber should also consider the parties' observations regarding the suggested date. They could be useful in defining an objective timeframe within which disclosure should be conducted and to counter bad faith conduct that would otherwise delay proceedings. The Chamber could thus reject unreasonable applications to postpone the proceedings, if they are inconsistent with the parties' own previous representations as to the schedule.

2.3. The document containing the charges

Fundamental to expeditiousness and fairness in the conduct of the disclosure proceedings is the approach of the designated single judge. The judge should encourage the Prosecutor to file a document containing the charges (the "Document" or the

2 The European Court of Human Rights (the "ECtHR") has considered the two violations of the reasonable time standard. The majority of the cases of the ECtHR cope with unduly expeditious proceedings: *Frydlender v. France*, 2000; *Scordino v. Italy*, 2006; *Cocchiarella v. Italy*, 2006.

"Charging document") before the commencement of the disclosure, as the basis on which to organise the disclosure proceedings.

This approach has basis in Article 61 (3) of the Statute, which seems to set out the general framework of disclosure and implies that "orders regarding the disclosure of information" are issued *after* the filing of the document containing the charges by the Prosecutor. The procedure is then more concretely specified in Rule 121 (3) of the Rules, which states that "[t]he Prosecutor shall provide to the Pre-Trial Chamber and the person, *no later than* (not just before but not later than) 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of evidence which he or she intends to present at the hearing".

The filing of a charging document before the commencement of disclosure would advance expeditiousness and fairness of proceedings. The charging document fixes the proceedings' parameters and defines the inquiry to be undertaken by the Chamber. Its early filing would thus streamline and accelerate disclosure. It would concentrate the parties on only the disclosure of that evidence (incriminatory or exculpatory) related to the relevant charges. This approach to disclosure forces the Office of the Prosecutor to prepare diligently and professionally for the disclosure.[3] Filing the Document before the beginning of disclosure secures the proceedings' efficiency. It ensures that disclosure is focused on selected charges founded on specific, carefully culled evidence. The Prosecutor will have carefully to consider the findings of the investigation and, as a result, to define his policy to prosecute certain crimes. He will be expected to vigilantly prepare his participation in the disclosure proceedings identifying those charges on which he intends to seek trial. Both the parties and the Chamber would be spared the effort and time otherwise wasted on the disclosure of evidence irrelevant to the Prosecutor's case for trial. This method to disclosure recalls that it should not consist of the haphazard production of any and all evidence collected during investigation, but should instead consist only of that evidence supporting the charges filed in the Document.

When setting up the system of disclosure, the judge should also require a systematic submission of the evidence subsequently related to each of the charges, if more than one, and linked to every single count in the charges. This would avoid the disclosure of a bulk of evidence by excluding those pieces extraneous to any of the counts and useless for the purposes of the confirmation hearing and of the trial. This strategy would expedite proceedings. Certainly, the mixed nature of some pieces of evidence

3 It is important to recall that the arrest warrants themselves do not contain the charges. This point is underscored by the Statute's neutral expression for persons listed in the warrants of arrest ("a person for whom a warrant of arrest … has been issued under Article 58" in Article 19 (2) (a), "a person subject to a warrant of arrest or a summons to appear under Article 58" in Rule 121 (1), "the person in respect of whom a warrant of arrest has been issued" in Rule 121 (2)). The term "person charged" is only used at a later stage, namely in the context of the confirmation hearing (Article 61 (1)). Moreover, disclosure on the basis of the original warrants of arrest would be impracticable in cases where the Prosecutor has continued his investigation, which could supposedly lead to the amendment of some of the counts, within the scope of the same criminal conduct, or to even withdraw some of them.

should also be considered. The drafters of the statutory documents promoted the idea of a streamlined, organised, focused system of disclosure. This understanding is, *inter alia*, reflected in Rule 121 (6) of the Rules. This rule states that the person "shall provide a list of evidence … in response to *any* amended charges or a new list of evidence provided by the Prosecutor". This appears to imply that the Prosecutor is bound to organise and submit evidence in specific association with every single count.[4]

A "charges-based" approach towards disclosure is also consistent with the rights of the defence. Disclosure has a clear purpose: to make the parties, and especially the Defence, aware of the evidence supporting the charges and evidence of an exculpatory nature. The Defence should not be obliged to disclose evidence before it has been confronted with concrete charges on which the Prosecutor intends to seek trial. Indeed, a defendant is entitled to be informed promptly and in detail of the nature, cause and content of the charges and to confront these charges.[5] To overwhelm the Defence with a surplus of evidence unconnected with the charges is to risk this right. The Pre-Trial Chamber must act to ensure the effective and efficient defence participation in disclosure and confrontation of the charges. Such an approach also prevents the Defence from unwittingly disclosing a strategy and relevant evidence thereto which is related to criminal activity of the suspect that has evaded the investigation of the Prosecutor. The Defence is not a "partner" to the Prosecutor and is not expected to contribute to the disclosure of new, presently unknown crimes committed by the defendant.

The Document would contain the "initial" charges upon which disclosure should be conducted. This method does not compromise the Prosecutor's power during the pre-trial stage to continue the investigation and, consequently, to reformulate the existing charges and to add new charges. The statutory documents provide for the amendment of the charges without limitation. The Prosecutor has the capacity to amend it at different times and stages of the proceedings.[6] He may, in particular, amend the Document before the confirmation hearing pursuant to Article 61 (4), and even after the confirmation hearing, subject to permission by the Chamber (Article 61 (9)). This capacity is closely linked to the power of the Prosecutor to continue his

4 It is further supported by the jurisprudence of Pre-Trial Chamber I, in which the Chamber ruled that the Prosecutor, when presenting the Document and the list of evidence (which he intends to present at the hearing) "shall ensure that it is organised so that: (i) each item of evidence is linked to the factual statement it intends to prove; and (ii) each factual statement is linked to a specific element of the crime, a mode of liability or both". See PTC I, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, ICC-01/04-01/06-102, p. 11, para. 11.

5 Articles 55 (2), 56 (1) (c), 60 (1), 61, 63, 64 (2) and (3) (c), 67 of the Statute; Rules 76 to 80, 81 (6), 82 (4) and (5) of the Rules.

6 See Articles 61 (4) and (9), and 65 (5), of the Statute and Rules 121(4) and 128, of the Rules. See also the Appeals Chamber Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006 ,ICC-01/04-01/06-568, paras. 2, 51 and 54.

investigation of the case after the filing of the document containing the charges.[7] The initial Document filed by the Prosecutor and its pre-trial amendments may hence be considered provisional in nature, until the case has been sent to trial. Thus, after the "initial" Document the Prosecutor should, before the deadline of 30 days enshrined in Rule 121 (3) present his "final" charges as the subject of the confirmation hearing, together with the list of evidence supporting those charges.

The "charges-driven" approach is consistent with the Statute,[8] with the rights of the Defence and with the powers of the Prosecutor respectively. It best serves the principles of fairness and expeditiousness, and the interests of justice.

2.4. Quantity of evidence

As critical to expeditious proceedings (pre-trial and trial) are the number of counts and the quantity of evidence adduced. The Court's architects were keenly aware, both during deliberations and after, that the Court could not reasonably prosecute every alleged perpetrator of crimes within its jurisdiction. Prosecution on a vast number of counts would be equally impossible. So indiscriminate a strategy would stymie the proceedings and so frustrate the interests of the victims, of the Defence, of the international community, of justice and the mandate of the Court itself. Selectivity in the crimes and counts charged is thus necessary.

It is, therefore, highly advisable that the Prosecutor pursue only the most hideous crimes for few counts. Such an approach would undoubtedly prove professionalism in the Prosecution's office that would, in turn, expedite proceedings and arguably achieve the goal of the prosecuting authority.

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7 This power was confirmed by the Appeals Chamber, which held that "[t]he Prosecutor's investigations may be continued beyond the confirmation hearing. Such investigations may relate to alleged new crimes as well as to alleged crimes that are encompassed by the confirmation hearing" and that "[t]he document containing the charges is an assertion by the Prosecutor that he intends to bring a person to trial for the specific crimes set out in the document; it is *not* an assertion that he will not seek to put the suspect on trial for *other* crimes in the future. Furthermore, limiting the right of the Prosecutor to investigate other alleged crimes of the suspect would conflict with Article 61 (9) of the Statute. This article provides *inter alia* for a possibility to add further charges until the trial has begun. Thus, it must be possible for the Prosecutor to continue his investigation in respect of crimes that are not covered by the document containing the charges", and "[t]he Appeals Chamber notes that, ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing – a matter that the Prosecutor acknowledges (see document in support of the appeal, para. 14)". See *supra* note 6, paras. 2, 51 and 54.

8 The structure of Article 61 (3) of the Statute appears to imply that the document containing the charges should be filed before the commencement of disclosure. The first sentence of the article makes reference to the Prosecutor's obligation to file the document containing the charges "within a reasonable time". The second sentence vests the Chamber with the power to "issue orders regarding the disclosure of information for the purposes of the hearing". This sequencing suggests that the Chamber issues orders for the organization of disclosure after the filing of the document containing the charges.

As critical to expeditiousness is the quantity and kind of evidence to be adduced in pre-trial proceedings. The quantity of evidence necessary to the Pre-Trial Chamber's confirmation of charges is less than that which is necessary to the Trial Chambers' determination of guilt or innocence. Logically, therefore, not all evidence in possession of the Prosecutor should be disclosed for the purposes of the confirmation hearing. The statutory provisions related to these proceedings, authorise the production of "summary evidence" and/or "sufficient" evidence. Article 61 (5) of the Statute permits the Prosecutor to rely on summary evidence and relieves him of the obligation to call witnesses expected to testify at the trial. It is only a select summary of the Prosecutor's best evidence. This provision tellingly requires that each charge is supported by "sufficient" evidence. It does not direct that the Prosecutor indiscriminately adduce *all* the evidence he has gathered in support of the charge. Instead, it would seem to direct restraint and stipulate the production of only "sufficient" or enough evidence as to permit the charge's confirmation. The Prosecutor must, therefore, be selective in his production of evidence at the pre-trial stage. He ought to choose only that evidence which, in his professional opinion, best establishes "substantial grounds for belief".

A selective list of the best evidence for the prosecution's case serves the challenging and sensitive issue of redactions. The Prosecutor will inevitably seek extensive redactions to protect witnesses. The Pre-Trial Chamber must, accordingly, negotiate its mandates to secure the safety and protection of victims and witnesses, and to safeguard the interests of the Defence. A professional approach to evidence could immensely contribute to this Delicate negotiation. If the Office of the Prosecutor adheres to its procedural obligations under the statutory documents (Article 61 (3) (b)), it will disclose only a select list of witnesses. This limited list would make protective measures technically possible, such that no extensive redactions would be necessary. Avoidance of redactions would, in turn, advance the Court's most fundamental principles: fairness, expeditiousness and full respect for the rights of the accused.

2.5. Exculpatory evidence

Another issue of concern is the exculpatory evidence to be disclosed to the Defence. It would not have been identified as problematic, if the disclosure at the ICC adhered to the "dossier" approach, where the dossier usually contains all the information gathered during the investigation. Though the Prosecutor is deemed to approach his obligations in good faith, the potential for non-compliance must still be canvassed. In other words, how the Pre-Trial Chamber may verify the Prosecutor's compliance with his disclosure obligations related to exculpatory and mitigating evidence under Article 67 (2) and Rule 83 remains challenging.

The Statute and the Rules are largely silent on the failure of the Prosecutor to comply with his duty regarding disclosure of exculpatory evidence. Nor do they provide for any meaningful "check" on the Prosecutor's fulfilment of this obligation.

The Pre-Trial Chamber is likely to face several problems in this regard. Firstly, it is questionable whether and how it could be informed of Prosecutorial misconduct. The Chamber might become aware of such circumstances in several ways, i.e.

through witness statements, especially defence witnesses, observations of the victims and their legal representatives, the result of the presentation of evidence of a mixed nature. However, there is no guarantee that any such failure might come to the attention of the Pre-Trial Chamber. Secondly, even if the Chamber has proof of misconduct neither the Statute nor the Rules envisage any sanction. The Chamber might decline to confirm the charges. However, if the charges are well supported by evidence, this sanction should be excluded for its mix of case-based considerations (the confirmation of charges) with disciplinary measures imposed for procedural misconduct of participants of the case. A plausible alternative might be a postponement of the confirmation hearing and an order by the Pre-Trial Chamber for the disclosure of exculpatory evidence in the possession of the Prosecutor. This strategy has basis in Rule 121 (7), second sentence, which states that "[t]he Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing". Furthermore, a deliberate failure of the Prosecutor to disclose evidence that is clearly exculpatory could trigger a sanction under Article 71 of the Statute for "misconduct".

3. Confirmation of charges "*in absentia*"

3.1. The right to be present

As fundamental to expeditious proceedings is the execution of the warrants of arrest, a particular problem for the ICC.

The individual's right to be present at the proceedings adjudicating his/her case is a fundamental principle of criminal justice and ought to inform criminal procedure. This tenet is stipulated in all international and regional instruments on human rights,[9] and is a basic principle of the International Tribunals' statutory documents.[10]

9 The International Covenant on Civil and Political Rights (the "ICCPR") enshrines the right of a person to be present at trial at Article 14 (3) (d), and provides that, "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: …(d) To be tried in his presence …". The European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR") of the Council of Europe recognizes this right at Article 6, para. 3 (c), according to which, "[e]veryone charged with a criminal offence has the following minimum rights: … (c) To defend himself in person …". The Inter-American Convention on Human Rights (the "ACHR") refers to the same right at Article 8 (2) (d), which states that, "[d]uring proceedings, every person is entitled, with full equality, to the following minimum guarantees: … (d) the right of the accused to defend himself personally …".The African Charter on Human and Peoples' Rights (the "ACHPR") also states at Article 7 (1) (c) that any individual has "the right to defence, including the right to be defended by counsel of his choice." This undoubtedly provides the individual with the right to personally defend himself/herself and, in addition, be assisted by counsel of his/her choice.

10 The Statute of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (the "ICTY") makes reference to this right at Article 21 (4) (d), by which, "[i]n the determination of any charge against an accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: […] (d) to be tried in

In accordance with so comprehensive an approach, the Statute of the ICC enshrines the right of the accused to be present at the trial in Article 67 (1) (d).

The right to be present is not, however, absolute. Where fair trial standards are employed by the defendant to disrupt proceedings, the trial *in absentia* is an acceptable alternative to the usual procedure. Proceedings *in absentia* are a contingency available to any judicial system in the event of the accused's non-appearance. They are a discouragement to bad faith conduct by the accused to delay or frustrate proceedings with his wilful absence. The failure to appear and defend in person should not render the court impotent. A number of arguments support the *in absentia* approach both in national and international criminal proceedings.[11]

3.2. The concept of "in absentia" *proceedings*

A survey of different domestic systems attests to a growing support for the trial *in absentia*. It is employed by both the civil and common law courts to cure proceedings that would otherwise be stalled by the accused's wilful disappearance or disruptive conduct.[12]

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his presence […]". The Statute of the International Criminal Tribunal for Rwanda (the "ICTR") contains a similar provision at Article 20 (4) (d). Furthermore, the Special Court of Sierra Leone provides for the same right for the accused at Article 17 (4) (d) of its Statute.

11 Criminal procedure should negotiate the rights of the defendant/accused and the interests of those who suffered the crime. The reasonable time standard for the conduct of criminal proceedings must also be respected (Article 9 (3) of the ICCPR, Article 6 (1) of the ECHR, Article 7 (1) (d) of the ACHPR and Article 7 (5) of the ACHR). Only the timely resolution of criminal proceedings and determination of criminal responsibility can satisfy the society and contribute to the deterrence of future criminality. The scope and years-long duration of the crimes under the jurisdiction of International Tribunals have produced a great number of victims whose expectations must be satisfied within a reasonable time. The International Tribunals can use the trial *in absentia* to compel state compliance with their obligations under international and domestic law and to co-operate with them.

12 The debate over trials *in absentia* is to some extent rooted in the divergences among common and civil law traditions, though neither rejects outright the trial *in absentia* as an abuse of right to fair proceedings. In the civil law domestic justice systems, *in absentia* trials are accepted and deemed compatible with the right to be present at the trial as long as the accused has been duly served with appropriate notice of the hearing (Human Rights Committee of the United Nations (the "HRC"), *D.M. Mbenge v. Zaire Case*, 25 March 1983 (16/1977), 2. Sel. Dec 76, at 78. The common law tradition, alternatively, endorses the accused's presence at trial as a general principle. The right to attend the trial is not, however, absolute. See W. Schabas, Article 63 – Trial in the Presence of the Accused, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 803. Exception to the injunction against trials *in absentia* is increasingly admitted in national common law jurisdictions. The United States Supreme Court held the trial *in absentia* to be constitutional where the accused purposefully absented him/herself from ongoing proceedings (*Diaz v. the United States* Case, 223 U.S.

Analogous to these developments in national criminal justice systems are those in the international field of criminal justice. Although international and regional instruments specifically acknowledge the right of the accused to be present at trial, the jurisprudence of the international and regional human rights bodies pointedly recognises exceptions and permits proceedings *in absentia*.[13]

442 (1912)). The Supreme Court held disruptive conduct to constitute a waiver of the constitutional right to attendance at trial (*Illinois v. the United States Case*, 397 U.S. 337 (1970)). Though the Supreme Court stipulated that the United States Federal Rules of Criminal Procedure banned the initiation of trial proceedings in the absence of the defendant (*Crosby v. the United States Case*, 506 U.S. 255 (1993)), the 6th Circuit Court of Appeals held that those trial proceedings unregulated by the Federal Rules could, in fact, proceed absent its defendant, if the defendant knows that the proceeding has begun (Kirk v. Dutton Case, (No. 94-5725), 1994 WL 561146). Finally, the 9th Circuit Court held the sentencing of a defendant *in absentia* to be constitutional (*Brewer v. Raines Case*, 670 F.2d 117). The United Kingdom's Privy Council found exception to the injunction against the trial *in absentia* on felony proceedings, where the accused's violent conduct renders a trial in his presence impossible (*Lawrence v. the King Case*, App. Cas. 699 (P.C. 1933)). The Privy Council similarly stipulated that criminal trials on misdemeanour offences might, in "special circumstances", proceed in the absence of the accused (Id. at 708). The Court of Appeal reiterated the exception of trials *in absentia* on misdemeanour offences, where the absence of the defendant is voluntary (*Regina v. Jones Case (R E W),* 1972, 2 All E.R. 731 (Eng. C.A.), in which the Court of Appeal cautioned, however, that the discretion to proceed to trial *in absentia* ought to be exercised "cautiously" and with a view to the due administration of justice rather than to convenience or comfort. Australia's Court of Criminal Appeals for New South Wales held that though the accused's presence at indictable offence trial proceedings was ordinarily necessary to a fair trial, his escape from lawful custody and consequent absence at trial qualified as a waiver of his right to be present at trial (*R. v. McHardie and Danielson Case*, 1983, 2 N.S.W.L.R. 733 (Australia)).

13 Under the jurisprudence of the ECtHR the right to attend trial is not absolute. In the cases of *Van Geyseghem v. Belgium,* 1999 and *Krombach v. France,* 2001 the ECtHR held that the defendants' trial *in absentia* were appropriate where their absence was unjustified. The ECtHR specifically provided that the tribunal must be able to discourage unjustified absences. Moreover, the ECtHR has dealt with several aspects of trials *in absentia*, including: the accused's waiver of the right to be present (*Pfeifer and Plankl v. Austria,* 1992), according to which the "waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner"; *Yavuz v. Austria,* 2004, according to which "in circumstances where the accused has not been notified in person of a hearing, particular diligence is required in assessing whether the accused has waived his right to be present"; see also *Sejdovic v. Italy*, 2004; being informed of the charges and the interests of the defence (*Colozza and Rubinat v. Italy*, 1985; *Sejdovic v. Italy*, 2004; *Stoichkov v. Bulgaria*, 2005). In *Colozza and Rubinat v. Italy*, the Court asserted that, "undoubtedly … Article 6, para. 3(c) does not secure the accused of the right to be personally present in all circumstances. His absence may be due to special circumstances bound up with the way the trial is organised, such as the attitude he himself adopts at the hearing". In addition, the Court held that "the fact that the accused does not appear, cannot justify the depriving him or her of fair trial protections enumerated in the Convention". Furthermore, as noted by scholars, the trial *in absentia* does not create any problems with regard to fairness as long as it is possible for the person

The proceedings before the international tribunals should be as independent of the alleged perpetrators' non-attendance. Thus the very idea of these tribunals created to prosecute the crimes of the greatest concern to mankind – their mandate to fight impunity – will not be compromised.[14]

convicted to obtain a full retrial merely upon request. See S. Trechsel, *Human Rights in Criminal Proceedings* (2006), p. 254. Hence, the ECtHR ruled that a convicted person who appears to lack knowledge of the trial and the conviction against him has the right to ask for a retrial. Thus, the trial *in absentia* is justified under certain conditions with the possibility of a retrial. The ECtHR also observed that, "the manner in which Article 6 (1) and (3) (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case" (*Granger v. UK*, 1990; *Imbrioscia v. Italy*, 1993). Thus, the ECtHR recognizes proceedings *in absentia* and leaves room for national authorities to decide whether they are justified with regard to the specificities of the particular case and the procedural behaviour of the person. The HRC also shares the view that trials *in absentia* are not prohibited. The Committee has expressed the view that, "[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary". See HRC, General Comment 13, Article 14, para.11, adopted at its 21st session, 1984.

14 The possibility for *in absentia* proceedings was enshrined in the governing documents of the ICTY in recognition of their necessity to overcome the extreme delay of the ICTY's proceedings and the international disapproval thereof. The ICTY's answer to the problem of the absent accused consisted of its Rule 61 proceedings, which "re-confirms" the indictments of individuals accused of committing criminal offences that the ICTY is competent to prosecute. The ICTR's Statute provides for the same procedure in Rule 61 of its Rules of Procedure and Evidence ("Procedure in case of failure to execute a warrant of arrest"). Rule 61 proceedings follow upon the failure to execute an arrest warrant and are an inquiry into whether there are reasonable grounds to believe that the accused has committed all or any of the crimes charged in the indictment. The ICTY's Rule 61 proceeding is arguably a reply to the relative toothlessness of its enforcement mechanisms. The Rule 61 procedure was crafted to alert the international community of the outstanding warrants and inspire increased state efforts to apprehend the accused. The reconfirmation of the indictment is thus a means to alert the United Nations' Security Council to member states' failure to cooperate and is an answer to the expectations of the international community to advance the proceedings against the alleged perpetrators of the most hideous crimes. With regard to the Defence interest within the frame of the Rule 61 proceedings, the ICTY has taken a negative attitude toward giving the accused or his or her defence counsel certain rights related to fair trial, on the grounds that the Rule 61 procedure does not constitute a trial. The ICTY has though, at a later stage, recognized in the *Blaškić Subpoenae Judgment* "[i]f … *in absentia* proceedings were to be instituted, all the fundamental rights pertaining to a fair trial would need to be safeguarded". See ICTY Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 59.

3.3. The concept of "in absentia" *proceedings in the history of the Rome Statute*

The question of trials in the absence of the accused was amongst the most controversial legal issues in the negotiations of the Rome Statute. An obstacle to consensus throughout the deliberations was the differences of the two traditions' approach to *in absentia* proceedings.

The majority of the civil law countries favoured the possibility for trials *in absentia* and referred to the legacy of the Nuremberg Tribunal where they were permitted and took place. These countries also observed the recent experience of existing Tribunals, in which trials were stalled by an absent accused.

Their substantially common law opponents either rejected the notion of the trial *in absentia* outright or required the person's presence at least at the commencement of the trial. Some delegations even opined that the ICC risked discredit by allowing trials *in absentia*.[15]

As no compromise could be found, the debate at the Diplomatic Conference was finally resolved with an agreement that the Court would generally strive for presence of the accused. The trial *in absentia* was permitted only insofar as it countered the disruptive accused; it is otherwise excluded by the Statute.[16] Instead, provisions were adopted to allow only the pre-trial proceedings (the hearing for confirmation of the charges) to proceed in the absence of the accused.[17]

3.4. The confirmation hearing "in absentia"

Article 61 (2) of the Statute governs the confirmation hearing *in absentia.* It distinguishes the two scenarios in which the confirmation hearing may be held *in absentia*: namely, when the person charged has: (i) waived his or her right to be present, or (ii) 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.

Some scholars have asserted that a confirmation hearing *in absentia* can only be held "if, *after* the first appearance, [the person] … has fled, or cannot be found".[18] Specifically "[i]n…cases, in which a warrant of arrest originally issued or issued following the failure of a summons to appear, has not been executed, and the person has not voluntarily appeared before the Court, no trial may take place "*in absentia*" of the accused and therefore, no confirmation hearing is possible".[19] This view, however, con-

15 See Schabas *supra* note 12, p. 806 at 9.

16 Article 63, para. 2, of the Statute; see also Schabas, *supra* note 12, p. 806 at 10.

17 H. Friman, "Rights of Persons Suspected or Accused of a Crime", in R. S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results* (1999), p. 262.

18 M. Marchesiello, Proceedings before the Pre-Trial Chamber, in Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, Volume II, p. 1241 and 1244.

19 Ibid., at 1244.

flicts with Article 67 (1) and (2) and with other relevant provisions of the Statute and the Rules. A closer survey of the relevant provisions arguably indicates that proceeding to the confirmation hearing *in absentia* absent a prior initial appearance before the Court is indeed compatible with the meaning of the Statute and the Rules and with the rights stipulated at Article 67 (1) (a). A number of provisions of the Statute and the Rules make clear that the drafters intentionally provided for the possibility of a confirmation hearing *in absentia* under Article 61 (2) (b), *prior* to surrender and an initial appearance before the Court.

The force and effect of Article 61 (1) is qualified. Its direction on the confirmation hearing's method (in the presence of the person charged), timing (within a reasonable time after the person's surrender or voluntary appearance before the Court) and precursors (the person's surrender or voluntary appearance) is explicitly "subject to the provisions of paragraph 2". The wording of Article 61 (1) of the Statute indicates that requirement of "surrender or voluntary appearance" is not absolute but subject to exception as provided in paragraph 2. The phrase "subject to" is habitually employed by the drafters as a favourite technique to limit the force and effect of various Articles and Rules, and to explicitly specify exceptions to their directives.[20] The reference in Article 61 (1) suggests that paragraph 2 carves out an exception to the general rule. It is thus logical to assume that the wording of Article 61 (1), *"subject to"*, gives Article 61 (2) an independent meaning and leaves room for a confirmation hearing *in absentia* when there has been no initial appearance. In other words, paragraph 2 could be considered *lex specialis* to paragraph 1, requiring that a hearing to confirm the charges shall be held within a reasonable time after the initial appearance of the person.

Such an interpretation also appears consistent with the apparent intention of the drafters of the Statute. It is unlikely that the drafters introduced comprehensive provisions for a confirmation hearing *in absentia* only for the singular scenario in which a person flees or cannot be found after the initial appearance. On the contrary, it is more probable that the drafters contemplated the scenario in which arrest efforts have remained unsuccessful. When drafting Article 61 of the Statute the founding fathers were also aware of the ICTY's Rule 61 proceedings, created in 1993 as an answer to unexecuted warrants of arrest.[21] The possibility for a confirmation hearing *in absentia* under the ICC Statute was arguably inspired by a similar objective. The ICC, moreover, lacks an enforcement body. A confirmation hearing *in absentia*

20 "Subject to" is used in the Statute and the Rules at: Articles 29, 36 (1), (6) (a) and (9) (a), 47, 60 (2), 61 (11), 64 (3) (c) and (8) (b), 67 (1) (d), 69 (2), 73, 77 (1), 81 (3) (b), (3) (c) and (4), 93 (3), (5), (7) (a) (ii), (9) (b) and (10) (b) (ii), 94 (1), 99 (4) (b), 105 (1), 106 (1), 107 (3), 110 (4) (b), 115 (b). 121 (6), 125 (2) of the Statute; Rules 15 (1), 16 (2) (b), 19, 21 (1), 22 (3), 23, 34 (2), 43, 52 (1), 71, 73 (1), (2) and (4), 74 (7) (b), 76 (4), 77, 81 (1) and (6), 84, 89 (1), 94 (2), 98 (5), 114 (1), 121 (1) and (10), 122 (9), 131 (2), 138, 140 (2), 150 (1), 164 (2) and (3), 185 (1), 200 (3), 215 (2).

21 See H. Friman, "Confirmation of Charges in the Absence of the Person Charged", in R. S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 527; and *supra* note 17, p. 257.

is also likely to produce the effects of the ICTY's Rule 61 procedure: it will alert the international community of the outstanding warrants and inspire increased state efforts to apprehend the accused. It should be noted as well that the ICTY's Rule 61 and Article 61 (2) proceedings are pre-trial proceedings, deciding neither the guilt nor the innocence of the accused. Their function is merely to advance criminal proceedings that are otherwise stalled by the absent accused.

The idea of the mandatory initial appearance, as expressed in the literature, is, by virtue of the clear wording of the Statute and the corresponding Rules 123, sub-rule 1 and 124, in particular, sub-rules 1 and 2, obviously applicable to Article 61 (2) (a) of the Statute.[22] In determining how the Court should proceed in these cases, the interpretation of the ECtHR on the term "waived" might be of assistance.[23]

3.4.1. The provision of Article 61 (2) (b)

Article 61 (2) (b), of the Statute, states that the Chamber may hold a confirmation hearing *in absentia*, if the person "fled or cannot be found and all reasonable steps have been taken to secure his or her presence before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held".

Article 61 (2) (b) allows the Chamber to proceed with a confirmation hearing *in absentia* where the person "fled" or "cannot be found". Although enshrined in one provision of the Statute, two different options for a confirmation hearing *in absentia*, are apparent.

This construction of Article 61 (2) (b) is bolstered by a number of arguments. First, the terms "fled" and "cannot be found" are used in juxtaposition and so define each other. The use of "or" is material, as it communicates the drafters' clear intention to stipulate two different options. Next, the precursor to the confirmation hearing *in absentia* (the initial appearance) depends on whether the person has "fled" or "cannot be found". Finally, the terms "fled" or "cannot be found" are distinguished on the basis of the person's availability to the Court. "Fled" describes the person who was at some point accessible to the Court. "Cannot be found" describes the person who has never been accessible.

The term "fled" is defined as "run or hasten away" (from a person, place etc.).[24] This definition supports a plain reading of Article 61 (2) (b), and clearly suggests a link be-

22 Rule 123 (1) of the Rules, states that when the person is arrested or served with the summons, "…the Pre-Trial Chamber shall ensure that the person is notified of the provisions of Article 61, para. 2". Rule 124 (1) provides that "[i]f the person concerned is available to the Court but wishes to waive the right to be present at the hearing on the confirmation of charges …", he may submit his request in writing to the Pre-Trial Chamber. Finally, Rule 124 (2) provides that "[a] confirmation hearing pursuant to Article 61 (2) (a) shall only be held when the Pre-Trial Chamber is satisfied that the person concerned understands the right to be present at the hearing and the consequences of waiving this right".

23 ECtHR, *Pfeifer and Plankl v. Austria*, 1992; *Yavuz v. Austria,* 2004; *Sejdovic v. Italy*, 2004.

24 The *Shorter Oxford English Dictionary on Historical Principles*, 5th ed., Volume 1 (2002), p. 979.

tween the accused and the Court (for example, the execution of an arrest warrant, a voluntary or pursuant to a summons appearance before the Court or any other form of availability of the person in question). In this case, the person should be brought promptly before the Court, as directed by Article 60 and rule 121, sub-rule 1. Hence, the option of "fled" implies, as a general rule, three elements that are cumulative and chronological: the availability of the person to the Court and his or her initial appearance; the person's subsequent flight; and a failure to re-apprehend and return the person or to otherwise re-establish his/her link with the Court. Thus, the initial appearance in the option of "fled" is an ordinary proceeding before the confirmation hearing *in absentia* pursuant to Article 61 (2) (b), although there could still be exceptions to this general approach (when the person has fled after apprehension but before his or her initial appearance).

This conclusion is not, however, valid for the second option provided in Article 61, paragraph 2 (b), in which the person "cannot be found". The person who "cannot be found" is unlike the one who has "fled". The person who "cannot be found" is entirely absent any link to the Court. If there had been at any point such a link, then the person would qualify as having "fled" under the first option. The second option thus implies that the person neither made nor could have made his or her initial appearance.

This interpretation is also confirmed by rule 123 (3), which expressly includes the scenario of a *failure to arrest*. This provision states that "the Pre-Trial Chamber shall ensure that … if a warrant of arrest is not executed within a reasonable period of time after the issuance of the warrants of arrest that all reasonable measures have been taken *to locate* and arrest the person". Rule 125 (1) of the Rules, regulating the method to the decision to hold a confirmation hearing in the absence of the person, is, arguably, additional proof that an initial appearance is not a mandatory precursor to the confirmation hearing *in absentia*. The second sentence specifies that the "Pre-Trial Chamber shall, when appropriate, set a date for the hearing and make the date public". This specification would be superfluous if it was the intention of the drafters to allow a confirmation hearing *in absentia* only in cases of a prior initial appearance, since Rule 121 (1) obliges the Chamber "to set the date on which it intends to hold a hearing to confirm the charges" at the initial appearance.

3.4.2. Potential reservations to the confirmation hearing *"in absentia"*

The confirmation hearing *in absentia* could provoke concern with respect to the person's rights under the Statute, and, in particular the right to be informed of the allegations against him/her.

An accused enjoys numerous protections at all stages of the proceedings, including the right to be informed. Article 67 (1) (a) of the Statute enshrines the right "to be informed promptly and in detail of the nature, cause and content of the charge".[25] This Article deals formally with the rights of the "accused". But it is also applicable to the pre-trial stage, pursuant to Tule 121 (1), second sentence, which states that "a

25 These rights adhere to international human rights standards (Article 9(2) of the ICCPR, Article 3(a) of the ECHR, Article 8(2)(b) of the IACHR and Article 9(1) of the ACHPR).

person subject to a warrant of arrest or a summons to appear under Article 58" shall "enjoy the rights set forth in Article 67" upon arriving at the Court. Article 55 (2) (a) supplements this general rule, and grants the suspect the right "to be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court".

The confirmation hearing *in absentia* prior to an initial appearance does not, however, conflict with the "right to be properly informed of the charge". This is made clear by a number of provisions. Article 60 (1) firstly makes clear that the communication of information on the charges is not exclusive to the initial appearance itself. It provides that: "[u]pon surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person *has been informed* of the crimes which he or she is alleged to have committed…". The provision is, conspicuously, in past tense. Its language suggests that the person must have been informed of the crimes he or she is facing *prior* to the initial appearance. The drafters thereby imply that the person would be given information on the nature, cause and content of the charge in other ways.[26] That the initial appearance is not specifically intended to inform the person of the charges lends support to the view that a confirmation hearing *in absentia* in the absence of an initial appearance does not necessarily infringe upon the rights of the suspect.

Rule 117 (1) of the Rules provides some further clarification. It states that "the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber", "once" the Court "is informed of the arrest of a person". This wording makes clear that the obligation of the Court to notify a person begins *after* arrest. Absent the impetus of arrest – when the person "cannot be found" – the Court has no obligation to notify.

Additional argument is found at Rule 125 (2), which governs the decision to hold the confirmation hearing *in absentia*. Sub-rule 2 states that "the decision of the Pre-Trial Chamber [to hold a confirmation hearing *in absentia*] shall be notified… *if possible*, to the person concerned…". This wording implies that there is no ultimate obligation on the Chamber to notify the person, including in the case when there was no initial appearance.

Finally, Rule 121 (1) renders the person's Article 67 rights derogable. Specifically, it provides that they are "[s]ubject to the provisions of Articles 60 and 61". The holding of a confirmation hearing *in absentia* under Article 61 (2) may thus qualify as a permissible derogation from the formal right to be informed "promptly and in detail of the nature, cause and content of the charge". This reading of the relevant provisions indicates that it is indeed possible to hold a confirmation hearing *in absentia* in conformity with the rights of the person, in cases when no initial appearance has taken place.

26 Pre-Trial Chamber I, Confirmation of charges hearing, 9 November 2006, Transcripts, p.6-7 (ICC-01/04-01/06-T-30). The Presiding Judge stated that "On 20 March, Thomas Lubanga Dyilo appeared for the first time before this Chamber… during a hearing in which the Chamber verified if he had been informed of the crimes, which he is alleged to have committed and of his rights".

The hearing in the absence of the person should, however, be an exceptional recourse, and employed by the Pre-Trial Chamber as a measure necessary to advance the criminal proceedings. This perception of the drafters is clearly identified in the wording of the relevant provisions. Article 61 (2) (b) requires that "*all reasonable steps*" must have been taken to secure the presence of the person before the Court. Rule 123 (3) specifies this requirement. It suggests that the Chamber must have issued warrants of arrests which have not "been executed within a reasonable period of time". Moreover, it requires the Chamber to take "*all reasonable measures*" to "locate and arrest the person". It is thus advisable that the Court exhausts all the possible "steps" and "measures" within its powers before taking a decision to proceed with the confirmation hearing *in absentia*. The requirement demands diligence by the organs of the Court and allows proceedings *in absentia* once all reasonable steps have been exhausted.[27]

The option to advance the pre-trial proceeding by virtue of confirmation hearing *in absentia* should be considered by the Court. It would contribute to expeditious proceedings, a meaningful consideration of the victims' views and concerns, enhanced co-operation and the deterrence of crimes within its jurisdiction.

27 In this regard, the HRC has also emphasized that even though proceedings *in absentia* are in some circumstances permissible, nevertheless, "the effective exercise of the rights under Article 14 [of the ICCPR] presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him".

Chapter 24 Human rights protection in the ICC pre-trial phase

*Göran Sluiter**

1. Introduction

Protection of human rights in the pre-trial phase raises the same complex questions for the ICC as for other international criminal tribunals. The fundamental difficulty is the fact that pre-trial investigations and activities by definition take place outside the jurisdiction proper of international criminal tribunals, and tend to involve outsiders, like national authorities or multinational (peacekeeping) forces. In the practice of the ICTY and ICTR this has given rise to case law, where questions of responsibility and appropriate remedy occupied a central position.[1] This jurisprudence gives the impression of Chambers trying to steer a middle course between the Scylla of ensuring a fair trial and the Charybdis of not having to assume responsibility for (procedural) errors committed by persons not associated with the Tribunals.

Mindful of these problems at the ICTY and ICTR the law of the ICC appears to set out a number of improvements from the perspective of legal protection in the pre-trial phase, even if important issues remain unresolved. One of these unresolved

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1 The following cases, all dealing with *habeas corpus* rights and situations of unlawful arrest, should be mentioned: ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić and others*, Case No. 95-13a-PT, T.Ch. II, 22 October 1997; ICTR, Decision, *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999; ICTR, Decision (Prosecutor's Request for Review or Reconsideration), *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19-A, A. Ch., 31 March 2000; ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002; ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-A, A. Ch., 5 June 2003.

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problems is that the ICC trial judge will, just as his ICTY and ICTR colleague, lack the oversight of what is going on in the pre-trial phase. This could have been remedied by either a stronger role for the pre-trial judge, making him lead the investigations, or a duty for the Prosecutor to meticulously keep track of his investigative activities in a case file. These solutions would, however, constitute too strong a shift towards the inquisitorial procedural model, to be acceptable for all negotiating parties.

Another unresolved issue is the lack of legislation regulating investigative powers, even in a rather reduced form. Especially in the case of coercive measures, like search and seizure operations, we are in the international criminal justice system still confronted with a legal vacuum, which is given the absence of or considerable divergence in national standards undesirable.

In this paper the focus is, however, not on the remaining areas of concern, but on the improvements. It will be explored whether the application of these improvements in the initial case law lives up to their expectations. I will address first the effect of Article 21 (3) of the ICC Statute for the overall application of human rights law. Then, I will examine the application of Article 59, offering legal protection to arrests performed by national authorities. I will conclude with some final observations.

2. General applicability: The effect of Article 21 (3) of the Statute

The position of the ICTY and ICTR in respect of human rights is ambiguous. One encounters strong adherence in jurisprudence to internationally codified human rights, but also observations that a more liberal interpretation is justified and that it is good practice that human rights treaties do not apply fully.[2]

This schizophrenia may be explained by a general unease with applicable sources of law and with discovering these sources.[3] This not only concerns human rights law, but there is strong criticism also in relation to the use of customary international law, as well as general principles of law by ICTY and ICTR Chambers.[4] Regarding human rights, the central matter seems to be whether the particular context of international criminal justice mechanisms warrants a re-interpretation of the existing corpus of human rights law. As one author put it:

2 This has been said by Judge Shahabuddeen in the ICTY Galić appeal: ICTY, Separate Opinion of Judge Shahabuddeen, *Prosecutor v. Galić*, Case No. IT-98-29-A, A. Ch., 30 November 2006, para. 19. In other cases as well one notices the explicit assumption in favour of reduced applicability of internationally protected human rights; see, e.g., ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 10 August 1995, paras. 26-28, and , ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A. A. Ch., 15 July 1999, para. 52. For a detailed analysis of the applicability of human rights norms in international criminal proceedings, see A. Zahar & G. Sluiter, *International Criminal Law – A Critical Introduction* (2007), pp. 276 – 286.

3 N. Affolder, 'Tadić, the Anonymous Witness and the Sources of International Procedural Law', (1998) 19 *Michigan Journal of Internaional Law* 448.

4 See for a critical analysis Zahar & Sluiter, *supra* note 2, Chapter 3.

> "…if it is accepted that human rights are principles that can only have meaning in context the Tribunal is entitled, by reference to the human rights regime, to develop its own set of human rights standards in light of its context as an international criminal court dealing with crimes committed in times of war. The real issue of concern then is not whether the Tribunal adheres to existing interpretations of universal human rights principles, but whether the standards it is setting are proper international standards so that it could be said the Tribunal does conform to the rule of law."[5]

This approach calls for a significant degree of caution. First of all, human rights are minimum norms, inherent in the human dignity and thus universal. This certainly concerns the bulk of fair trial norms, such as the right to counsel. A few norms may need re-interpretation, because their current content cannot be dissociated from national societal context. A good example in this respect is the right to be tried by an independent tribunal, the content of which is coloured by *Montesquieuan* views on separation of powers. While the international order is not organized among these same separation of powers-lines, this is not to say that independence of international criminal tribunals is non-existing or inapplicable as a human right. What matters is giving new content to this right, taking into account new factors such as the role of the UN Security Council.

Second, one notices the harmful tendency that this so-called re-interpretation of the human rights corpus in light of the unique character and circumstances of international criminal tribunals practically by definition results in reduced protection, and always favours the interests of prosecution and/or victims over those of the accused. I cannot think of any decision of a contemporary international criminal tribunal in which the conclusion is reached that the circumstances surrounding the functioning of these tribunals should result in increased human rights protection. There are nevertheless many reasons justifying such a conclusion. To mention just one, experiencing pre-trial detention far away from one's family and other support systems, in a strange (legal) environment imposes additional hardship upon an individual, which is a matter worth taking into account. This, and many other elements unique to the international criminal justice system, are overlooked in a fair assessment of applicability, scope and content of human rights norms.

The above observations are not merely theoretical. The criticism on international criminal tribunals from a human rights perspective is fed by a number of questionable practices. One can think of the length of pre-trial detention and –for a long period of time- the 'exceptional circumstances' clause in relation to provisional release. The length of pre-trial detention can be illustrated by the situation of Mr. Bagosora, indicted by the ICTR. He was arrested early 1996 and in 2008 his trial –in first instance- has still not come to an end. In this period he remained in detention.[6] Equally

5 G. McIntyre, 'Defending Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY', in G. Boas & W.A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2003), p. 194.

6 Bagosora was arrested on 9 March 1996 and transferred to the ICTR on 23 January 1997. On account of all kinds of procedural difficulties, many related to joinder, his trial started on 2 April 2002 and has at the time of writing (March 2008) still not been completed.

unacceptable is the approach towards pre-trial detention, which was for a long time codified in Rule 65 (B) of the ICTY and ICTR, according to which interim release can only be ordered in exceptional circumstances; this imposed, in fact, a regime in which detention was the rule and release the exception. It took the Judges amazingly long to dismiss this regime, which is in violation of internationally protected human rights.[7]

Compared to the ICTY and ICTR the legal framework of the ICC is a clear improvement in the codification of human rights. Both habeas corpus and fair trial rights[8] find protection in the Statute, either as attributed rights, or as obligations for specific organs or States. In this respect, we should mention Article 55, containing the rights of persons during an investigation, and Article 67, containing the classical fair trials, with some minor adaptations. The so-called *habeas corpus* rights are incorporated in Article 59 – regarding arrest proceedings in the custodial State, including the arrested person's right to be promptly brought before a judge and his right to apply for interim release-, and Article 60, which includes –among other things- an individual's right to apply for interim release when detained by the ICC. Mention should also be made –from a human rights perspective- of a number of focused Articles, such as Article 63, protecting the accused's right to be tried in his presence, Article 66, containing the right to the presumption of innocence –and corresponding burden of proof on the Prosecutor-, Articles 81 – 84, giving effect to the right of appeal, and Article 85, attributing to a victim of unlawful arrest or detention an enforceable right to compensation.

Interestingly, the Statute is on a few points more protective than is required under international human rights law. For example, strict interpretation of Articles 66 (2) and 67 (1) (i) might result in burden of proof on the Prosecutor in all circumstances, which may be inconsistent with the operation of criminal law on the basis of certain assumptions (like the assumption of sanity of the accused).[9] Another example where 'over-protection' in the realm of human rights may affect the effective administration of justice concerns the admission of prior recorded testimony. Rule 68 appears to set out a mandatory exclusionary rule for 'written statements', when one of the parties has not been in a position to examine the witness. This goes far beyond the law and practice of the ad hoc Tribunals and is also not warranted by human rights law. The ICTY Appeals Chamber rightly observed –by referring to a series of European Court of Human Rights decisions, that

> "…where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness,

7 1999 for the ICTY and 2002 for the ICTR.

8 I leave aside other rights, like the right not to be tried twice for the same offence (Article 20 of the ICC Statute) and the right not to be tried or punished on the basis of retroactive penalization (Articles 22 and 23).

9 Schabas has pointed out that this may lead to an unworkable practice; W.A. Schabas, 'Article 66', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), pp. 840-841.

> the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement…."[10]

More concretely, human rights law allows admission of written – unchallenged – statements, as long as the conviction is not solely or to a decisive extent based on such evidence.[11] Rule 68, however, offers no discretion for the judges in this area. The provision is particular puzzling in light of the absence of a subpoena power regarding witnesses. This implies that significant portion of testimonial evidence may simply not be available to the Court, when witnesses refuse to testify before the Court and when either party has not been in a position to question the witness.

This having been said, the most significant innovation of the ICC Statute concerns the position of human rights law in the hierarchy of applicable law. Article 21 (3) stipulates as follows:

> "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".

It follows from this provision that both the primary sources of law – the Statute, Rules and Elements of Crimes- and the secondary, gap-filling, sources are subject to a consistency-review in light of international human rights standards. It represents a rupture in respect of the more conservative and closed legal culture of the *ad hoc* Tribunals, where no similar hierarchy of sources applied.

The provision also posits the view that 'internationally recognised human rights' are applicable fully, and thus need not be 're-interpreted' in light of the unique mandate and context of the ICC. More concretely, the mandatory and specific content of Article 21 (3) of the Statute appears to prevent Judges from adjusting the content of human rights law to the unique ICC-context; while this offers certain safeguards, a too rigid stance on this matter should be rejected. What matters is not that human rights cannot be re-interpreted, but that this exercise should be conducted on adequate reasons, cautiously and not by definition result in a loss of protection.

The reference to human rights law as some form of review mechanism for all other sources of applicable law was, in spite of its far-reaching effects, not a controversial issue during the Rome negotiations, this in contrast to the exact wording and effect of the discrimination clause within Article 21 (3).[12] Apparently there was no funda-

10 ICTY, Decision on Interlocutary Appeal concerning Rule 92 *bis* (C), *Prosecutor* v. *Galic*, Case No. IT-98-29-AR73.2, ICTY, A. Ch., 7 June 2002, footnote 34.

11 See for an analysis, including references to relevant case law, Zahar & Sluiter, *supra* note 2, p. 389.

12 M. McAuliffe deGuzman, 'Article 21', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), pp. 445 – 446.

mental discussion on the basis of ICTY and ICTR jurisprudence whether the body of international human rights law applies fully to the ICC. This may be considered a matter for determination for the judges in case law. It would also be interesting to see how international human rights law on the basis of this broad clause can penetrate the law and practice – also pre-trial – of the ICC and whether judges should take an active stance in applying it or would leave it to the parties to raise any incompatibility issue, in the application of Article 21 (3). Obviously, the potential of Article 21 (3) is enormous, especially from a defence perspective. The provision is a clear rejection of 'black letter lawyering', and entails that the effect and importance of written law is quite relative. The latter must in its interpretation and application be consistent with human rights law. An interesting question is whether applicable sources of law cannot be applied at all, when they are inconsistent with international human rights law. As an example of such an issue arising, one can refer to Article 60 (4) of the Statute which makes the question whether or not a person is detained prior to trial for an unreasonable period of time dependent upon 'inexcusable delay by the Prosecutor'. Arguably, under human rights law the assessment of existence of unreasonable period of detention is not made dependent upon this condition;[13] so, should this element of Article 60 (4) of the Statute remain inapplicable? The matter is currently pending in the ICC's *Katanga Case*, with the Defence adopting this position, by resorting to Article 21 (3) and the Prosecutor positing that where the language of the Statute is clear, the Judges should follow it, not paying any attention to the effect of Article 21 (3).[14]

Looking at the practice of the ICC, one has difficulty assessing the effect of Article 21 (3) of the Statute. In my view, it tends to be used to confirm provisions and practice in place; any corrective force cannot (yet?) be discerned.

A number of decisions offer some tentative views, but leave us still very much in the dark as to the concrete role of Article 21 (3). In the *Lubanga* jurisdiction case the Appeals Chamber said the following in respect of Article 21 (3):

> "Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety".[15]

13 See the criticism by Karim Khan on this element of Article 60 (4), K. Khan, 'Article 60', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), p. 780.

14 ICC, *Prosecutor v. Katanga,* Response of the Defence to the Prosecution's Observation on the Pre-Trial Detention of Mr. Germain Katanga, pursuant to the Statute and the Rules, ICC-01/04-01/07, 7 February 2008 and ICC, *Prosecutor v. Katanga,* Prosecution's Observations on the Pre-Trial Detention of Germain Katanga, ICC-01/04-01/07, 3 March 2008.

15 Appeals Chamber, *Prosecutor v. Lubanga,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the

Actually, this is hardly informative, but merely repeats the content of the provision. What one would like very much to know of the Appeals Chamber are answers to, for example, the following questions:

– What is the effect of Article 21 (3) in relation to written sources of law, including the Statute? Simply, can human rights law override explicit terms and provisions within the Statute?
– How is the review process to be conducted? Is there a duty *proprio motu* for judges to exercise this review in each instance and to explicitly motivate its results, or should this be a matter for the parties, who carry the burden of proof in this respect?
– What is exactly the appropriate standard for review, in other words, what does the corpus of 'internationally recognised human rights' consist of and what room is there for re-interpretation in the specific ICC context?

Apparently, providing some sort of answer to these vital issues was too much asked. Another matter which was not tackled head-on by the Appeals Chamber in *Lubanga* concerns the effect of Article 21 (3) for the pre-trial phase. Clearly, the applicable law of the ICC and the right to a fair trial is not confined to what happens in the courtroom, or at the seat of the Court.[16] The protection of Article 21 (3), like the protection of the right to a fair trial, should extend to the pre-trial phase. Any other approach deprives individuals of essential protection and may make the Court the beneficiary of activities it would not wish to be associated with. A number of provisions in the Statute, like Articles 55 and 59, are illustrative of a deliberate and wise choice for closer supervision of the pre-trial phase. However, as will be further explored below, the initial case law of the ICC reveals a tendency to retreat within the safe limits of The Hague and a strong desire to keep hands clean by refusing to supervise activities within domestic jurisdictions. By doing so, the adverse effect may be achieved: a refusal to review the national activities that have benefited the Court can with good reason be seen as acceptance of them, and implicates the integrity of international proceedings. And since we are dealing with proceedings that extend over many jurisdiction, with a great variety in the national level of protection, a strong supervisory effect triggered by Article 21 (3) seems to me indispensable, simply to save the credibility of the Court in human rights terms.

The *Darfur* arrest warrant decision offered the following views on 21 (3), concerning the required evidentiary standard for the issuance of an arrest warrant:

> "The Chamber is of the view that, as required by Article 21(3) of the Statute, the expression "reasonable grounds to believe" must be interpreted and applied in accordance with internationally recognized human rights. Thus, in interpreting and applying the expression "reasonable grounds to believe", the Chamber will be guided by the "reasonable suspicion" standard under Article 5(l)(c) of the European Convention on Human Rights and

Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, para. 37.

16 See for an analysis Zahar and Sluiter, *supra* note 2, pp. 281 – 286.

> the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under Article 7 of the American Convention on Human Rights".[17]

Interestingly, regional instruments appear to be viewed by the Chamber as 'internationally recognized human rights' in the sense of Article 21 (3). And surprisingly no mention is made of the universal ICCPR. But it offers a starting point in filling the blanks within the Statute on the basis of human rights law. At least the Chamber is considerably more concrete than the Appeals Chamber in the *Lubanga* case. It does raise, however, again the question whether there is an obligation on a Chamber to make the Article 21 (3) – assessment *proprio motu* at each instance. In this respect, the matter is particularly relevant, because the arrest warrant decisions concerning *Kony and others*, *Lubanga*, *Katanga* and *Ngudjolo* do not contain a similar role for Article 21 (3).

One wonders whether Article 21 (3) may have any effect in filling gaps within the Statute; in other words, could it serve as a basis for some sort of law-making by the judiciary? The obvious problem in all legal frameworks of international criminal tribunals is a very limited role for the principle of procedural legality. Especially in the pre-trial phase there is hardly any regulation of the exercise of investigative powers, whereas such may be required on the basis of human rights law, given the infringement of certain investigative measures upon fundamental rights. For example, evidence obtained via search and seizure may be said to violate the right to privacy; this breach may – under human rights law – be justified when performed in accordance with the law.[18] The applicable legal framework must under human rights case law be sufficiently accessible and foreseeable.[19] In its current state, the law of the ICC makes it impossible to meet this condition. Should the effect of Article 21 (3) then be the exclusion of all evidence obtained via search and seizure? Or is there a task for the competent Chamber to set out an applicable framework, including such matters as the obligation to obtain a search warrant and the authorities competent to conduct searches (for example, could international (peace-keeping) forces perform this task?)?

Difficult questions thus lie ahead. What matters now is how participants in ICC proceedings, especially the Judges, will interpret Article 21 (3) and its effect on the

17 Pre-Trial Chamber I, *Prosecutor v. Harun and Kushayb,* Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, 27 April 2007, para. 28.

18 Cp. Article 8 (2) ECHR, which makes the legality of an interference with the right to privacy dependent on this being in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

19 The European Court of Human Rights in this respect held that "[t]he expression 'in accordance with the law', within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law". (ECtHR, *Huvig v. France*, Judgment of 24 April 1990, Series A 176-A, para. 26.

ICC's functioning. It exceeds the scope of this contribution to analyse the ICC's early case law in relation to interpretative methods of its sources of applicable law. Suffice it to say that a number of interpretative choices are surprising, to say the least, and that the methodology is unclear and arbitrary. The guiding rule of Article 31 of the Vienna Convention on the law of Treaties, according to which treaty provisions must be interpreted in accordance with their ordinary meaning bearing in mind their object and purpose, is with disconcerting ease substituted by other methods of interpretation, like the – infamous – teleological interpretation; these methods seem to me to have no other purpose than to justify the desired result.

As in a number of areas, including the scope and content of the principle of complementarity, the Judges have already turned the Statute into something which it is not and which is it not intended to be, I am therefore not confident that Article 21 (3) will in practice have the effect, which it should have bearing in mind its ordinary meaning and its object and purpose.

3. The interpretation of Article 59 of the Statute

As was already mentioned, the ICC Statute offers more legal protection, also regarding activities in the pre-trial phase at the national levels. I will now explore in respect of arrest what problems may arise in putting that increased protection into effect.

The arrests of persons in the context of the ICC is governed by Article 59 of the Statute and Rule 117 of the RPE. These provisions are from the perspective of legal protection marked improvements to the law of the ICTY and ICTR. There, the implementation of arrest warrants was essentially perceived as an obligation of result for the State receiving the warrant, and the position of the arrested person was hardly a matter of concern. This is underlined by Rule 56 of the ICTY and ICTR RPE obliging the State concerned to execute the arrest warrant. Furthermore, Rule 58 stipulates that the obligation to execute the warrant shall prevail over 'extradition obstacles'. The focus on result may appear self-evident in light of the ad hoc Tribunals' mandate, their primacy over national courts and the (initial) difficulty in getting arrested persons indicted, but it seriously overshadows important questions of legal protection. All we have in the legal framework of the ICTY and ICTR is Rule 55 (E):

> "The Registrar shall instruct the person or authorities to which a warrant is transmitted that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language that he or she understands and that the accused be cautioned in that language that the accused has the right to remain silent, and that any statement he or she makes shall be recorded and may be used in evidence".

It appears that with this instruction the responsibility of the *ad hoc* Tribunals ends; what then happens is the full responsibility of national authorities. The prevailing view at the ICTY and ICTR at present seems to be that only when in the course of an

arrest an individual's human rights have been egregiously violated, is there a duty for the Tribunals to intervene.[20]

The approach of the ICC is a different one. Article 59 attributes the individual arrested by national authorities certain rights, and the provision imposes clear obligations on the State arresting an individual at the request of the ICC. The provision is exclusively oriented on arrests by States and it is unclear what legal regime applies to arrests performed by non-State entities, such as (peace-keeping) forces. There is in this respect a clear deficiency in the Statute in that Article 59 appears to be exhaustive and attributes clearly defined rights; when the procedure of Article 59 is not followed – or not followed correctly – there is a direct basis for the applicability of Article 85, in my view. The latter provision stipulates that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. Put in these broad terms, adopting *verbatim* the wording of Article 9 (5) ICCPR, it should not matter who was responsible for the unlawful arrest, and certainly applies in my opinion to direct violation of the Court's own statutory provision.[21]

The degree of protection offered by Article 59 is a welcome contribution to increased supervision by international criminal tribunals over what is going on in the pre-trial phase. However, one has to recognise that Article 59's content is not only the result of a keen desire to enhance legal protection; rather, it had a strong basis in sovereignty concerns for a number of negotiating States, who felt that national courts should retain the power to decide over early release as long as the individual was detained at the national level.[22] Although Article 29 of the ILC Draft Statute put the power over early release in the hands of the Court, Article 59 moved this to the national authorities.

Is Article 59 a Trojan horse, from the perspective of the effective administration of justice? One has to acknowledge that the strong role for and reliance on national authorities under the Statute creates problems, both from an angle of 'over-protection' and 'under-protection'. An almost natural inclination for Judges, as we will examine later on in more detail, could then be to reduce the role of Article 59 as much as possible, and to retreat, as was the practice of the ICTY and ICTR, within the safe limits of The Hague. This would amount to rejecting a strong supervisory role in respect of what is going on in the DRC, or any other State which would execute arrest warrants in the future.

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20 This is the result of the Nikolić jurisprudence on the matter: ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002; ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-A, A. Ch., 5 June 2003.

21 One commentator raises but does not answer the issue whether Article 85 (1) could be confined to the conduct of national authorities; see C. Staker, 'Article 85', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), p. 1043.

22 See A. Schlunck, 'Article 59', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), p. 768. See also M. El Zeidy, 'Critical Thoughts on Article 59 (2) of the ICC Statute' (2006) 4 *JICJ* 448, 450.

Let us start with the situation where a State would offer more protection than is envisaged by the Statute. Practically, this is the situation where national authorities would order interim release pending surrender. Bearing in mind the great difficulties in arresting a suspect, the reluctance from the perspective of the Court in accepting such a decision is understandable. Furthermore, one can imagine how Article 59 (3) and (4) can be used by States which are not very keen on – to put it mildly – arresting individuals as a tool to order release. For example, can Sudan, when arresting Mr. Harun and Mr. Kushayb, order their release, if a court of law would determine that their rights were violated in the course of their arrest by Sudanese police authorities? This would, understandably, meet with objections, and Article 59 contains mechanisms to accommodate concerns, which are clearly set out in sections 4, 5 and 6 of Article 59.

What is important to note is that the national court's competence is restricted to order interim release. This implies that re-arresting the person should remain possible. In other words, the competent national court cannot order the final release, with prejudice to national prosecuting/police authorities, when this would be warranted under national level, for example in case of (egregious) violations of the rights of the arrestee. At least, this cannot be done under Article 59. That particular situation could be a basis for refusal of cooperation, on the basis of supervening impossibility under national law to re-arrest the suspect, and is a matter for consultation pursuant to Articles 97 of the Statute. Or the matter can be raised with the Court, but only after surrender.[23]

The emphasis in Article 59 (4) on detention and the interplay with provisions on cooperation in the Statute are delicate. For example, the reference to 'urgent and exceptional circumstances to justify interim release' is reminiscent of the ICTY and ICTR approach to pre-trial detention as a rule. However, here it is fully justified, in light of the fact that the Court has already decided pursuant to Article 58 that it is necessary to arrest the person concerned, and any deviation from that decision should be based on very strong grounds.

One also notices in Article 59 (4) that it is not open to the national court to consider whether the arrest warrant was properly issued in accordance with Article 58 of the Statute.[24] However, this seems to me very much moving problems around. Whereas the national court may not do this, the executive branch could still raise this as an obstacle to cooperation, applying Article 97.[25] Thus, a national court, which

23 The possibility in seizing the ICC directly during custody at the national level appears to be limited to the situations of requesting assistance of counsel and challenging the arrest warrant. See Rule 117 (2) and (3).

24 Rule 117 (3) makes it possible to directly challenge the legality of an arrest warrant with the ICC, even while in custody at the national level. Clearly, for this right to be effective, two conditions must be fulfilled: a) the arrested person is informed of this possibility, b) the arrested person receives the cooperation of the custodial State in putting his challenge to the Court.

25 I have elsewhere defended the position that Part 9 of the Statute does not amount to an exhaustive codification of grounds justifying refusal of cooperation; the language of Arti-

operates in extradition in conjunction with the executive, could inform the Minister of Justice of any doubts it has in relation to the legality of an arrest warrant issued by the ICC. Though this may not be a ground for interim release, it can be a reason not to cooperate.

A final point to be made concerns the sufficiency of evidence. Case law in the US demonstrates how views may differ as to what can be regarded as sufficient evidence underlying an individual's arrest and surrender.[26] The starting point here is the duty for the ICC to accompany its request for arrest and surrender with sufficient evidence, and that the standard is that of the requested State, be it that that standard may not be more demanding than in ordinary extradition proceedings (see Article 91 (2) (c) of the Statute). Insufficient evidence could be regarded as a basis for the State to refuse the assistance. Clearly, that determination will be made by the prosecuting authorities; is the accompanying evidence sufficient to convince the national court of the arrest of the person? Article 59 does not rule out that a national court adopts a different view in respect of the sufficiency of accompanying evidence, and, under those circumstances must order the individual's (interim release). This is all part of due process of law, and the separation of powers. It is for the executive to ensure the sufficiency of evidence. Article 59, however, could have been strengthened by inserting a provision, which would give the prosecution service adequate time and opportunity to request the ICC additional evidence. Of course, things may then become really complicated, because the ICC's Pre-Trial Chamber has already decided on the evidence underlying the arrest warrant and in order to satisfy domestic concerns a new decision, including the newly adduced evidence, may have to be taken.

While the foregoing illustrates the difficulties that arise in a situation of 'over-protection', the reverse, 'under-protection' is equally problematic. It is self-evident that violations in the application of Article 59 need to be addressed by the Court. Only the latter is in a position to effectively address any violation and has in that respect an obligation to ensure the fairness of the trial as a whole. In itself, this imposes a duty upon the Court to address relevant violations, including those committed by others than organs of the Court. Traditionally, one can identify three compelling reasons to

cle 97 permits States to raise obstacles in the implementation of legal assistance requests which are not explicitly set out in the Statute: G. Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002), pp. 159 – 160.

26 This concerns the case of E. Ntakirutimana, whose arrest and surrender was initially refused by a Texas District Court, because the evidence did not meet the requirements imposed by the Fourth Amendment to the US Constitution; the situation was remedied by the Court of Appeals, just narrowly, after the evidence was supplemented (In the matter of surrender of Elizaphan Ntakirutimana, Misc. No. L-96-5, United States District Court for the Southern District of Texas, Laredo Division, 1997 U.S. Dist. LEXIS 20714, December 17, 1997, Decided.; and Elizaphan Ntakirutimana, Petitioner-Appellant, versus Janet Reno, Attorney General of the United States; Madeleine Albright, Secretary of State of the United States; Juan Garza, Sheriff of Webb County, Texas, Respondents-Appellees, No. 98-41597, United States Court of Appeals for the Fifth Circuit, 1999 U.S. App. LEXIS 18253, August 5, 1999, decided).

do so: 1. to offer a remedy for violation of rights (cp. Article 85); 2. to prevent future violations, via deterrence; 3. to preserve the integrity of court proceedings.

These are alternative reasons and depending upon the degree and nature of violation as well as the involvement of actors the Court can decide how to react. For example, the very fact that there has not been concerted action between the ICC Prosecutor and national authorities may result in the non-applicability of the second rationale, but does not mean that measures should not be taken for the reasons sub 1 or 3.[27]

The first incident before the ICC dealing with this matter was the *Lubanga* case, where the Defence argued that Mr. Lubanga's arrest and detention in Congo violated human rights norms and that, as a result, the Court had no longer jurisdiction over the case. The Defence's challenge to jurisdiction was dismissed, for two reasons. First, the abuse of process doctrine is not applicable, as there was no concerted action between the Congolese authorities and the ICC Prosecutor regarding the treatment of mr. Lubanga in Congo.[28] The ICC Appeals Chamber in this respect ruled that:

> "Mere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose."[29]

Second, the treatment of Mr. Lubanga in Congo did not amount to torture, which would normally require a Court to decline jurisdiction.[30]

These two decisions accord well with the ICTY and ICTR jurisprudence on the matter, especially the recent case of Mr. Nikolić.[31] On the basis of that case law, the prevailing view is that the communicating barrels of 'concerted action' and 'egregious mistreatment' offer the appropriate standard to decide on a refusal to exercise jurisdiction. But that case law and the ICC's approach to *Lubanga* suffer also from the same flaw. With the focus being on the ultimate remedy, no jurisdiction, the core of the matter – have violations occurred? – and the need for alternative remedies, tend to be overlooked. In the case of the ICC this is especially problematic, in light of two distinctive elements. First, the ICC system is more inquisitorial in nature than the ad hoc tribunals, requiring Judges to explore issues *ultra petitum* and address viola-

27 These rationales also underly the debate on the exclusionary rule concerning unlawfully obtained evidence; see Zahar & Sluiter, *supra* note 2, pp. 379 – 380.

28 Pre-Trial Chamber I, *Prosecutor v. Lubanga,* Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute, ICC-01/04-01/06-512, 3 October 2006, p. 10, and Appeals Chamber, *Prosecutor v. Lubanga,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, No. ICC-01/04-01/06-772, 14 December 2006 , para. 42.

29 Appeals Chamber Judgment, *supra* note 28, para. 42.

30 Pre-Trial Chamber Decision, *supra* note 28, p. 10; Appeals Chamber Judgment, *supra* note 28, para. 43.

31 See *supra* note 20.

tions *proprio motu*; this would accord with the role of the ICC (pre-trial) judges 'as the ultimate guarantor of the rights of the Defence'.[32] Second, one wonders whether any violation raised concerning the arrest or detention of an individual should not by definition be assessed in accordance with Article 85 of the Statute. One notices that the Appeals Chamber in *Lubanga* refers to Article 85, but does not address the matter *proprio motu* in light of that provision; it confined itself to the question whether other remedies are available in addition to Article 85.[33]

There is another reason as to why the ICC cannot focus too much on ICTY and ICTR jurisprudence. This is the content of Article 59; as was already mentioned, a similar provision is not part of the law of the *ad hoc* Tribunals.

In this first case, it is interesting to see how the Judges assessed the role of that provision in the 'traditional' *male captus bene detentus* discussion.

Let us focus on the interpretation of Article 59 (2):

> "A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
> (a) The warrant applies to that person;
> (b) The person has been arrested in accordance with the proper process; and
> (c) The person's rights have been respected".

The reference to "in accordance with the law of that State" may raise the impression that the points a, b and c are a matter of national law essentially. However, if the attribution and interpretation of rights are a matter of national law only, the provision would lose much of its protective force, for the very simple reason that the degree of protection, and rights offered may vary considerably among States. Furthermore, we would not need Article 59, but could have simply followed the law of the ICTY and ICTR, emphasising the obligation of result, with the minimum level of protection that one cannot be subjected to egregious mistreatment. Therefore, doctrine supports the view that the reference to rights in Article 59 (2) is about "the rights of the person under national law and human rights treaties to which the requested State is a party".[34] In this light, one can then imagine a difference in degree of the ICC's supervisory role; clearly, its supervision of respect for national process should be far more marginal than supervision of the internationally protected rights of each arrested person. This accords with the previously discussed effect of Article 21 (3).

Neither the Pre-Trial Chamber nor the Appeals Chamber in *Lubanga* shared this position. The Pre-Trial Chamber offered the following starting point for its analysis:

32 Pre-Trial Chamber I, *Prosecutor v. Katanga,* Decision concerning Pre-Trial Detention of Germain Katanga, ICC-01/04-01/07, 22 February 2008, p. 6.

33 Appeals Chamber Judgment, *supra* note 28, para. 37.

34 B. Swart, 'Arrest Proceedings in the Custodial State', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), pp. 1252 -1253.

> "Considering that in the Chamber's view, the words "in accordance with the law of the State" means that it is for national authorities to have primary jurisdiction for interpreting and applying national law;
> Considering however, that this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which, like those here, are referred directly back to that national law by the Statute;"[35]

This then resulted, on the basis of the facts, in the conclusion that

> "that no material breach of Article 59 (2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request …."[36]

Interestingly, the basis for review – which is marginal – appears to be national law only, and not a set of core rights directly on the basis of Article 59 (2).

The Appeals Chamber offers similar views:

> "The appellant's argument is that the Pre-Trial Chamber is charged under this Article to review the correctness of the decision of the Congolese authority to sanction the enforcement of the warrant of arrest. No such role is cast on the Court. The enforcement of a warrant of arrest is designed to ensure, as Article 59 (2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have been respected. The Court does not sit in the process, as the Prosecutor rightly observes, on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority. Its task is to see that the process envisaged by Congolese law was duly followed and that the rights of the arrestee were properly respected. Article 99 (1) of the Statute lays down that the enforcement of the warrant must follow the process laid down by the law of the requested state. In this case, the Pre-Trial Chamber determined that the process followed accorded with Congolese law."[37]

This ruling leaves us in the dark as to (i) the applicable law – only Congolese law, or also internationally protected human rights law, and (ii) the level of review – what margin of appreciation is left to national courts? The Appeals Chamber emphasis seems to be, however, on an interpretation of Article 59 (2) as essentially – or merely – offering the protection of national law. This can in my opinion be inferred from the conclusion in this section that 'the process followed accorded with Congolese law'. The logical follow-up question, whether Congolese law – or simply the process as it was applied in practice – was consistent with internationally protected human rights, at least those rights set out in treaties to which Congo is a party, is not addressed.

35 Pre-Trial Chamber Decision, *supra* note 28, p. 6.

36 Id., p. 11.

37 Appeals Chamber Judgment, *supra* note 28, para. 41.

Hereby, Article 59 (2) loses much of its protective force and its interpretation is not in keeping with Article 21 (3) of the Statute.

In my view, the purpose of Article 59 is not only to ensure the application of a (national) legal framework to the implementation of arrest warrants, but also the application of a framework and overall practice which are consistent with international human rights standards. A different view, dramatically decreases protection and subjects an arrested person to the whims of domestic law and approaches. As these may vary for each State, we furthermore may be confronted with unacceptable inequality in treatment.

The proposed interpretation is therefore that the reference to 'rights' in Article 59 (2) be interpreted independently from the national law; what matters are internationally protected rights of the arrested person. In this approach, the words 'in accordance with national law' – in the chapeau of Article 59 (2) – concern the national procedural steps, but cannot colour the interpretation of rights in the same provision. This is a frequently encountered and widely supported mode of interpretation. For example, the reference to 'procedure under their national law' in Article 89 (1) is generally interpreted in the sense that it can by no means colour the substantive obligation to cooperate under the Statute.[38] Likewise, one should disentangle national (procedural) law and substantive (human) rights in Article 59 (2).

Applying this distinction does not only accord better with the obligation set out in Article 21 (3). It also facilitates the supervisory role of the Court. The latter can then better distinguish between a marginal supervisory role in relation to national law and a stronger supervisory role when it concerns internationally protected human rights.

4. Concluding remarks

In respect of legal protection, the legal framework of the ICC Statute is a clear improvement to the legal frameworks of the ICTY and ICTR. Herewith the authority of the ICC as a true human rights court is affirmed, at least on paper. It remains to be seen to what extent the suspect really benefits from an improved human rights protection in the pre-trial phase. The initial case law of the ICC is not very promising. Reluctant to act as supervisor of national law and practice, there is already a tendency at the ICC to retreat within the safe confines of The Hague. This does not only concern human rights issues, but also regarding the principle of complementarity one cannot detect much courage when it comes, for example, to labelling (investigative) activities in Sudan as those of an unwilling or unable State.

This position is quite surprising, because the Statute was intended to represent a marked rupture to the law and practice of the ICTY and ICTR, where there was – and is – limited concern for the protection of individual rights in the pre-trial phase.

38 See C. Kress & K. Prost, 'Article 89', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), p. 1075.

Initial case law, especially Pre-Trial Chamber and Appeals Chamber decisions in the *Lubanga* case, reveals flawed interpretation and application of two vital provisions for the protection of individual rights in the pre-trial phase, Article 21 (3) and Article 59. Article 21 (3) has not yet occupied its prominent place as a systematic and obligatory human rights review standard for each and every activity of the Court and activity that is of benefit to the proceedings before the Court. Furthermore, many questions in respect of the precise scope and content of Article 21 (3) remain – yet – unaddressed. The same applies to Article 59, where the Appeals Chamber has in the *Lubanga Case* wrongly reduced the ICC's supervisory role. This is not only inappropriate from the perspective of fairness; it is also a risk for future situations. Where the prevailing position would turn out to be that the arrest and detention of individuals is governed by domestic law essentially – or only -, this can backfire when a State would too easily – in the view of the Court – order the interim release of an arrested person.

For these reasons, the ICC must strengthen its grip on national activities which are an indispensable and inextricable part of ICC proceedings, whether we like it or not.

Chapter 25 How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?

*Robert Heinsch**

1. Introduction

In a famous interview Judge Claude Jorda, former President of the ICTY and presiding judge of Pre-Trial Chamber I of the International Criminal Court (ICC) stated: "A trial should never last more than 18 months total".[1] And indeed, the Rome Statute stipulates in article 64 (2) that the "Trial Chamber shall ensure that a trial is fair *and expeditious*".[2] One cannot but get the impression that the ICC already has difficulties to fulfil this promise of an expeditious trial. Commentators have criticised that the Court is moving with "glacial speed".[3] Although the requirement of a fair and expeditious trial seems to leave room for interpretation, the dualism "fair and expeditious" will probably create even more problems in the future because the principles of fairness and expeditiousness can under certain circumstances be standing at opposing

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1 F. Petit, 'Interview with Judge Claude Jorda, president of the Pre-Trial Chamber: 'A trial should never last more than 18 months total', in International Justice Tribune (ed.), *ICC in 2006: Year One* (2007), 63.

2 Emphasis added; For an overview on the right to a 'fair and expeditious trial', see S. Zappalà, *Human Rights in International Criminal Proceedings* (2005), at 109; for more details on the "fairness" of the proceedings see G. Bitti, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Article 64, margin no. 9; for an elaborated overview on the "principle of a speedy trial", especially concerning the human rights aspect see, C. Safferling, *Towards an International Criminal Procedure* (2001), at 250.

3 Cf. W. A. Schabas, 'First Prosecutions at the International Criminal Court', in (2006) 27 *Human Rights Law Journal*, 25, at 40.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 479-499.

ends of a spectrum, since an expeditious trial can be unfair and a fair trial might not always be expeditious.[4] In any case, one has to keep in mind that "the desire to ensure speedy trials can under no circumstances be taken as a justification for reducing the rights of defendants".[5] As the ICTY has already stated, "a balance should be struck between judicial economy and the right of the accused to a fair trial".[6]

A look at the chronology of the first case ever to be conducted before the ICC, the case against Thomas Lubanga Dyilo[7] reveals the biggest problem of international criminal trials. They are very lengthy.[8] On 17 March 2006, the Congolese rebel leader Thomas Lubanga was transferred to the detention unit of the ICC and had his initial appearance three days later on 20 March 2006.[9] After almost a year of pre-trial proceedings, Pre-Trial Chamber I confirmed the charges against him on 29 January 2007[10] and afterwards the case was handed over to Trial Chamber I which was constituted on 6 March 2007. Trial Chamber I again took almost a year to prepare the opening of its first case, with the actual proceedings scheduled to begin in 2008.[11] Thus, it will take over two years to actually begin with a trial which according to an experienced judge like Judge Jorda should not last longer than 18 months. How can this happen? And what has to change in order to make expeditious trials possible without violating the rights of the accused? In this regard, it is important to keep in mind that during these proceedings, Mr. Lubanga Dyilo who has to be presumed in-

4 See especially F. Terrier, Powers of the Trial Chamber, in A. Cassese, P. Gaeta & J. Jones, *The Rome Statute of the International Criminal Court – A Commentary* (2002), 1263, at 1264.

5 S. Zappalà, *Human Rights in International Criminal Proceedings* (2005), at 28.

6 ICTY, *Prosecutor v. Simić, Tadić, Todorovic, and Zaric,* Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, Case No. IT-95-9-PT, 25 March 1999, at 4.

7 See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06; for a more detailed analysis of the first decisions of this case, please refer to the contribution by R. Gallmetzer in Ch. 26 of this volume.

8 This has already been realized very early during the preparation of the first trial at the ICC. An informal expert group consisting of H. Friman, F. Guariglia, C. Kress, J.R. Spencer and V. Tochilovsky therefore was given the task to give recommendations on how to reduce the length of proceedings, see Informal Expert Paper: Measures available to the International Criminal Court to reduce the length of proceedings, available at <www.icc-cpi.int/library/ organs/otp/length_of_ proceedings.pdf>.

9 See ICC, Press Release, '*First arrest for the International Criminal Court,*' 17 March 2006 and ICC, Press Release, '*Initial appearance of Mr Thomas Lubanga Dyilo before the Pre-Trial Chamber I*', 20 March 2006.

10 See ICC, Press Release, '*Pre-Trial Chamber I commits Thomas Lubanga Dyilo for trial*', 29 January 2007.

11 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06, 9 November 2007, para. 29 which sets the date for the commencement of the trial to 31 March 2008.

nocent until proven otherwise,[12] sits in the ICC detention unit in Scheveningen waiting for his trial to start, while Article 67 (1) (c) of the Rome Statute ("the Statute")[13] gives him the right to be tried with undue delay. It is of course difficult to decide how much delay has been created by the accused's own action, i.e. his defending strategy, and where the time limits of this right actually lay.[14]

At the conference on "The ICC's Emerging Practice: The Court at Five Years", Judge Ekaterina Trendafilova and Judge Sir Adrian Fulford proposed some important measures in order to achieve expeditious ICC pre-trial and trial proceedings. Judge Trendafilova stressed the need for the Office of the Prosecutor (OTP) to limit its charges to the most serious ones and suggested that pre-trial disclosure should be approached on the basis of a concise and precise charging document instead rather than relying on the arrest warrant[15] while Judge Fulford highlighted the necessity for brevity in filings.[16] Both suggestions go to the very heart of the problem of lengthy international criminal proceedings. The following article tries to further elaborate on the weaknesses of the current international criminal law system while offering some ideas in order to overcome these problems.[17] It will be argued that it is time to give judges more responsibility in mainstreaming the proceedings because under the Rome Statute and its Rules of Procedure and Evidence ("the Rules")[18] they are vested with the power to change the way trials are conducted.

2. What makes international criminal proceedings so slow?

First of all, let us have a short look at the reasons why international criminal proceedings still take so much longer than national proceedings. In this context, six aspects seem to be crucial for the fact that trials like, e.g. the case against Slobodan

12 Cf. Article 66 (1) Rome Statute.

13 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3; UN Doc. A/CONF.183/9; available at <www.icc-cpi.int> (last visited on 20 January 2008).

14 On this point see Zappalà, *supra* note 5, at 114 et seq.

15 See report on the conference, available at <www.jur.uva.nl/aciluk/object.cfm/0EFCAE9F-1321-B0BE-68C125F164E4299> (last visited on 28 January 2008).

16 Ibid.

17 There already have been quite a number of articles dealing with this matter. For further reference, please see, among others: S. Kirsch, 'The Trial Proceedings before the ICC', (2006) 6 *International Criminal Law Review* 275-292; C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603-617; D. Mundis, 'From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence', (2001) 14 LJIL 367-382; V. Tochilovsky, 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience', (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice* 268-275; O.G. Kwon, 'The challenge of International Criminal Trial as Seen from the Bench', (2007) 5 *JICJ* (2007), 360-376; I. Bonomy, 'The Reality of Conducting a War Crimes Trial', (2007) 5 *JICJ* (2007), 348-359.

18 2002 Rules of Procedure and Evidence, Official Records ICC-ASP/1/3; available at <www.icc-cpi.int (last visited on 20 January 2008>.

Milošević,[19] have been unnecessarily lengthy and inefficient. If the ICC continues on this course, there is a danger that the same phenomenon will take place at this Court.

2.1. The complexity of the factual background: the real reason for lengthy Proceedings?

One of the most important reasons which are normally stated in order to find reasons for long international criminal proceedings is the special characteristic of the crimes they are dealing with.[20] While in a national murder case, for example, there is usually only a handful of suspects and victims, this is different in war crimes, crimes against humanity and genocide cases. These cases deal with a much bigger scale of perpetrators and victims. There can be hundreds or thousands of suspect and even ten thousands or more victims. The crimes are sometimes committed on large stretches of territory which are not easy to access and the investigators face enormous challenges. However, the mere fact of large numbers of victims should not be an excuse for a delay in proceedings. If you have a look at national cases of economic fraud or tax evasion,[21] you will easily come to similar complex situations, although one has to concede that national authorities are still much better equipped than the investigators of the ICC and these cases also have the tendency to be lengthy.

2.2. Proceedings are too complex and create disadvantages for the Defence

Nevertheless, some of the problems with regard to the enormous amount of information seem to be homemade. A crucial role in this context which prolongs the pretrial and trial-phase is the complexity of the disclosure proceedings.[22] This institution which has its origins in adversarial[23] systems seems to have become even more complicated in international war crimes cases. What is the reason for this impression?

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19 For a detailed analysis of the Milošević trial, see G. Boas, *Lessons from the Conduct of Complex International Criminal Proceedings* (2007).

20 This is stipulated as an "objective factor" in the Informal Expert Paper, see *supra* note 8.

21 Cf. also Bonomy, *supra* note 17, at 349, who also draws the parallel to "fraud and other complex cases".

22 For a general overview of disclosure proceedings, cf. A. Orie, Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC', in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court* (2002), Vol. II, 1439, at 1449.

23 The present article mainly uses the terms "adversarial" and "inquisitorial" for denominating the Common Law system or the Civil Law system (which correctly probably should be called Romano-Germanic system), trying to avoid any geographical or national connotation which usually makes an understanding between lawyers coming from the different systems much more difficult. There already have been lengthy discussions concerning the "right" terminology with regard to differentiating between Common Law and Civil Law or Adversarial or Inquisitorial Legal System: for an impressive account of the cur-

2.2.1. Disclosure proceedings overburden the participants with too much unstructured information

Due to the special characteristic of war crimes cases, the ICC Prosecutor gathers enormous amounts of evidence, especially transcripts of witness interviews. For example, in its "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial" of 9 November 2007, the ICC Trial Chamber I stated that

> "As of 1 October 2007, the prosecution submitted that there are currently 27,500 documents which compromise some 92,500 pages in its possession that relate to the Democratic Republic of Congo document collection.[24] Of those, the prosecution thinks it likely that a little under 20,000 documents (about 74,000 pages) require review within the framework of the case against Mr Thomas Lubanga Dyilo."[25]

These are dimensions which are not very easily grasped by a lawyer coming from a national domestic system. Actually, it is probable that any average human-being would have difficulties dealing with such a huge amount of information. Already the well-staffed ICC Office of the Prosecutor probably has problems bringing these many thousand pages of transcripts and other documents into a reasonable order. Unfortunately, it seems to have become a habit at the ICC that the Prosecution overburdens the participants (Defence, judges and victims) with documents, often without making a selection to the relevance of the documents. To be frank, one cannot blame the Prosecution for this: first, because they surely worked very hard to gather this evidence and, second, overburdening the opposing party with hundreds of pages is a very popular tactic among lawyers, even outside international criminal proceedings.

However, in war crimes trials this becomes a problem insofar as the Defence is hopelessly disadvantaged in the preparation of the case and regularly the question of the "equality of arms" arises.[26] It will never have comparable human and technical resources and it is unrealistic to assume that a defence counsel will have the chance to properly investigate a genocide case far away from his home office. However, even if he has means and time to travel to the place of the alleged crime, it remains doubtful

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rent use of terminology, cf. K. Ambos, 'International criminal procedure: "adversarial", "inquisitorial" or mixed?', (2003) 3 *International Criminal Law Review* 1, at 2.

24 Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 11, line 4.

25 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, Case ICC 01-01/04-01/06-1019, 9 November 2007, para. 2 with reference to Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, at page 11, line 7.

26 See for a general overview Safferling, *supra* note 2, at 265; R. Higgins, 'Fair and expeditious Pre-Trial Proceedings: The Future of International Criminals Trial', (2007) 5 *JICJ* 394 describes some necessary assistance to defence counsel in order to at least have some sort of equality of arms; the issue of the "equality of arms" has arisen regularly already during the pre-trial phase of the *Lubanga* case, see e.g. *Prosecutor vs. Thomas Lubanga Dyilo,* Response to order of 7 November 2006, ICC-01/04-01/06-681, 8 November 2007, at 4-7.

whether he will be able to conduct a proper investigation even if the Court's registry provides additional resources.

An additional aspect which makes disclosure in international criminal proceedings even more complicated than in a national legal system are the restrictions to disclosure under rules 81 and 82 of the Rules of Procedure and Evidence,[27] including redactions of the documents which are going to be disclosed.[28] Rules 81, for example, refers to different reasons for restricting disclosure which are mentioned throughout the Statute, including protection of information obtained by the Prosecutor confidentially and solely to generate new evidence,[29] protection of information as to certain witnesses prior to commencement of the trial,[30] protection of national security information,[31] and protection of information provided by a State confidentially and solely to generate new evidence.[32] In order to provide protective measures to certain witnesses it is necessary to redact a lot of documents, i.e. erase names, places and other information which could endanger the witnesses well-being when he/she could be threatened by people trying to obstruct the proceedings. However, the process of redacting a document is very time-consuming because someone has to go over each single statement and decide whether a piece of information represents a possible threat for the witness. Although the protection of the witness' integrity is crucial for conducting trials against war criminals, the practice of redactions raises at least two major problems.

First of all, redactions have a high potential for compromising the fairness of the proceedings because sometimes redacted documents lack complete sentences and even paragraphs which makes it often very hard, sometimes impossible to read them.[33] In practice, this raises the question whether the Defence has any benefit from receiving documents which do not contain the original information. The second question is how to find a way to reduce the number of redacted documents in order to save time, especially because in the end many of the documents are finally made public. This dilemma seems very hard to solve because of the risk which is at stake: the well-being of witnesses. It might be worth considering whether it makes sense to disclose original documents which include so many redactions that they do not contain valuable information anymore. In these cases, it probably would be less time-consuming to provide summaries instead, and where the Statute allows to use this tool, like in

27 For an overview of the relevant rules governing the restrictions on disclosure see R. Dixon, K. Khan & R. May, *Archbold's International Criminal Courts* (2003), at 7-73.

28 For the practice in the ICTY concerning restrictions on disclosure see, V. Tochilovsky, *Indictment, Disclosure, Admissibility of Evidence: Jurisprudence of the ICTY and ICTR* (2004), at 46 et seq.

29 Article 54 (3) (e).

30 Article 68 (5).

31 Article 72.

32 Article 93 (8) (b) and (c).

33 For a good example of a hardly readable paragraph, see ICC, *Prosecutor vs. Thomas Lubanga Dyilo,* Document Containing the Charges, Article 61(3)(a), ICC-01/04-01/06-Anx2, 28 August 2008, at para. 86.

Article 68 (5),[34] use should be made of it. However, this is not the place to give a final answer to this problem; nevertheless, one should be aware that the process of redacting documents is responsible for much additional delay in the proceedings and is an imminent problem of disclosure proceedings as such.

Not only in this regard, there seems to be the need to simplify disclosure proceedings in cases before the ICC. This will be a daunting task for future chambers, especially since disclosure is one of the few "traditional" technical terms which made its way into the Statute and this makes it much more difficult to deviate from the traditional setup of this instrument, i.e. to establish alternative forms like a "dossier" known from inquisitorial systems.[35] But it is important to note that although the Statute and Rules use the term "disclosure" there still remains room for the judges to construct the way it is conducted due to the lack of very detailed technical instructions and the existence of many open questions.[36] Thus, it appears as if judges have the possibility and responsibility to find an effective way of disclosure before the ICC in order to make the proceedings more efficient and ensure that the Defence is not hopelessly disadvantaged because of its lack of resources.

2.2.2. The Prosecutor's duty to establish the truth has to be taken seriously

The judges are not the only ones who have a certain responsibility; a crucial role also lies with the Prosecutor. The Prosecutor has to take his obligation under Article 54 (1) (a) "in order to establish the truth" and "extend the investigation to cover all facts and evidence, relevant to an assessment of whether there is criminal responsibility under this Statute, and in doing so, investigate incriminating and exonerating circumstances equally" much more seriously than is presently being practiced.[37] At the moment, one can get the feeling that the ICC OTP still is behaving much more like an actor in a typical adversarial proceeding. This is not surprising because a rather important number of OTP staff have learned their skills during many years of ICTY or ICTR trial proceedings.[38] And in some regard this vast experience from the *ad hoc* tribunals is a good characteristic. Routine and experience is pivotal for fast and efficient proceedings, especially because everyone learns from past mistakes.

However, in the long run, the Defence probably has no other choice but to rely on evidence gathered by the Prosecution because as already stated the accused will never have the resources to investigate his case in a similar way as the prosecution.[39] But, for the Defence to be able to rely on the independent investigation of the Prosecutor, it is absolutely necessary to have proactive judges during the pre-trial as well as during the trial stage. Only when the Defence can rely much more on the fact that in

34 Cf. D. Donat-Cattin in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court (1999)*, article 68, margin no. 33.

35 Concerning the term "dossier" see Orie, *supra* note 22, at 1451.

36 See Orie, *supra* note 22, at 1482 et seq.

37 In the same direction, see Kress, *supra* note 17, at 609.

38 See also the numbers cited by V. Nerlich in Ch. 17 this volume.

39 Coming to the same conclusion, Ambos, *supra* note 11, at 36.

cases where there is need for further investigation, the Chamber is ordering the Prosecution to bring more or new evidence,[40] than it will not be necessary for the Defence team to conduct a whole set of independent investigations. In this regard, Article 64 (6) (d) of the Rome Statute could be used by the Defence to ask the Trial Chamber to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties". Depending on the background of the presiding judge, chances are that this provision will be used quite differently.[41] However, when this provision would be used wisely, this could reduce human and technical resources and also will prevent the Defence from asking for time extensions which have become a big problem with regard to the length of the proceedings. That the presiding judge can direct the proceedings in this direction is highlighted by Article 64 (8) (b) which states that the "presiding judge may give direction for the conduct of the proceedings, including to ensure that they are conducted in a fair and impartial manner" and that the Trial Chamber has the power to ask for additional evidence in certain circumstances is made clear by the next sentence stating that "subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute".[42] Of course, this seems to indicate that one should carefully review the possibility of simplifying the usually very complex technical provisions dealing with the adversarial way of disclosure in favour of a more inquisitorial approach to evidence.[43] This is a thought which has already been stated by the ICTY expert commission on the speeding-up of proceedings which emphasised that "some civil law models can doubtlessly deal with criminal law cases more expeditiously than the common law adversarial system".[44]

It is important to note in this context that while the Prosecutor has the *duty* under Article 54 (a) "to establish the truth" there is no parallel provision for the Trial Chamber as such.[45] However, according to Article 69 (3) the "Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of truth" which comes very close to being obliged to establish the duty.[46] There is also no explicit provision demanding that the Judges should become more

40 Cf. Kirsch, see *supra* note 17, at 287.

41 W. Schabas, *Introduction to the International Criminal Court* (2004), at 143.

42 See G. Bitti, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (1999), Article 64, margin no. 30 who stresses that this will give the presiding judge the possibility to "ask a witness if he or she desires to make a general statement before the examination and cross-examination in order for the judges to get information not subject to an oriented questioning made by the parties".

43 Cf. Tochilovsky, *supra* note 17, at 270; also Higgins, *supra* note 26, at 395.

44 See UN General Assembly document A/54/634 of 22 November 1999, para. 82.

45 See Kirsch, *supra* note 17, at 279 who also highlights this problem.

46 See H.J. Behrens, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (1999), Article 69, margin no. 40 who highlights that "[d]ue to this formulation, the Court will not be allowed to call evidence on its own authority". This power, however, is given to the Trail chamber by Article 64 (6) (d), see G. Bitti, ibid, Article 64, margin no. 23.

proactive during trial proceedings in order to ensure the "equality of arms" between Prosecution and Defence and enhance the efficiency of trial proceedings. Rather, the drafters of the Rome Statute chose to use the phrase "the presiding judge *may* give directions for the conduct of the proceedings" in Article 64 (8) (b).[47] Nevertheless, this sentence is very important because it opens the possibility for a more proactive judge who is in charge of interrogating the witnesses and asking for further evidence when necessary. This latter power is expressly given to the Chamber by Article 64 (6) (d).[48] This sentence also stands in the way of people who argue that the ICC trial proceedings are nothing more than a typical party proceeding known from the common law system. As has been stated in many different places, the ICC proceedings are a *sui generis* proceeding with aspects of both common law and civil law system.[49] Since the Rome Statute and the Rules of Procedure and Evidence are drafted in way that leaves room for the discretion of the judges, it will be in the hands of the first Trial Chambers and of course the Appeals Chamber to form the right amalgam between both systems. However, it will be crucial for efficient proceedings that the judges take up their responsibility and become more active than in the classical party proceeding. At the same time, it is important that the Prosecutor prepares the case in a well-structured way, because the conduct of the trial will depend very much on the preparatory work done by the Prosecutor.[50]

2.2.3. Proper guidance by proactive judges is needed

The reason for the demand to have more proactive judges is that without proper guidance by the judges, there is too much freedom for the parties to prolong the trial ad infinitum, as has e.g. been shown by cases like the *Milošević Trial* in the ICTY.[51] The classical divide known from the adversarial system between Prosecution case and Defence case takes often too much time in situations like those which will be dealt with by the ICC. It took more than two years for the ICTY Prosecutor to finish the presentation of her case and of course the defence has every right to use the same amount of time to present their witnesses and other evidence.

If you follow this classical approach also before the ICC, cases will probably take much longer than expected, even with the ICC Prosecutor actually trying to limit his charges to the ones with clear evidence and only a few counts, like e.g. in the *Lubanga* case. The classical approach with Prosecution case and Defence case mainly means that it takes much more time to finish a trial. It would probably be much more efficient if the Trial Chamber, i.e. the presiding judge, would take a lead role in ex-

47 Emphasis added.

48 See Bitti, *supra* note 42, margin no. 23.

49 See e.g. C.T. McLaughlin, 'The *Sui Generis* Trial Proceedings of the International Criminal Court', (2007) 6 *The Law and Practice of International Courts and Tribunals* 343, at 353; also C. Kress, *supra* note 17; for a detailed analysis cf. Orie, *supra* note 22, at 1475.

50 Arguing in the same direction, Tochilovsky, *supra* note 17, at 270.

51 See Boas, *supra* note 19, at 193 where he shows the lessons which have been learned from the *Milošević* case with regard to case management.

amining the evidence, and make extensive use of Article 64 (8)(b).[52] This idea is supported by very recent research which has shown the importance of proactive judges in international criminal proceedings in order to overcome difficulties created by the very own characteristics of international criminal cases.[53]

2.2.4. Judges are only able to speed up proceedings when they have enough information

However, the judges will never be able to play such a proactive role when they are not properly informed about the background of the case.[54] In a classical adversarial trial the judge does not have to know every little detail of the case because he is mainly seen as the arbiter or moderator of the "fight" between Prosecution and Defence. It could even be seen as endangering his impartiality and independence if he had too much information about the case. This is also the reason why lawyers and especially judges in an adversarial system will always be very reluctant, if not completely against preparing a case with a "dossier", i.e. a collection of documents "containing the results of the pre-trial investigations [which serves] the judge in the preparation or the conduct of the trial".[55] The general idea in an adversarial system is that disclosure takes place between the parties and they deal with the evidence in preparation for the trial while the judges mainly watch from the sidelines. In civil law proceedings, it is the "dossier [which] fulfils the function of the common law disclosure rules",[56] something which seems to be unthinkable for a common law lawyer.

But if one wants to speed up proceedings, it seems that one should overcome this general suspicion towards an "informed" judge. The experience during the last 15 years of ICTY proceedings have shown that the judges in the ad hoc tribunals have changed their rules of proceedings from an almost completely adversarial system to one which encompasses more and more inquisitorial features.[57] There are commentators who believe that nowadays the respective provisions of the ICTY Rules "tend

52 Already arguing for this approach before the ICC became operational: Safferling, *supra* note 2, at 220.

53 R. Byrne, *The Hidden Art: Efficiency and Adaptation in International Trial Practice*, paper presented at International Criminal Court, The Hague, 17 November 2008 (on file with author), when stating that "Proactive direction and clarity from the bench can significantly facilitate the adaptation of lawyers to international trial practice and *enhance the efficient management of proceedings*" [Emphasis added].

54 Along the same lines, see Tochilovsky, *supra* note 17, at 271.

55 Cf. Orie, *supra* note 22, at 1451.

56 See Ambos, *supra* note 23, at 15 with reference to Orie, *supra* note 22, at 1484.

57 D. Mundis, 'From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence', (2001) 14 *Leiden Journal of International Law* 367-382; Higgins, *supra* note 43; Ambos, supra note 23, at 5; V. Tochilovsky, 'Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia', in H. Fischer, C. Kress & S.R. Lueder, *International and National Prosecution of Crimes Under International Law – Current Developments* (2004), at 633.

toward a *flexible* civil law approach … with a *wide* discretion of the Court instead of the rather strict common law approach of a system of exclusionary rules.[58] A specifically created ICTY commission under the lead of Judge Bonomy – a Scottish judge having a common law background – also came to the conclusion that the adaptation of some civil law components, especially a more pro-active bench would increase court efficiency.[59] In that regard, it is worthwhile to repeat a quote which has already been cited by a trial attorney from the ICTY in the context of ICTY proceedings but has the same value for ICC proceedings,[60] because it expresses the main problem of the traditional disclosure proceedings:

> "The advantages of the [European civil law] dossier are in relation to availability of exculpatory material, the timing of disclosure and a more full disclosure of the way the investigation has developed. The common law rules … have gone a long way to ensuring that information helpful to the accused is brought to notice, but disclosure does not commence until after the proceedings have been instituted. This can work to the disadvantage of the defence where, for example, access to exhibits is denied until long after they have been examined and reported on by an expert instructed by the police".[61]

It is essential to find a way in which the judges of the ICC can be informed properly, thus being able to take active steps during proceedings. In civil law proceedings this situation is achieved by the establishment of a "dossier" which is started during proceedings containing all the exonerating and incriminating circumstances and which is, after the confirmation of charges, handed over to the trial chamber.[62] In this context, there is no such thing as the classical disclosure, but the Defence has in principle the right to access the dossier during the preparation of the trial.[63] Usually the Defence receives a copy of the dossier with the condition that it has to be treated according to ethical standards. Of course, there will be exceptions to this general possibility of access to the dossier in cases where sensitive information is concerned or witnesses have to be protected.

Nevertheless, the Defence's access to a dossier in an inquisitorial system seems to be slightly easier to achieve than the disclosure proceedings during an adversarial trial.[64] The reason is very clear: in an adversarial proceeding, the Prosecution tries to protect its information as long as possible because they believe that they maintain

58 See Ambos, *supra* note 23, at 22.

59 Cf. F. Pocar, Letter Dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2006/353 (2006), at 7.

60 Cf. Tochilovsky, *supra* note 17, at 273.

61 J. Niblett, *Disclosure in Criminal Proceedings* (1997), at 213-214.

62 Cf. Orie, *supra* note 22, at 1451.

63 Ibid.

64 Also in favour of a dossier approach international criminal proceedings: Tochilovsky, *supra* note 17, at 273.

an advantage ("knowledge is power"[65]). Although a certain tendency of this attitude can also be found by a civil law Prosecutor, it is much less developed because in the end it is the judges' responsibility to "find the objective truth" and the judges will take care of deciding whether all necessary steps have been taken to find this objective truth. In that regard, one probably can say that the main difference between the two systems is a shift of responsibility. While in an adversarial system it is, of course, the responsibility of the parties to take care of the development of their case, in inquisitorial proceedings this responsibility has shifted to the judges and the parties only have the possibility to suggest a possible way in which the proceeding should be led. The final word lies with the judges. It might be worth a thought to demand that in trial proceedings before the ICC, judges should also take up this responsibility for the sake of fair and especially expeditious proceedings.

In this context, it is important that the judges of the Trial Chamber have the possibility to prepare themselves accordingly using a collection of documents provided to them by the Prosecutor and the record of the pre-trial proceedings. However, it is suggested that this collection of documents should *not* be referred to as a "dossier".[66] First of all, the mere number of documents will prevent that this collection of documents will resemble anything comparable to a dossier from a national system, although there might even exist very large cases with a comparable number of documents in national cases when dealing, e.g. with terrorist attacks.[67] The second, maybe even more important reason is that the drafters of the Rome Statute deliberately avoided most of the "typical" terminology coming from national criminal systems (with the exception of the term "disclosure") because they were aware that this would always carry a heavy load of tradition and already established concepts.[68] Personal experience has shown that lawyers from an adversarial system will react very reluctant and sceptical when confronted with the term "dossier" for the very understandable reason that this concept is not known to such a great extent in the Anglo-American legal system. Therefore, one should try to stick to the language used by the Rome Statute and the Rules of Procedure and Evidence as closely as possible, even if this means that the terminology sometimes appears to be a bit complicated and vague. In its decision of 9 November 2007 on the Timing and Manner of Disclosure and the Date of the Trial, Trial Chamber I requested the prosecution to "serve a document

65 Sir Francis Bacon, Religious Meditations, Of Heresies, 1597 available at <www.quotationspage.com/ quote/2060.html> (last visited on 28 January 2008).

66 The Informal Expert Group, see supra note 8, at 70 rightly comes to the conclusion that "it might be worth considering not to resort to the controversial "dossier-approach" right from the beginning of the Court's operation".

67 A famous example being the indictment against the Baader-Meinhof Gang, cf. *infra* note 109, in which the dossier included 50.000 pages, and the indictment consisted of 354 pages; 1.000 witnesses were asked to testify, 1.000 expert opinions were taken into account; 40.000 pieces of evidence were ready to be inspected; see the exact numbers at <www.swr.de/nachrichten/deutscher-herbst/-/id=2070672/nid=2070672/did=2116442/1fpg01u/index.html> (last visited 10 February 2008).

68 See Kress, *supra* note 17.

which explains its case by reference to the witnesses it intends to call and the other evidence it intends to rely upon"[69] and that "this document shall explain how the evidence relates to the charges".[70] According to the Trial Chamber "[t]his document will be referred to as the 'summary of presentation of evidence'".[71] Of course, this is not a term which is well-established, but since we are dealing here with a *sui generis* trial proceeding, one should welcome such a development, although it still does not cover a collection of "all" documents relevant for the case.

One might even think about the idea whether it would not be sensible to request the Prosecution to already include such a summary in the document containing the charges. The respective provisions of the Statute,[72] of the Rules[73] and Regulations of the Court ("the Regulations")[74] would provide enough basis for requesting such a summary. They already request the Prosecutor to submit "a *detailed description of the charge*s together with *a list of evidence* which he or she intends to present at the hearing".[75] However, as already demanded by the Trial Chamber, it would be extremely helpful for streamlining the proceedings if the Prosecutor would be required to link the charges to the respective evidence because then the danger of presenting unnecessary or superfluous evidence is reduced. It seems as if Judge Trendafilova had something like this on her mind when she suggested that the pre-trial disclosure should be approached on the basis of a charging document in order to streamline proceedings.

There is a need for the Prosecution to be forced to present its case as structured and streamlined as possible, already during the pre-trial phase of the trial.[76] As already mentioned, the charges against the accused should be directly connected with the supporting evidence. The length of pre-trial proceedings would dramatically decrease if the Prosecution was forced to present its case in a strictly organized and structured form. The OTP Legal Advisory Section itself actually has developed an impressive tool to present the enormous amounts of evidence: the ICC Case Matrix.[77] This tool could and should be used by all parties and participants of the proceedings. The only way they can be forced to use it, however, is by order of the Pre-trial and Trial Chambers although one should maybe think about the question whether a less rigid system might also be helpful.

69 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, Case No. ICC-01/04-01/06, 9 November 2007, para. 26.

70 Ibid.

71 Ibid.

72 Article 61 (3) (a) and (b).

73 Rule 121 (3).

74 Regulation 52 of the 2004 Regulations of the Court, ICC-BD/01-01-04; available at <www.icc-cpi.int> (last visited on 20 January 2008).

75 Rule 121 (3) [Emphasis added].

76 See Higgins, *supra* note 43, at 398.

77 For details concerning the Case Matrix tool, please refer to <www.icc-cpi.int/library/ICC-CaseMatrix_ENG.pdf>.

It will be extremely important that the Trial Chamber uses its powers under Article 64 (8) (b) to see that the Prosecution complies with the standards set up for the summary of the evidence.[78] It is important to stress that Article 64 (8) (b) not only encompasses the management of the hearing as an independent arbiter, but gives the presiding judge the power "to control the manner of questioning the witness"[79] and any other issue connected with the presentation of evidence. Only then the OTP will see the necessity to structure their evidence from a very early stage. It would not be realistic to expect the Prosecution to restrict itself and the extent of their filings when they are not forced by the Chamber. That this will not be an easy process has already been shown by the pre-trial phase in the *Lubanga* case when Pre-Trial Chamber I, under the direction of the presiding Judge Jorda, became active concerning the protection of witnesses and made aspirations to monitor the development of the pre-trial phase.[80] The reaction of the Prosecution was not always positive,[81] to say the least. But in order to make the ICC an efficient Court which spends its budget in a reasonable way, it would be desirable that all participants do their utmost to contribute to fair and expeditious proceedings.

2.2.5. Self-Representation of the accused should not be used to obstruct the proceedings

While the preceding paragraphs mainly dealt with the responsibilities of the OTP and the judges as organs of the Court, one should not forget to stress the responsibility of a decent Defence. Recent trials in the ICTY (*Milošević*, *Šešelj*) have shown that it has become a quite popular tactic among accused to obstruct the proceedings by using the right to self-representation as a means to constantly interrupt a normal way of proceeding in the trial.

As other renowned commentators have already stressed, the right to self-representation should not be understood in a way that it makes a criminal trial almost impossible to be completed.[82] Of course, the right to self-representation goes to the

78 See Kirsch, *supra* note 17, at 286 who stresses the importance that "the judges have to ensure that the Prosecution complies with the obligation to establish the truth."

79 See Bitti, *supra* note 2, margin no. 30.

80 See e.g. Pre-Trial Chamber I, 'Decision to Convene a Status Conference', ICC-01/04-9, 17 February 2005; for an extensive overview on the question of victims' participation during the Pre-Trial phase, see C. Stahn, H. Olasolo & K. Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *JICJ* 219-238.

81 See e.g. the Prosecutor's reaction: ICC, 'Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference', ICC-01/04-12-Anx.

82 R. J. Wilson, 'Assigned defense counsel in domestic and international war crimes tribunals: The need for a structural approach', (2002) 2 *International Criminal Law Review* 145, at 193; M.P. Scharf, 'Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals', (2006) 4 *JICJ*, 31, at 46; see also N.H.B. Jorgensen, 'The Problem of Self-Representation at International Criminal Tribunals: Striking a Balance between Fairness and Effectiveness', (2006) 4 *JICJ* 31-46; J.T. Tuinstra, 'Assisting an Accused to Represent Himself: Appointment of *Amici Curiae* as the Most Appropriate Option', (2006) 4 *JICJ*, 47-63 argues for the assignment of *amicus curiae* which does not

core of a fair trial, but one has to keep in mind that the original idea behind this right of the accused was to get a possibility to defend them at all, not to block the trial forever.[83] Even in many common law jurisdictions it is well-established that there are ways to institute a duty counsel in cases where the accused violates the dignity of the Court.[84] Against the background of what has already been said about the complexity of proceedings before the ICC, one can have serious doubts if the accused should be allowed to defend him without any counsel at all. There might be the danger that an accused without a counsel will have grave disadvantages in preparing the trial without assistance.

Nevertheless, Article 67 (1) (d) of the Rome Statute is very clear about the right of the accused 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 …".[85] Interestingly, this wording is almost identical to Article 14 of the ICCPR ("to defend himself in person")[86] and Article 6 of the ECHR ("to defend himself in person"),[87] which have been ratified by states that know the institution of assigned counsel. Those countries, however, are usually not seen as in violation of their treaty obligation. The drafters of the Rome Statute obviously had already foreseen that there might be cases when there would be the need for an assigned counsel. Article 67 (1) (d) goes on to state the possibility "to have legal assistance assigned [to the accused] by the Court in any case where *the interest of justice* so require". This seems to be an open clause for cases in which the interest of justice, including the interest to conduct fair and expeditious proceedings, would make it necessary to assign duty counsel to the accused.[88] This provision has to be read in conjunction with Article 63 (2) which formulates the exception to the accused's presence: "[i]f the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside of the courtroom…". This provision is further elaborated by rule 170 of the Rules of Procedure and Evidence.

Again, self-representation of the accused is an example for a situation facing the Trial Chambers of the ICC which requires the "strong hand" of the presiding judge to prevent the proceedings by unnecessary disruption. That the assignment of a duty counsel under certain special circumstances is in compliance with international hu-

seem completely persuasive because this institute which has its origin in common law system and was not designed to be applied in these kind of cases.

83 For a very thorough and enlightening article on the origins and the true nature of the right to self-representation, see Scharf, *supra* note 82, at 34.

84 Cf. Scharf, *supr*a note 82, at 38.

85 Cf. W.S. Schabas in O. Triffterer (ed*.), Commentary on the Rome Statute of the International Criminal Court* (1999), Article 67, margin no. 30.

86 See Article 14 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

87 See Article 6 of the 1950 European Convention of Human Rights, 213 UNTS 222.

88 Schabas, *supra* note 85 suggests the assignment of *amicus curiae,* a procedure which has proven problematic in the context of the ICTY cases, cf. Scharf, *supra* note 82, 31-46.

man rights law and especially the right to a fair trial has been confirmed, among others, by the European Court of Human Rights.[89] In contrast, to use the right to self-representation as a means to undermine the authority of the Court and obstruct the proceedings stands in complete violation of the very sense of an international criminal procedure.

The dignity of the Court, the interest of justice, and the interests of the victims also has to be taken into account in this regard. It is definitely not the object and purpose of international criminal proceedings to give the defendant the possibility to use the trial as a forum to give political speeches, to insult the judges, the victims and the witnesses and not be held responsible for this. In this context, the institution of a duty counsel would have the advantage that counsel would be bound by certain professional ethics which probably prevent incidents like these which took place in the *Milošević* and *Šešelj* trials. While judges and prosecutors have been supported in many ways during the last 15 years of international criminal proceedings, it seems absolutely necessary for fair and expeditious proceedings that the training, support and imbursement of defence counsel develops accordingly. Only when attorneys with the highest possible qualification will be representing defendants before the ICC, one can be sure that the system of international criminal proceedings has a future.

2.2.6. Participation of victims creates the need for a new balance between the parties

Finally, as one of the last but not least important aspects of the ICC trial proceedings, the challenge created by the participation of victims in the ICC proceedings according to Article 68 (3) should not be underestimated.[90] Celebrated as one of the major achievement during the drafting of the Rome Statute, one can easily come to the conclusion that the participation of victims might be the biggest challenge for the ICC trial proceedings. This is especially true because at the moment the proceedings are still very much influenced by the adversarial approach which usually does not foresee the participation of victims. It is an aspect borrowed from the inquisitorial system and might be a good example of how difficult it is to combine the two systems. It is comparable with the daunting task of combining two sets of jigsaw puzzles with complete different pictures into one coherent and harmonic image: it seems almost impossible.

The integration of victims into a traditional party proceeding will normally threaten the careful balance which is usually upheld between Prosecution and Defence, disturbing an equilibrium which has been reached over centuries of legal tradition.[91]

89 For more details, see M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), at 259.

90 See also D. Donat-Cattin, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), article 68, margin nos. 22-25 and C. Jorda & J. de Hemptinne, The Status and Role of the Victim, in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court – A commentary* (2002), 1387-1420.

91 See Jorda & Hemptinne, *supra* note 90, at 1399; arguing along the same lines: V. Tochilovsky, *supra* note 17, at 273.

However, the experience from the Italian national system shows that it is possible to "combine an adversarial procedure with the possibility of conspicuous participation of victims in trials".[92] But there is also the danger that the participation of victims will delay the proceedings and create even more lengthy trial. To that end, again a stronger role of the presiding judge is inevitable in order to prevent that the Defence is faced with actually two counterparts, and in the end is simply outnumbered. Only a proactive bench will be able to uphold the balance which is necessary for a fair trial that respects the rights of the accused and is nevertheless efficiently managed.

Another approach – which probably will not be very much favoured by NGOs and victims organisations – is to restrict the number of victims who will be allowed to participate under Article 68 (3). As one ICTY Judge has stated in a different context, but which is nevertheless also valid for this aspect of the trial: "Ours is first and foremost a criminal court: successful prosecution of the guilty and the exoneration of the innocent must remain our central concern."[93] In that regard, it seems necessary to take careful steps when admitting victims to the proceedings. Accordingly, Trial Chamber I seems to go into the right direction when stating in its recent 'Decision on victims' participation' that "A *general* interest in the outcome of the case or in the issue or evidence the Chamber will be considering at that stage is like to be *insufficient*" to participate as a victim in the proceedings.[94] However, in his separate and dissenting opinion, one of the trial judges opts for an even more restrictive approach when demanding that:

> "the Chamber must assess 1) whether the applicant is a person who has suffered harm as a result of the crimes charged and confirmed against the accused; 2) whether the victim applicant's interest are affected in the particular case; 3) whether participation by the victim is appropriate at the particular time and stage within the proceedings; and whether their manner of participation would prejudice the rights of the accused to a fair, impartial and efficient proceeding.[95]

He gives a very valid argument for this restrictive approach when stating in the same paragraph that "by providing the possibility of victims' status to applicants who have suffered harm not linked to the charges in the present case, the rights of those victims who do fulfil the criteria of victim are compromised."[96]

Another important way for the Chamber to make participation of victims possible without completely blocking the proceedings before the ICC is to request the com-

92 Zappalà, *supra* note 2, at 225.

93 Kwon, see *supra* note 17, at 373 with reference to Judge Bonomy, 'The Reality of Conducting a War Crimes Trial', speech delivered at ETHICS regional workshop for Europe, Riga, Latvia on 8 June 2006.

94 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* 'Decision on victims' participation', ICC-01/04-01/06-1119, 18 January 2008, at para. 98 (emphasis added).

95 Trial Chanber I, *Prosecutor v. Thomas Lubanga Dyilo*, 'Separate and Dissenting Opinion of Judge René Blattmann', ICC-01/04-01/06-1119, 18 November 2008, at para. 32.

96 Ibid.

mon legal representation of victims envisaged in rule 90 (2). Because even if one opts for a narrow definition of the term "victim", war crimes cases encompass almost by nature a great number of victims, also when the Court is only dealing with one perpetrator. Therefore, common legal representation would be a very good tool in order to streamline the proceedings, but nevertheless enable victims to make their voices heard.[97] However, it has to be kept in mind that the participation of victims will pose one of the biggest challenges the ICC has to face, and with reference to the issue of victims' reparations two commentators stated correctly: "[it] is likely to jeopardize the expeditious administration of justice".[98]

2.3. A spirit of cooperation is needed

Although this essay has shown that there is a need for a proactive bench and a strong presiding judge who is taking up the responsibility to lead the trial and seek actively for the truth by being the main actor during the presentation of evidence, there might be even a greater necessity for a spirit of cooperation[99] among the individual participants of an ICC trial.[100]

International criminal proceedings are not easy. Every day poses new challenges and brings people to the limits of their individual capacity. One reason is of course the complexity of the situation in which the alleged crimes take place. Another important factor is the mere fact that these are international proceedings. People coming from all over the world have to find a common (legal) language to deal with problems which are way beyond the problems they are used from their national legal background.[101] In many ways the colleagues at the international criminal courts and tribunals still lack a common legal culture[102] because the discipline of international criminal law is so young compared to other areas of law.

The Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Court provide the Trial Chamber with a lot of answers concerning the legal framework in which the trial before the ICC has to be conducted. However, there are a number of provisions which leave place for interpretation ("constructive ambiguity").[103] This constructive ambiguity is especially exemplified by the fact that the Rome Statute as well as the Rules of Procedure and Evidence do not give any explicit

97 For more detail on victims' participation, please refer to G. Bitti & F. Håkan, 'Participation of Victims in the Proceedings', in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 456-474.

98 See Jorda & J. Hemptinne, *supra* note 90, at 1399.

99 Cf. Kress, *supra* note 17.

100 See Kress, *supra* note 17, at 609 stresses the need for a "mutual professional trust" and concludes that "the ICC's normative framework *allows* for a degree of coordination between Prosecution and defence in their investigative activities".

101 Arguing along similar lines Tochilovsky, *supra* note 57, at 627.

102 See Kirsch, *supra* note 45, at 282.

103 For some instructive examples of "constructive ambiguity" in the Rome Statute, see Kress, *supra* note 17, at 605.

guidance on two important questions: (i) whether the Trial Chamber should have access to the record and examine it before the beginning of the trial; (ii) whether the record created during the pre-trial phase should be amended with documents disclosed after the confirmation of charges and before the actual trial?[104] This room has to be filled by the Prosecutor and especially the judges of the ICC, which is not always an easy task if you have in mind that in many areas it is pioneer work, e.g. concerning the participation of victims in trial proceedings. It is therefore of utmost importance that an institutional memory is established which makes it possible that these difficult questions are answered in a coherent way. A certain responsibility, of course, lies here with the Appeals Chamber.

In that regard, it is only natural that experienced lawyers in difficult situations try to draw on their vast experience accumulated during their professional routine in their home jurisdiction. Normally, this is what makes a good lawyer, the instinctive knowledge what has to be done in difficult legal and factual situations. However, this is only partly true for the work at the ICC. Of course, people who come from working at the *ad hoc* Tribunals will use this experience to deal with their daily challenges,[105] and prosecutors, judges or other staff members who come from a national background will draw on their respective experience from their national practice. But, and this is a very important "but", no one can offer the experience of having already witnessed several trials before the ICC and having dealt with its rules of procedure on a day-by-day basis. And people who are already used to work in one of either system (civil or common law) should not try to just stick to their system because by this they gain an advantage over the "other side". It is common knowledge that civil law colleagues who come to work in international criminal proceedings will face – at least at the beginning – problems in adjusting to the special characteristics of the adversarial system.[106] And the common law colleagues sometimes seem to guard their knowledge and try to "defend" their system in any way possible.[107] Although this is more than understandable from a human perspective because nobody wants to lose their expert knowledge in such an important area, it should not lead to a situation where one system "overrules" the other. Rather, the Rome Statute offers the unique possibility to construct *sui generis* trial proceedings for the future.

This will be the challenge for the years to come, to fill the ICC trial proceedings with life, to deal with them on a daily basis and to find solutions for all the problems which they will face on the road ahead. This can only be achieved when a spirit of cooperation is achieved not only among all the organs of the Court, but also between all participants of the proceedings, including victims and Defence.

There will be people who ask why the defence should cooperate in any way with the Court. This is a valid question, at least at this moment in time. There are com-

104 Highlighting these two crucial points, see Kress, *supra* note 17, at 612.

105 Actually the various collections of ICTY/ICTR jurisprudence are already crucial material for researching current problems existing in the ICC proceedings; see e.g. J. Jones, '*International Criminal Proceedings*' (2003).

106 See Tochilovsky, *supra* note 17, at 274.

107 Interesting examples are presented by Tochilovsky, *supra* note 17, at 274.

mentators who suggest that the "ICC's normative framework allows for a degree of cooperation between prosecution and defence in their investigative activities".[108] Maybe this is a bit too optimistic, since in general one cannot expect – even in an inquisitorial system – the two main opposing parties to cooperate with each other. But what is important is that the international criminal justice system will only be successful on the long run when you have prosecutors, judges and defence counsel who not only believe in the necessity of this system but also adhere to the same kind of ethical values. This is something which is almost natural in a national system. Only in very few dramatic cases[109] the defendant actually questions the legitimacy of the Court. In 99% of the cases, the defendant accepts the jurisdiction of the national court which is dealing with his case and situations like in the *Milošević* or *Šešelj* case where the defendant did not accept the authority of the UN-Tribunal, do not usually take place. The first two cases before the ICC could be a slight indication that change is underway, since both defendants seem to choose their defence according to the system which the Rome Statute is providing, although it is definitely too early to make a final statement in this regard.

3. What are the prospects for change?

The necessity of an efficient judge-led trial proceeding is self-explanatory if one has in mind the many challenges the ICC is going to face during the next couple of years. However, the ICTY experience has shown that a process from a purely adversarial proceeding to a more inquisitorial approach can take more than a decade.[110] Of course, the ICC is already benefiting from the ICTY/ICTR know-how, but will also make its own independent steps. The prospects for the *Lubanga* trial are still very open, since the presiding judge comes from a common law country while the two other judges have a civil law background. This could make a good combination when discussing and finding the solutions for the *sui generis* procedure of the ICC, although the discussions among them will probably sometimes be rather difficult.[111] The first decisions of Trial Chamber I have already indicated that the bench seems to be willing to go an independent way (disclosure procedure, victims participation, witness preparation).[112] This gives hope for the future while one should never forget that change takes time ("trial and error"), and after 15 years of defining most of the substantive international criminal law, the new challenge lies in finding a good ap-

108 See Kress, *supra* note 17; see also the Informal Expert Paper, *supra* note 8, at para. 24.

109 Like e.g. the trials against the members of the German terrorist movement "Red Army Faction (RAF)", see S. Aust, *The Baader-Meinhof Group: The Inside Story of a Phenomenon* (1987).

110 Actually, it took more than ten years until the ICTY instituted a special expert group to find ways for speeding up the proceedings.

111 See Tochilovsky, *supra* note 17, at 274 who has already highlighted how difficult the cooperation between common law judges and civil law judges can be.

112 For an overview of the most recent decisions of Trial Chamber I in the Lubanga case, please visit <www.icc-cpi.int/cases/RDC/c0106/c0106_docTrial1.html>.

proach for an international criminal procedural law. One case will not be enough for this daunting task. In that context, it is to be seen as a positive development that the ICC Prosecutor restricts himself by charging only crimes which can be proven by accessible evidence and have a background which can easily be explained in court. Of course, one has to find a good balance with regard to the overall gravity of the crimes committed. There should be a way in which the Prosecutor finds representative crimes which can be proven in an efficient way.

4. Conclusion

This contribution has shown that there are many challenges ahead for the first Trial Chamber of the ICC and has tried to highlight in a cursory way some possible solutions. The ICTY experience has proven that international criminal procedure as it exists today has certain drawbacks which need to be overcome in the years to come. In this context it will be necessary that all participants show the willingness to go new ways, and as Judge Kwon has put it "this task requires a considerable amount of vision and mutual understanding"[113] and that "there is also a core duty … to think 'internationally'".[114] Therefore, it will be indispensable to rethink some already well-established concepts of international criminal law. Hope lies here in the new generation of young international criminal lawyers who will learn the principles of international criminal law already while still being open for new approaches. Especially before the ICC, there is the need to find a good mixture between common law and civil law elements in order to achieve universal acceptance. Only when the two major concepts of criminal systems are incorporated in ICC proceedings will the Court be a truly international court representing the world (even though it will still not encompass all legal systems of the world). Some people will argue that this will lead to a compromise which does not necessarily reflect the best solution, but by the time the system is used on an everyday basis, a new efficient and fair procedure will develop which gives its own answers to the problems created by international crimes and their perpetrators. This will take considerable time and many decisions by the ICC, and it is therefore crucial that the international community as well as academics, NGOs and other commentators monitor the proceedings regularly but keep their criticism constructive and objective. Otherwise this great project of a Permanent International Criminal Court may fail because of wrong expectations, although one of the ICC judges has recently stated: "Nothing is stronger than an idea whose time has come".[115]

113 See Kwon, *supra* note 17, at 363.

114 Id, at 376.

115 See H.-P. Kaul, 'Closing remarks and outlook on the ICC' during the conference *The International Criminal Court at Work: Challenges and Successes in the Fight against Impunity*, 22 September 2007, see report available at <www.icc-berlin2007.de/Conference_Report_31.10.07.pdf>. (last visited on 28 January 2008).

Chapter 26 The Trial Chamber's discretionary power to devise the proceedings before it and its exercise in the trial of *Thomas Lubanga Dyilo*

*Reinhold Gallmetzer**

1. Introduction

How to conduct trial proceedings was one of the most controversial issues during the drafting of the Rome Statute ('Statute') and the Rules of Procedure and Evidence ('Rules'). A participant in the negotiations characterised the discussions as a "clash of cultures between the civil law and the common law".[1] Because it was difficult to agree with respect to the conduct of trial proceedings, many questions are not regulated in detail by the Statute and the Rules but are instead left to be determined by Trial Chambers exercising their discretion within the framework of the Statute and the Rules. Although the Regulations of the Court ('Regulations') provide additional guidelines, the Judges' discretion to tailor trial proceedings is remarkably broad.

When a case is transferred to a Trial Chamber, it is not yet ready for trial. It is the Trial Chamber's duty to take measures to prepare it for trial. Among other things, the Trial Chamber must establish the necessary procedures that will govern the proceedings. For these purposes, the Statute and the Rules provide the Trial Chamber with the discretionary power to regulate its own procedure, within the framework of the Statute and the Rules. The Trial Chamber's discretion covers most of the procedural aspects of the proceedings conducted before it.

In this context, a Trial Chamber should not aim to adopt a procedure that is common-law adversarial or Romano-Germanic inquisitorial, but should aim to devise the procedure that best assists it in ensuring that a trial is fair and expeditious and is

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1 P. Lewis, 'Trial Procedure' in R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 547-550.

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conducted with full respect for the rights of the accused and due regard to the protection of victims and witnesses.[2]

The first section of this paper examines the procedural regulatory power conferred upon a Trial Chamber by the Statute and the Rules and identifies some of the main areas that require the Trial Chamber's direction. The second section briefly analyses how Trial Chamber I exercised its regulatory power in the proceedings against *Thomas Lubanga Dyilo*, the first trial proceedings to be held at the ICC.

2. The Trial Chamber's procedural discretion

2.1. Legal basis for the exercise of the Trial Chamber's discretionary power

Article 64 (3) (a) of the Statute provides that, upon assignment of a case for trial, the Trial Chamber must confer with the parties with a view to adopting the necessary procedure. Hence, the Prosecution and the Defence have a right to be heard on matters pertaining to the conduct of the proceedings.

The Trial Chamber's power to rule on issues concerning the conduct of proceedings is enshrined in Rule 134. The Trial Chamber may do so prior to the commencement of the trial either after having heard the parties on its own motion, or at the request of the Prosecutor or the Defence.[3] The Trial Chamber also maintains its regulatory power after the commencement of trial and throughout trial proceedings, when it may rule on any issue that arises in the course of trial.[4]

In exercising its regulatory power, the Trial Chamber must ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused, as well as with due regard for the protection of victims and witnesses.[5]

In order to confer with the parties and give instructions as to the conduct of proceedings, the Trial Chamber must hold status conferences. A first status conference will be held promptly after the Trial Chamber is constituted, during which a provisional date for trial will be set.[6] Other procedural issues may also be discussed during this initial status conference. Additional status conferences may be held as necessary in order to facilitate the fair and expeditious conduct of proceedings.[7] The Prosecution and the Defence may also be permitted to present their views in writing regarding relevant procedural issues.

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2 See Article 64 (2). Similarly, the ICTY Appeals Chamber held that 'the purpose of the Rules is to promote a fair and expeditious trial and the Trial Chambers must have the flexibility to achieve this goal.' See *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No. IT-95-14/1-T, 16 January 1999, para. 19.

3 Rule 134 (1).

4 Rule 134 (3). See also Article 64 (8) (b).

5 Article 64 (2). See also Article 64 (3) (a), Article 64 (8) (b).

6 Rule 132 (1).

7 Rule 132 (2).

2.2. Areas that require or may be subject to direction from the Trial Chamber

Article 64 (3), Rule 140 and Regulation 54 identify areas that require or may be subject to direction from the Trial Chamber, mostly prior to the commencement of trial. The following are some of the main issues that are subject to the Trial Chamber's regulatory power.

2.2.1. Manner in which disclosure and inspection are to be handled

The scope of the Prosecutor's disclosure obligations to the Defence extends to the names of the witnesses that the Prosecutor intends to call to testify, as well as to copies of any previous statements made by those witnesses.[8] In addition, the Prosecutor must permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are material to the preparation of the Defence or that the Prosecutor intends to use as evidence at the confirmation hearing or at trial, or which were obtained from or belonged to the person who is the subject to the investigation or prosecution.[9] As soon as practicable, the Prosecutor must disclose to the defence evidence in the Prosecutor's possession or control which the Prosecutor believes shows or tends to show the innocence or mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.[10]

Although the Defence is obviously not subject to an equivalent disclosure obligation, it must notify the Prosecutor of its intent to raise the existence of an alibi or raise a ground for excluding criminal responsibility.[11] In addition, the Defence must permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the Defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.[12] Moreover, the Trial Chamber may order disclosure of any other evidence.[13]

In practice, disclosure is a two-stage process: while some disclosure will take place prior to the confirmation of the charges under the supervision of the Pre-Trial Chamber,[14] the Trial Chamber must "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial".[15] In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of proceedings, the Trial

8 Rules 76 (1) and (2).

9 Rule 77.

10 Article 67 (2).

11 Rule 79 (1).

12 Rule 78.

13 Rule 79 (4).

14 Article 61 (3) (b).

15 Article 64 (3) (c).

Chamber shall make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence.[16]

As the Prosecution will necessarily have started complying with its disclosure obligations prior to the confirmation hearing under the supervision and direction of the Pre-Trial Chamber, the Trial Chamber may simply adopt the system of disclosure and inspection put in place by the Pre-Trial Chamber in order to ensure that all relevant materials are disclosed prior to trial and that inspection takes place in a timely fashion. However, the Trial Chamber is not bound by any prior decision from the Pre-Trial Chamber to that effect.

In general, to avoid delay and to ensure that trial commences on the set date, any orders pertaining to disclosure and inspection must include strict time limits which shall be kept under review by the Trial Chamber.[17]

The Regulations require the Court to establish an electronic system to support the daily judicial and operational management of court proceedings. Accordingly, evidence other than live testimony must be presented in electronic form whenever possible.[18] The Registry, which is entrusted with the implementation of the electronic system, developed the E-Court Protocol, which is designed to ensure that all necessary information is available to the Court electronically during proceedings. The E-Court Protocol defines the standards for entering information in electronic format. Having entered all relevant information into such a central electronic database, disclosure may take place by simply giving the recipient electronic access to the relevant sections of the database. In addition, the Trial Chamber may also order that information and material subject to inspection pursuant to Rules 77 and 78 be made available to the other party through the central electronic database. However, the Trial Chamber may also disregard the system of disclosure and inspection via the E-Court Protocol and order that disclosure take place *inter partes*, that is, directly from one party to the other and not through the Registry.

With respect to the Prosecutor's duty to disclose exculpatory material pursuant to Article 67 (2), any such material that has not yet been disclosed during the pre-trial phase of the proceedings or that is discovered after the confirmation hearing must be disclosed under the guidance of the Trial Chamber. If the Prosecutor is unsure about whether or not evidence is exculpatory within the scope of Article 67 (2), he may, according to Rule 83, request an *ex parte* hearing as soon as practicable before the Trial Chamber. The Trial Chamber will then rule on whether or not the material must be disclosed, or under what conditions.

The Statute and the Rules provide for certain restrictions on disclosure. Such restrictions concern work product,[19] information which may prejudice further or ongoing investigations,[20] information previously determined to be confidential or relevant

16 Rule 84. See also Regulations 54 (f) and (l).

17 Rule 84.

18 Regulation 26. See also Rule 121 (10).

19 Rule 81(1).

20 Rule 81 (2).

for the protection of victims and witnesses,[21] and documents or information that the Prosecutor obtains on condition of confidentiality and solely for the purpose of generating new evidence.[22] In addition, the Prosecutor may, prior to trial, withhold evidence or information which, if disclosed, could lead to the grave endangerment of a witness' security or the security of the witness' family.[23] During the disclosure process, the Trial Chamber has the authority and the duty to take all necessary steps to protect the interests covered by the disclosure restrictions and to ensure that the parties comply with their respective obligations.[24]

Eventually, the Trial Chamber has the power to actively participate in the fact-finding process.[25] Thus, in order to play a meaningful role in establishing the truth, the Trial Chamber may employ its regulatory power under Article 64 (3) (a) and Rule 134 to require the parties to submit information disclosed to the other party, as well as additional information relevant to the management of proceedings, to the Chamber before the commencement of the trial.[26] Hence, the Trial Chamber may effectively place on the parties a duty similar to the one found in Rule 65*ter* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), which provides for the production of pre-trial briefs.[27]

2.2.2. Manner in which evidence is to be presented

The Statute and the Rules are silent on most issues concerning the presentation of evidence. Article 64 (8) (b) generally prescribes that the Presiding Judge may give directions for the conduct of proceedings. Moreover, Article 64 (2) defines the general principle that the Trial Chamber shall ensure that a trial is fair and expeditious and

21 Rules 81 (3) and (4).

22 Article 54 (3) (e) and Rule 82.

23 Article 68 (5).

24 See for instance Rules 81 (2), (3), and 81 (4), and Rule 82 (3) and (4).

25 According to the Rome Statute, the process of establishing the facts leading to the truth is not left entirely to the parties, in a purely adversarial manner. Rather, the Trial Chamber may play a significant initiating role in this process in a number of different ways. First, pursuant to Rule 140 (2) (c), the Trial Chamber may question any witness testifying during trial. Second, Article 69 (3) provides the Trial Chamber with the authority to request the parties to submit all evidence that it considers necessary for the determination of the truth. This provision applies to both witness testimony and documentary evidence and must be read in conjunction with Article 64(6) (d), which empowers the Trial Chamber to order the production of evidence in addition to that already collected prior to trial or presented during trial by the parties. Third, pursuant to Article 64 (6) (b), the Trial Chamber may, *proprio motu* or upon the request of a party, require the attendance and testimony of witnesses and order the production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in Part 9 of the Statute.

26 Such an obligation goes beyond the disclosure of material included in the record of the pre-trial proceedings transferred to the Trial Chamber pursuant to Rule 121. The content of the record of the pre-trial proceedings is limited to materials relevant for the preparation and the conduct of the confirmation hearing.

27 ICTY Rules 65*ter* (H), (F) and (G).

is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

If the Presiding Judge does not give directions under Article 64 (8) (b), then the Prosecutor and the Defence shall agree on the order and manner in which the evidence is to be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.[28]

In this context, the following issues may be subject to instructions from the Trial Chamber or an agreement between the parties:

Structure of the case: The trial procedure may be structured in an adversarial fashion, whereby evidence is first presented by the Prosecution (Prosecution case), followed by the evidence of the Defence, provided that the Defence decides to rebut the incriminating evidence (Defence case).[29] In this framework, the Prosecution may also be allowed to present evidence in rebuttal and the Defence may be permitted to present evidence in rejoinder. However, evidence may also be presented in a different fashion. For example, the charges may be divided into a number of topics or thematic blocks, such as particular crimes or incidents, background information, issues regarding the responsibility of the accused or technical topics requiring expert evidence. The Trial Chamber could hear all evidence on each of these topics before moving on to the next. Within each thematic block, since the burden of proof lies with the Prosecution, the Prosecution's evidence must be heard first. If the Trial Chamber wishes to play an active role in establishing the truth by requesting the Prosecution or the defence to submit additional evidence,[30] or by summoning witnesses and admitting other evidence *proprio motu* or upon the request of a party,[31] it may exercise these powers either at the end of the trial, giving the Defence a possibility to challenge additional evidence, or at an earlier stage of the trial. The Statute and the Rules do not preclude exclude the Trial Chamber from summoning witnesses at the beginning of the trial, either on its own motion or at the request of a party.

Order of questioning witnesses: Rules 140 (2) (a) and (b) identify who shall be given the opportunity to question a witness, while parts (c) and (d) provide limited guidance regarding the order of questioning. Rule 140 (2) (c) states that the Trial Chamber has the right to question a witness before or after a party referred to in Rules 140 (2) (a) or (b), while Rule 140 (2) (d) gives the Defence the right to examine a witness last. The Rules do not clarify whether or not the calling party may re-examine the witness after he or she has been questioned by the other party pursuant to Rule 140 (2) (b). The need for re-examination may depend on the role that the Trial Chamber decides to play in the proceedings. By making extensive use of questioning witnesses pursu-

28 Rule 140 (1). See also Regulation 43.

29 See Article 67 (1) (i).

30 Articles 69 (3), and 64 (6) (d).

31 Article 64 (6) (b).

ant to Rule 140 (2) (c), an active Trial Chamber may make re-examination mostly redundant.

Manner in which witnesses may be questioned: The Rules do not define the scope of the initial questioning of a witness pursuant to Rule 140 (2) (a). However, bearing in mind the general duty of the Trial Chamber to provide for fair and expeditious proceedings, the initial questioning may be limited to matters relevant to the case. Moreover, while, in principle, evidence should be given freely and without any influence from the participant questioning the witness, the Rules do not provide whether or not, or under what conditions, a participant may ask leading questions to a witness. Pursuant to Rule 140 (2) (b), the scope of the subsequent questioning extends to relevant matters related to the witness' testimony and its reliability, as well as the credibility of the witness and other relevant matters. However, the Rule does not provide for the manner in which the witness shall be questioned. The same applies to re-examination, provided that it is permitted. Eventually, the scope and the manner of the final questioning of a witness pursuant to Rule 140 (2) (d) also needs to be defined. The Trial Chamber, being the ultimate guardian of the fairness of proceedings,[32] has the discretion to determine the most appropriate way in which to conduct the questioning of witnesses by the Bench, and the scope of the questioning.

2.2.3. The admissibility and evaluation of evidence

The Statute's approach *vis-à-vis* the admission of evidence is to eschew most of the technical rules on admissibility,[33] in favour of a system of utmost flexibility.[34] The provisions in the Statute and the Rules are brief and their purpose is to promote fair and expeditious trials, giving the Trial Chamber wide discretionary power and flexibility to achieve this goal. Article 69 (4) provides generally that 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 […].'[35] While the Trial Chamber may freely assess all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69 (4),[36] the Trial Chamber may not impose a requirement of corroboration,[37] and it shall not apply national laws governing evidence, other than in accordance with Article 21.[38] When deciding on the admission

32 Articles 64 (2) and 64 (8) (b).

33 The only two rules on exclusion of evidence are found in Article 69 (7) (evidence obtained by means of a violation of this Statute or internationally recognised human rights) and Rule 71 (evidence of the prior or subsequent sexual conduct of a victim or witness).

34 D.K. Piragoff, Evidence, in R.S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure* (2001), 351.

35 See also Article 64 (9) (a).

36 Rule 63 (2).

37 Rule 63 (4).

38 Rule 63 (5).

of evidence, the Trial Chamber may adopt one of the following analytical methods or a combination thereof:

First analytical method – early filtering of inadmissible evidence: At the moment when evidence is tendered to the Trial Chamber, the Chamber may rule on its admissibility and exclude any evidence it finds inadmissible at this early stage. Eventually, when making its final decision, the Trial Chamber will evaluate the weight of any evidence that was admitted.

Second analytical method – admission of evidence and later evaluation: The Trial Chamber may first admit evidence applying a rather low threshold for admissibility.[39] Then, when making its final decision, the Trial Chamber may consider relevance, probative value and other criteria under Article 69 (4) in order to determine the weight to be given to the evidence as part of the evaluation process.[40]

Given the lack of precision in the Statute and the Rules, there is a risk that, in determining issues of relevance and admissibility without advanced direction, too much time will be wasted and the proceedings will be constantly disrupted. Moreover, the lack of a visible and clear Trial Chamber policy may also lead to uncertainty in the parties' preparation and the presentation of their case. Therefore, pursuant to its regulatory power under Articles 64 (3) (a) and 64 (8) (b), and after hearing the parties,[41] the Trial Chamber may issue guidelines on the admission of evidence, as is the practice for trials conducted before the ICTY.[42] Such guidelines may set out the policy that the Trial Chamber will follow during the proceedings regarding the admission of evidence.

2.2.4. Measures to be adopted with a view to streamlining the proceedings

The Trial Chamber has the power – and the duty – to give instructions regarding the conduct of proceedings in order to ensure the fairness and the expediency of trials.[43] Regulation 54 provides for a non-exhaustive list of issues that the Trial Chamber may address during status conferences with a view to streamlining, and thus shortening, the proceedings. In order for the Trial Chamber to effectively streamline proceedings and make decisions pursuant to Regulation 54, the Trial Chamber may need advanced substantive knowledge of the parties' cases. Therefore, the Trial Chamber may use its regulatory power under Article 64 (3) (a) and Rule 134 to require the parties to submit to the Trial Chamber evidence and information disclosed to the other

39 The exclusionary rules included in Article 69 (7) and Rule 71 apply in any event.

40 Only evidence that has ultimately passed the test of relevance and admissibility may be considered for the decision pursuant to Article 74 (2): Rule 64 (3).

41 Article 64 (3) (a).

42 See for example, *Prosecutor v. Radoslav Brdanin and Momir Talic,* Order on the Standards Governing the Admission of Evidence, Case No. IT-99-36-T, 15 February 2002; *Prosecutor v. Naser Oric,* Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, Case No. IT-03-68-T, 21 October 2004.

43 Article 64 (2).

party, as well as additional information relevant to the management of proceedings.[44] The Trial Chamber may rule on the following issues, among others:

Length and content of legal arguments: Regulation 54 (a) provides that the Trial Chamber may issue an order on "[t]he length and content of legal arguments …." In making these decisions, the Trial Chamber may consider that the principle of *jura novit curia*[45] may make arguments on the applicable substantive law redundant and that it may be more efficient to require that technical legal arguments be made in writing, rather than presented orally.[46]

Agreement as to facts or evidence: Regulation 54 (n) authorises the Trial Chamber to issue decisions regarding evidence to be introduced as agreed upon facts pursuant to Rule 69. This provision is intended to promote agreement between the parties at an early stage of the proceedings. Such agreements consist of a stipulation by the Prosecutor and the Defence that certain alleged facts are not contested. In case of agreement, the Trial Chamber may consider such alleged fact as being proven and consequently narrow the scope of the issues in dispute. On the other hand, the Chamber may also decide that a more complete presentation of the alleged facts is required in the interests of justice, in particular in the interests of the victims.

Judicial notice of facts of common knowledge: Article 69 (6) provides that the Court shall not require proof of facts of common knowledge but may take judicial notice of them. The Trial Chamber may take judicial notice of facts of common knowledge either *proprio motu* or upon a motion by a party. Before deciding to take judicial notice, the Trial Chamber may assess whether an informed and reasonable person would have knowledge of that fact or could learn it from reliable and publicly accessible sources. The Chamber will take into account the circumstances of the case, hear the parties and inquire whether a fact is disputed. If the Trial Chamber takes judicial notice of a fact of common knowledge, the scope of the proceedings may be narrowed.[47]

Curtailing the proposed evidence: Regulations 54 (a) through (e) and Regulation 54 (g) encourage Trial Chambers to issue decisions during a status conference regarding, *inter alia*, the length of the evidence to be led, the length of questioning of the witnesses, the number of the witnesses to be called and the number of documents or exhibits to be introduced. Before the commencement of trial, the Trial Chamber

44 See also above: Manner in which disclosure and inspection are to be handled.

45 Regulation 55 (1).

46 In so doing, the Trial Chamber may set time limits and/or page limits pursuant to Regulations 34-38.

47 Contrary to the UN *ad hoc* Tribunals (*ICTY/ICTR Rule 94(B)*), the law applicable to the ICC does not expressly provide for the taking of judicial notice of adjudicated facts (*res judicata*). This omission may be interpreted as constituting a prohibition or expressing the Court's lack of power to take judicial notice of findings of facts made in another case.

may review the evidence and information provided to it by the parties[48] and make a *prima facie* assessment of the relevance and admissibility of the proposed evidence. The Trial Chamber may assess the time that will realistically be required to hear the evidence of a particular witness and the total time that is necessary to give a party a fair chance to present its case. In order to shorten proceedings, after hearing the parties the Trial Chamber may, for instance: exclude irrelevant, overly repetitive, or evidently inadmissible evidence; exclude evidence that goes to prove undisputed facts; limit the scope of the proposed witness evidence; set time limits for witness testimony; set a time limit for a party's entire case; or limit the time available for or the content of opening and closing statements.

2.2.5. Manner in which victims may participate in the proceedings

The framework established in the Rome Statute regarding victim participation represents a key innovative feature of the Rome Statute and is a milestone in international criminal justice. It is part of a consistent pattern of evolution in international law, including but not limited to international criminal law, which recognises victims as actors, rather than as passive subjects of the law, and consequently grants them specific rights.[49] According to Article 68 (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 that the Court determines to be appropriate. The manner of such presentation and consideration may not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In addition, the Trial Chamber must bear in mind that the envisaged participation of victims in the proceedings during the trial phase may not unduly delay the proceedings, and should take due regard of the protection of victims and witnesses.[50]

The relevant interests of victims and the appropriate instances and modalities of their participation in proceedings are not defined and therefore must be determined by the Chamber. Regulation 54 (o) provides that at a status conference the Trial Chamber may issue any order in the interests of justice on "[t]he conditions under which victims shall participate in the proceedings". Accordingly, the Trial Chamber may rule, among other things, on the following issues:

Victims entitled to participate in the proceedings: Rule 85(a) sets out the definition of the term 'victim' for the purposes of the Statute and the Rules.[51] While the criteria referred to in Rule 85 may be sufficient to determine the status of victim for the purposes of a situation, victim applicants in a case must establish a causal link between a crime charged in that case and the harm alleged. In this context, the Trial Chamber may also need to determine other issues, such as the nature and the harm suffered,

48 See also above: Manner in which disclosure and inspection are to be handled.

49 See e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 6; *Situation in the DRC*, ICC-01/04-143, 24 April 2006, para. 7; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, para. 8; *Situation in Darfur*, ICC-02/05-81, 8 June 2007, para. 8.

50 See Article 64(2), Rule 86 and Rule 89(1).

51 Rule 85(a).

the required proximity between the crime and the harm suffered, as well as the level of proof required to establish the applicable criteria.

Judicially relevant personal interests of victims: The applicable law does not define the relevant personal interests that might warrant victims' participation in proceedings, nor does it specify in what manner victims' personal interests must be affected by the particular stage of proceedings in which they seek to participate.

Stages of victim participation at the trial phase: According to Article 68 (3), the Trial Chamber may determine whether and at what stages of the trial phase proceedings conducted it is appropriate for victims to present their views and concerns. By referring to possible modalities of participation, Rules 89 (1) and 91 indicate examples of stages of the proceedings where participation may be appropriate.

Manner of participation: The appropriate modalities of victim participation in the proceedings during the trial phase include the following: making opening and closing statements;[52] participating in a hearing and making oral observations;[53] questioning witnesses, experts or the accused;[54] producing documents;[55] and providing their views upon request by the Trial Chamber.[56]

Specification of proceedings: The Trial Chamber must further specify the proceedings in which the respective modalities of participation are to be implemented in practice.[57] In this context, reference may be made to the Trial Chamber's general power to give instructions with regards to the conduct of proceedings.[58] In addition, the Trial Chamber may establish protective measures for victims participating in proceedings.[59]

Weight to be given to the victims' views and concerns: Article 68 (3) provides that the victims' views and concerns shall be 'considered'. However, it does not state the purpose for which they will be considered, or what weight may be given to the victims' views and concerns. The victims' views may be considered for a number of the Trial

52 Rule 89 (1). According to Regulation 54 (a), the Trial Chamber may give instructions regarding the length and the content of these statements.

53 Rule 91 (2).

54 Rule 91 (3) and Rule 91(4).

55 Rule 93 (3) (b). Victims are entitled to produce documents only if so ordered by the Trial Chamber pursuant to Article 64 (6) (d).

56 Rule 93.

57 Rule 89 (1).

58 Articles 64 (2), 64 (3) (a) and 64 (8) (b), and Rule 134.

59 Article 68, Rule 87.

Chamber's procedural decisions,[60] or for an order of reparations,[61] or for the purposes of the sentencing decision.[62] However, unless the presentation of the victims views and concerns is also governed by formal evidentiary requirements,[63] the Trial Chamber may not consider the views and concerns presented by victims when deciding on guilt or innocence of the accused.[64]

2.2.6. Principles Relating to Reparations

In addition, the Court must establish principles relating to reparations to, or in respect of, victims.[65] These principles are not strictly procedural; rather, the Court has a separate mandate – and duty – to establish principles dealing with matters such as restitution, compensation and rehabilitation. Taking into account the scope and extent of any damage, loss or injury, the Trial Chamber may use these principles as a basis for awarding reparations.[66] If not already established by the Court outside the context of a particular case, the Trial Chamber must establish these principles before the commencement of reparation proceedings. Preferably, reparation principles should be established even prior to receiving any request by the victims initiating reparation proceedings, so as to provide for legal and procedural certainty for victims.

3. The procedural direction given by the Trial Chamber in the trial of *Thomas Lubanga Dyilo*

3.1. Manner in which Trial Chamber I provided procedural direction

On 29 January 2007, Pre-Trial Chamber I confirmed the charges against *Thomas Lubanga Dyilo* ('*Lubanga*').[67] On 6 March 2007, the Presidency of the Court, acting

60 See for instance decisions on protective measures (Article 68 and Rule 87(1)); joint and separate trials (Rule 136); acceptance of admission of guilt (Article 65(4) and Rule 139) and safe conduct for a witness or an expert (Article 93 (2) and Rule 191). Rule 93 refers to these and other instances in relation to which a Chamber may seek the views and concerns of victims.

61 Article 75.

62 Article 76 (1).

63 See for instance the provisions on the admissibility of evidence (Article 69 and Rules 63-76), the disclosure obligations (Article 67(2) and Rules 76-84) and the right of the parties to test evidence submitted to the Trial Chamber (Rule 140).

64 Article 74 (2).

65 Article 75 (1). Although Article 75 (1) uses the term Court, the Court's power to rule on matters pertaining to reparations lies primarily with the Trial Chamber (see Article 76 (3), Rules 94-99 and 143, Regulation 56, and the Regulations for the Trust Fund for Victims (ICC-ASP/4/Res.3)). However, the principles under Article 75 (1) could also be established by the plenary of judges within its powers pursuant to Article 52 (1).

66 Article 75 (1).

67 Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007.

pursuant to Article 61 (11), constituted Trial Chamber I (the 'Trial Chamber') and referred to it the case of the *Prosecutor v. Lubanga*.[68]

On 18 July 2007, the Trial Chamber acting pursuant to Article 64, issued an order setting out a non-exhaustive list of proposals as to the subjects requiring early determination. The Trial Chamber did so in order to facilitate the efficient preparation of the *Lubanga* trial.[69] The Trial Chamber strongly encouraged the parties to consult and to agree between themselves on these proposals as framed, or on any alternatives.[70]

Having been notified of the Trial Chamber's request, the Defence submitted that it would not be in a position to make submissions on some issues set out in the request within the proposed timetable and asked for additional time to familiarise itself with the case file. As a consequence, the Trial Chamber suspended the original timeline,[71] and, on 5 September 2007, issued a new order ('Scheduling Order') setting out a schedule for submissions and hearings on subjects requiring early determination.[72] The Scheduling Order included the following ten items, together with deadlines for the parties and participants to file their submissions, as well as a timetable for hearings to discuss the matters in court:

(i) The date for trial (the earliest date by which the parties would be ready for the trial to commence, the volume of evidence to be relied upon by the prosecution and the anticipated number of witnesses to be called by them during trial).
(ii) The languages to be used in proceedings (whether interpretation into languages other than English and French would be required for some or all of the proceedings).
(iii) The timing and the manner of disclosure of the Prosecution's evidence to the other party, any participants, and the Chamber, as well as all other disclosure issues.
(iv) An E-Court Protocol (whether the 'technical protocol for the submission of evidence, material and witness information in electronic version for their presentation during the confirmation hearing' should be adopted, or amended, for use in trial proceedings).
(v) The role of victims in proceedings leading up to, and during, trial (which modalities of victims' participation should be used in proceedings leading up to, and during, trial).

68 ICC, *Prosecutor v. Lubanga*, Decision constituting Trial Chamber I, ICC-01/04-01/06-842, 6 March 2007.

69 Trial Chamber I, *Prosecutor v. Lubanga*, Request for submissions on subjects that require early determination, ICC-01/04-01/06-936, 18 July 2007.

70 *Ibid*, para. 2.

71 Trial Chamber I, *Prosecutor v. Lubanga*, Direction suspending the timetable on subjects that require early determination, ICC-01/04-01/06-942, 16 August 2007.

72 Trial Chamber I. *Prosecutor v. Lubanga*, Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC-01/04-01/06-947, 5 September 2007.

(vi) The procedures to be adopted for instructing expert witnesses (whether, in order to improve efficiency, it would be feasible for the parties to jointly instruct expert witnesses or, at the very least, to use common witnesses who would be instructed separately).
(vii) The approach to be adopted for witness familiarisation and witness proofing (whether familiarisation with the ICC procedure could be facilitated for witnesses whom the parties shall call at trial in a neutral manner and the extent, if at all, to which proofing of those witnesses shall be allowed).
(viii) The status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber.
(ix) The status of the decisions of the Pre-Trial Chamber in trial proceedings.
(x) The manner in which evidence shall be submitted subject to Article 64 (8)(b) and Rule 140.[73]

The initial status conference before the Trial Chamber was held on 1 October 2007.[74] Further status conferences were held as necessary.

3.2. Procedural direction from the Trial Chamber

The following sections briefly analyse some of the key procedural directions provided by the Trial Chamber to the parties and other participants by the end of February 2008, with a view to facilitating the efficient preparation of the trial.[75] Providing procedural guidance is an ongoing process. Thus, the decisions analysed below do not provide an exhaustive overview of the direction given by the Trial Chamber in the *Lubanga* proceedings. Until the commencement of the trail,[76] further procedural de-

73 On occasion, the parties made suggestions to add additional agenda items to the list of issues that require early determination. These suggestions have been approved by the Trial Chamber. See for instance *Prosecutor v. Lubanga*, Order on joint prosecution and defence request to add an agenda item to the agenda of the hearing on 20 November 2007, ICC-01/04-01/06-1032, 16 November 2007.

74 As for the agenda of the initial status conference, see *Prosecutor v. Lubanga*, Trial Chamber's Agenda for the Hearing on Monday 1st October 2007, ICC-01/04-01/06-862, 25 September 2007.

75 Decisions by the Trial Chamber providing procedural direction not analysed in this essay include: *Prosecutor v. Lubanga*, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, 9 November 2007; *Prosecutor v. Lubanga*, Decision on the procedures to be adopted for *ex parte* proceedings, ICC-01/04-01/06-1058, 6 December 2007; *Prosecutor v. Lubanga*, Decision on defence's request to obtain simultaneous French transcripts, ICC-01/04-01/06-1091, 14 December 2007; and *Prosecutor v. Lubanga*, Decision on agreements between the parties, ICC-01-04-01-06-1179, 20 February 2008.

76 See initialy Trial Chamber I, *Prosecutor v. Lubanga*, Decision on agreements between the parties, ICC-01-04-01-06-1179, 20 February 2008 , para. 11.

cisions from the Trial Chamber may be expected. Moreover, pursuant to Rule 134 (2), the Trial Chamber may later rule on any issues that arise during the course of trial.

3.2.1. Disclosure and E-Court protocol

On 9 November 2007 the Trial Chamber issued the "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial",[77] providing guidance on the issues of timely disclosure to the parties and on the procedure to be employed for disclosure.[78] On 24 January 2008, the Trial Chamber rendered its "Decision on the E-Court Protocol".[79]

The Trial Chamber, while finding that disclosure by the Prosecution of exculpatory materials is an ongoing obligation with no cut-off date,[80] ordered the Prosecution to serve the entirety of their evidence three months prior to the commencement of trial. This included incriminatory material in the form of witness statements and any other material which the Prosecution intends to rely upon at trial, as well as any exculpatory material.[81] The Trial Chamber emphasised that the Prosecution has an obligation to disclose potentially exculpatory material as soon as practicable throughout the trial period, as required by Article 67 (2) of the Statute.[82]

With respect to disclosure of exculpatory material, the Trial Chamber further specified that: "[i]f the prosecution has in its possession any exculpatory material which it is unable to disclose and which may materially impact on the Court's determination of guilt or innocence, it will be under an obligation to withdraw any charges which the non-disclosed exculpatory material impacts upon. If the prosecution is in doubt as to whether or not the material falls into this category, it should be put before the bench for the Trial Chamber's determination".[83]

The Trial Chamber also ruled that if the Prosecution wishes to serve any of this material in a redacted form, each proposed redaction must be explained and justified to the Trial Chamber.[84]

Finally, the Trial Chamber employed its regulatory power under Article 64 (3) (a) and Rule 134 to require the Prosecution to submit to the Chamber evidentiary information, as well as additional information relevant to managing proceedings, prior to trial. It ruled that 'the prosecution shall serve a document which explains its case by reference to the witnesses it intends to call and the other evidence it intends to rely upon. Furthermore, this document shall explain how the evidence relates to the

77 Trial Chamber I, *Prosecutor v. Lubanga*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, 9 November 2007 ("Disclosure Decision").

78 Disclosure Decision, para. 14.

79 Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the E-Court Protocol, ICC-01-04-01-06-1127, 24 January 2008.

80 Disclosure Decision, para. 19.

81 Disclosure Decision, paras. 21, 25 and 29.

82 Disclosure Decision, para. 28.

83 Disclosure Decision, para. 28.

84 Disclosure Decision, para. 27.

charges. This document will be referred to as the "summary of presentation of evidence".[85]

In a separate decision, the Trial Chamber also ruled that it would make use of the Court's electronic document and case-management tool, the E-Court Protocol. In the view of the Trial Chamber, this tool "can greatly enhance the courtroom and trial efficiency".[86] For the purposes of disclosure, the Trial Chamber ordered that "[a]ll documents disclosed by the parties and participants shall be provided in a Protocol-compliant format, with the required metadata fields being completed".[87]

3.2.2. The status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber

On 13 December 2007, the Trial Chamber issued the "Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted".[88]

With respect to the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber, the Trial Chamber found that "Article 64 (9) of the Statute gives the Trial Chamber a seemingly unqualified power to rule on the admissibility or relevance of evidence",[89] and that the "statutory and regulatory framework establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber".[90] Accordingly, the Trial Chamber ruled that generally,

> "evidence before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the

85 Disclosure Decision, para. 26.

86 Decision on the E-Court Protocol, para. 19.

87 Decision on the E-Court Protocol, para. 30 (a). Procedurally, the Decision on E-Court Protocol provides for disclosure of evidence *inter partes*. While the originals of incriminatory evidence are deposited with the Registry, the Prosecution provides copies of the incriminatory evidence and evidence under Article 67 (2) directly to the defence.

88 Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01-04-01-06-1084, 13 December 2007 ("13 December 2007 Decision").

89 13 December 2007 Decision, para. 4. The Trial Chamber further stated that "Rule 63 (2) of the Rules of Procedure and Evidence states that the Chamber has the authority 'to assess freely' all evidence when determining admissibility and relevance, and these matters must be raised, save exceptionally, at the time the evidence is submitted (Rule 64 (1)). By Article 74 (2) the Trial Chamber's decision is to be based on its evaluation of the evidence and the entire proceedings, and the court 'may base its decision only on evidence submitted and discussed before it during the trial'. Additionally, the Trial Chamber in performing its functions prior to or during trial may rule on any relevant matters (Article 64 (6) (f))."

90 13 December 2007 Decision, para. 5.

> Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*. Therefore, the record of the pre-trial proceedings (and all the evidence admitted for that purpose) transmitted to the Trial Chamber by virtue of Rule 130 is available mainly to be used as a 'tool' to help with preparation and the progress of the case. Nonetheless, the parties (and where relevant, the participants) can agree convenient mechanisms for the introduction of undisputed evidence".[91]

The Trial Chamber was requested, pursuant to its power under Rule 68 (a), to admit transcripts of a witness' testimony from the confirmation hearing without re-calling that witness at trial. Since there was no agreement amongst the parties and other participants on this issue, the Trial Chamber postponed this decision to a later stage so that it could be determined with a "firm understanding of the relevant facts".[92]

3.2.3. The status of the decisions of the Pre-Trial Chamber in the trial proceedings

The Trial Chamber found that, as a general principle, it "should only disturb the Pre-Trial Chamber's Decisions if it is necessary to do so. Not least for reasons of judicial comity, [the Trial] Chamber should follow the Pre-Trial Chamber unless that would be an inappropriate approach".[93]

In this context, the Prosecution argued that in these particular proceedings, the Trial Chamber should not be bound by, and therefore should not follow certain portions of, the Pre-Trial Chamber's decision on the confirmation of the charges. The Prosecution had charged Lubanga, pursuant to Article 8 (2) (e) (vii), with three counts of the war crimes of conscripting and enlisting children under age fifteen into armed groups and of using them to participate actively in hostilities.[94] However, the Pre-Trial Chamber found that "there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an *international* character from July 2002 to 2 June 2003 …"[95] As a result, for that period, the Pre-Trial Chamber changed the legal characterisation of the charges under Article 8 (2) (e) (vii) to allegations of conscripting and enlisting children under the age of fifteen years into the *national* armed forces and using them to participate actively in hostilities, pursuant to Article 8 (2) (b) (xxvi). In so doing, the Pre-Trial Chamber changed not only the legal characterisation of the charges brought by the Prosecution, but also their factual bases, without following any of the available avenues under Article 61 (7). Both the Prosecution and the Defence re-

91 13 December 2007 Decision, para. 8.

92 13 December 2007 Decision, para. 8.

93 13 December 2007 Decision, para. 6.

94 *Prosecutor v. Lubanga,* ICC-01/04-01/06-356-Conf-Anx1, 28 August 2006.

95 Pre-Trial Chamber I, *Prosecutor v. Lubanga,* Decision on Confirmation of the Charges (Public Redacted Version), ICC-01/04-01/06-803-tEN, 15 May 2007, para. 220 (emphasis added).

quested leave to appeal this aspect of the confirmation decision, pursuant to Article 82(1)(d), but the Pre-Trial Chamber denied leave.

The Prosecution argued that by confirming portions of the charges that the Prosecution did not plead, the Pre-Trial Chamber acted *ultra vires* and that the Trial Chamber would not be bound by the confirmation of those parts of the charges that are null and void. The Prosecution submitted that the Trial Chamber ought to sever the valid portions of the charges from those that were confirmed *ultra vires*, and that the trial should proceed only on the basis of the valid portions.[96]

The Trial Chamber, however, found that it "ha[d] no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber".[97] The Trial Chamber held that it lacked jurisdiction on this issue, as it considered that the Pre-Trial Chamber has sole authority over any issue concerning amendments to the charges prior to the commencement of a trial.[98] The Trial Chamber nevertheless acknowledged that once trial begun, it has the authority to authorise the withdrawal of the charges. If seized with a request from the Prosecution to that effect, the Chamber would then consider whether or not a partial withdrawal of the charges is permissible.[99]

The Trial Chamber also stated that it has the power to modify the legal characterisation of the facts under Regulation 55, but clarified that a decision to that effect would only occur at a later stage in the trial and would be factually dependant on having heard the evidence.[100] Accordingly, the Trial Chamber instructed the parties to prepare their cases on the basis that the Trial Chamber might decide that the charges encompass both international and internal armed conflicts. The Prosecution was instructed to be prepared to call, and the Defence was required to be in a position to address, all available evidence on the issue of whether the relevant conduct took place in the context of, and was associated with, an international armed conflict. The Trial Chamber further specified that after the commencement of the trial, the parties could submit a motion to either withdraw a discrete portion of the charges pursuant to 61(9) or to re-characterise the charges pursuant to Regulation 55, and that the Chamber would then rule on such a motion.[101]

96 *Prosecutor v. Lubanga,* Prosecution's submission regarding the subjects that require early determination: status of the evidence heard by the Pre-Trial Chamber; status of the evidence heard by the Pre-Trial Chamber; and manner in which evidence shall be submitted, ICC-01/04-01/06-953, 12 September 2007, paras. 11-27.

97 13 December 2007 Decision, para. 39.

98 13 December 2007 Decision, para. 41.

99 13 December 2007 Decision, paras. 42-45.

100 13 December 2007 Decision, paras. 42 and 48.

101 13 December 2007 Decision, paras. 50-51.

3.2.4. The manner in which evidence shall be submitted to the Trial Chamber

In their respective submissions to the Trial Chamber, the Prosecution and the Defence largely agreed on the manner in which evidence should be submitted to the Trial Chamber.[102]

Concerning the order of presentation of evidence, the parties agreed that the Prosecution should present all its incriminating evidence at the beginning of the trial, followed by the evidence of the Defence, provided that the accused decided to rebut the incriminating evidence by presenting his own evidence. As to the order of questioning witnesses, the parties reached an agreement that the calling party would be permitted to question that witness first, followed by the other party. The agreement also permitted the calling party to re-examine that witness. The parties further acknowledged that, pursuant to Rule 140 (2) (d), the Defence must always have the opportunity to be the last to examine a witness. Eventually, the parties agreed that the scope of initial questioning should be limited to matters relevant to the case and that a party conducting initial questioning would not be allowed to lead a witness, unless the questioning concerned background evidence or other non-contentious issues. The scope of subsequent questioning is regulated by Rule 140 (2) (b). In contrast, a party conducting subsequent questioning would be allowed to lead a witness. The parties further agreed that re-examination should be limited to issues arising out of the subsequent examination and should, in principle, not be leading. Moreover, they agreed that the final examination under Rule 140 (2) (d) by the Defence should be limited to matters arising during the questioning conducted by others, including by the Trial Chamber, subsequent to the Defence's prior examination of that witness. If a witness has been proposed by the defence, the final examination should not be leading.

The Trial Chamber acknowledged the agreement between the parties on the manner of evidence submission,[103] and did not further elaborate on this issue in its 13 December 2007 Decision. Hence, the Trial Chamber, without stating so expressly, may have interpreted the agreement between the Prosecution and the defence as an agreement pursuant to Rule 140 (1) 'regarding the order and manner in which the evidence shall be submitted to the Trial Chamber', which should govern the matter for the purposes of the trial proceedings against *Lubanga*.

The Trial Chamber only noted the Prosecution's submissions as to why it should be permitted to tender evidence from the bar table by referring to their exhibit number in the record of the proceedings. In this context, the Trial Chamber proposed an uncontroversial solution, noting that "the sole issue in this regard of consequence is whether or not the particular piece of evidence surmounts the applicable admissibil-

102 See, ICC-01/04-01/06-953, 12 September 2007, paras. 28-38 (Prosecution's submission) and ICC-01/04-01/06-1033, 12 September 2007, paras. 45-46 (Defence's submission). Note that the agreement does not extend to the Prosecution's submission regarding to Prosecution evidence in rebuttal and Defence evidence in rejoinder (see the Prosecution's submission, para. 31 and the defence's submissions, paras. 45-46).

103 13 December 2007 Decision, para. 2.

ity and relevance threshold".[104] Once the admissibility issue is resolved, the Chamber held, "the exact manner of introduction is unlikely to involve a dispute of substance, and it should be dealt with by reference to the circumstances of the situation".[105]

In a separate decision issued on 29 January 2008, the Trial Chamber provided additional guidance on various issues related to witnesses' testimony during trial.[106] The Trial Chamber implicitly confirmed the agreement reached between the parties that a party may exceed the scope of initial questioning when examining a witness called by the other party. The Trial Chamber specified that the scope of questioning pursuant to Rule 140 (2) (b) includes "trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered)". The Trial Chamber also ruled that "the parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily".[107] In addition, while the Trial Chamber recognised that a party has no obligation to disclose the line of questioning in advance, the Trial Chamber stated that in exceptional circumstances, such as for the examination of traumatised witnesses, a party may be required to disclose in advance the questions or topics they seek to cover during their questioning pursuant to Rule 140 (2) (b).[108]

In the 29 January 2008 Decision, the Trial Chamber also elaborated on the manner in which traumatised and vulnerable witnesses shall present their evidence,[109] and on the use of live testimony by means of audio or video link technology.[110]

3.2.5. Witnesses familiarisation

On 30 November 2007, the Trial Chamber issued the "Decision Regarding the Practices used to Prepare and Familiarise Witnesses for Giving Testimony at Trial".[111]

The Trial Chamber permitted the practice of witness familiarisation, which has the following purposes: "(i) assisting the witness to fully understand the Court proceedings, its participants, and their respective roles; (ii) reassuring the witness about his or her role in proceedings before the Court; (iii) ensuring that the witness clearly understands that he or she is under a strict legal obligation to tell the truth when testifying; (iv) explaining to the witness the process of examination first by the Prosecu-

104 13 December 2007 Decision, para. 7.

105 13 December 2007 Decision, para. 7.

106 See, *Prosecutor v. Lubanga*, *Decision* on various issues related to witnesses' testimony during trial: ICC-01/04-01/06-1140, 29 January 2008, ("29 January 2008 Decision").

107 29 January 2008 Decision, para. 32.

108 29 January 2008 Decision, para. 33.

109 29 January 2008 Decision, para. 35-40.

110 29 January 2008 Decision, para. 41-43.

111 *Prosecutor v. Lubanga,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007 ("Witnesses Familiarisation Decision"). See on this decision also the contribution by K. Ambos in Ch. 31 of this volume.

tion and subsequently by the defence; (v) discussing matters related to the witness' security and safety in order to determine the necessity of applications for protective measures before the Court; (vi) making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint himself or herself with the Prosecution's trial lawyer and others who may examine the witness in Court".[112] The Trial Chamber instructed the Court's Victims and Witnesses Unit to undertake the witness familiarisation process.[113]

However, the Trial Chamber prohibited the practice of 'witness proofing' as defined by the Prosecution.[114] The Prosecution, following the case law of the ICTY, defined "witness proofing" as the "practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony".[115] The Trial Chamber has refrained from relying on the jurisprudence and practice of the *ad hoc* Tribunals. It stated that it "does not consider the[ir] procedural rules and jurisprudence … to be automatically applicable to the ICC without detailed analysis".[116]

3.2.6. Victims' Participation in the Proceedings

On January 18 2008, the Trial Chamber issued the 'Decision on Victims' Participation,'[117] which is "intended to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings".[118] Within that decision, the Trial Chamber set out, among other things, the criteria to be applied to applications by victims to participate,[119] and the envisioned modalities of participation.[120] Judge René Blattmann appended a compelling separate

112 Witnesses Familiarisation Decision, paras. 29-30, embracing the approach of the Pre-Trial Chamber (ICC-01/04-01/06-679, paras. 18-27).

113 Witnesses Familiarisation Decision, paras. 33 and 53-56.

114 Witnesses Familiarisation Decision, paras. 57. As to the reasoning provided by the Trial Chamber, see paras. 35-52.

115 Witnesses Familiarisation Decision, para. 7.

116 Witnesses Familiarisation Decision, para. 44.

117 Trial Chamber I, *Prosecutor v. Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06-1119, ("Victims' Participation Decision").

118 Victims' Participation Decision, para. 84.

119 Victims' Participation Decision, paras. 86-100.

120 Victims' Participation Decision, paras. 101-122. On 26 February 2006, the Trial Chamber granted leave to appeal the Victims' Participation Decision on three issues, namely (i) whether the notion of victim necessarily implies the existence of personal and direct harm; (ii) whether the harm alleged by a victim and the concept of "personal interests" under Article 68 of the Statute must be linked with the charges against the accused and (iii)) whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence (ICC-01/04-01/06-1191). At the time of the delivery of this paper, the appeal against the Victims' Participation Decision was still pending.

and partially dissenting opinion. The following are the main conclusions of the majority of the Trial Chamber.[121]

Criteria to be applied to applications by victims to participate: In order to determine which victims will have the right to participate in the trial, the Trial Chamber indicated that it will consider only the following criteria: (i) whether the applicant is a victim of a crime under the jurisdiction of the Court as provided for in Rule 85; and (ii) whether the personal interests of victims are affected.[122] Thus, the Trial Chamber did not require that an applicant be a victim of a crime contained in the charges,[123] finding that "a victim of any crime falling within the jurisdiction of the Court can potentially participate".[124] However, the Trial Chamber acknowledged that "it would not be meaningful or in the interests of justice for all such victims to be permitted to participate as victims in the case against [*Lubanga*], given that the evidence and the issues falling for examination in the case (which will be dependent on the charges he faces) will frequently be wholly unrelated to the crimes that caused harm to victims coming from this very wide category".[125] The applicable test is therefore the following:

> "(i) Is there is a real evidential link between the victim and the evidence which the Court will be considering during [*Lubanga's*] trial (in the investigation of the charges he faces), leading to the conclusion that the victim's personal interests are affected? or (ii) Is the victim affected by an issue arising during [Lubanga's] trial because his or her personal interests are in a real sense engaged by it?"[126]

The Trial Chamber further specified that although it would make an initial determination that a victim should be allowed to participate in proceedings, thereafter, any victim wishing to participate in specific stages of the proceedings would need to submit a discrete application to this effect.[127] The victim would be required to demonstrate "the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek …."[128] Such interests, the Chamber held, "must relate to the evidence and the issues the Chamber will be considering in its investigation of the charges brought against

121 In addition, the Decision on Victims' Participation sets out criteria regarding the common legal representation for victims (paras. 123-126), general guidelines pertaining to protective and special measures for victims (paras. 127-131), and clarification regarding the dual status of victim-witnesses, disclosure to the Victims and Witnesses Unit and protection for victims who have applied to participate (paras. 132-137).

122 Victims' Participation Decision, para. 86.

123 Victims' Participation Decision, paras. 93-94.

124 Victims' Participation Decision, para. 95. The Trial Chamber granted leave to appeal this aspect of the Decision on Victims' Participation (ICC-01/04-01/06-1191).

125 Victims' Participation Decision, para. 95.

126 Victims' Participation Decision, para. 95.

127 Victims' Participation Decision, paras. 96-97.

128 Victims' Participation Decision, paras. 96-97.

[*Lubanga*]: the extent of the evidence and the issues to be considered by the Chamber during this trial are defined by the alleged crimes the accused faces".[129] The Appeals Chamber, however, found that the harm alleged by a victim and personal interests must be linked to the charges confirmed.[130]

Modalities of participation: Following a second application outlining the nature of the proposed intervention and demonstrating why the victim's personal interests are affected, the Trial Chamber will determine whether the requested manner of participation is appropriate. The relevant manners of participation involve the following issues:

(i) Access the trial record, including confidential filings where they are of material relevance to the personal interests of victims, and subject to any protective measures.[131]
(ii) Tender and examine evidence, if it will, in the view of the Chamber, assist in the determination of the truth, and if in this sense the Court has 'requested' the evidence.[132]
(iii) Challenge the admissibility or relevance of evidence.[133]
(iv) Inspect the materials in the possessions of the Prosecution, who, upon request, shall 'provide [victims with] any materials within its possession that are relevant to the personal interests of victims. … If part of a document in this context is confidential, the document should be made available in a suitably redacted form.'[134]
(v) Participate in hearings (including *ex parte* hearings), status conferences and during the trial, and file written submissions (including confidential or *ex parte* submissions).[135]
(vi) Initiate proceedings, for instance by filing applications and requests.[136]

129 Victims' Participation Decision, paras. 96-97.

130 Appeals Chamber, *Prosecutor v. Lubanga*, 11 July 2008, paras. 53-66.

131 Victims' Participation Decision, paras. 105-107. See also para. 110.

132 Victims' Participation Decision, para. 108. Questioning conducted by victims will not be restricted to reparations issues; instead, whenever their personal interests are affected by the evidence under consideration, victims will be allowed to put appropriate questions to the witness. *Ibid*. In this context, see also para. 121, relating to evidence regarding reparations that, according to the Trial Chamber, may also bear upon the question of guilt or innocence. Such evidence may be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination (para. 122). The Trial Chamber granted leave to appeal this aspect of the Decision on Victims' Participation (ICC-01/04-01/06-1191).

133 Victims' Participation Decision, para. 109.

134 Victims' Participation Decision, para. 111. See also para. 138 (f).

135 Victims' Participation Decision, paras. 112-117.

136 Victims' Participation Decision, para. 118.

4. Conclusion

In the process of adopting procedures to facilitate the conduct of proceedings, Trial Chamber I has taken a proactive approach. It identified core issues requiring early determination and issued numerous procedural decisions providing guidance to the parties and the participants. During this process, the Trial Chamber conferred extensively with the parties and other participants, who were given an opportunity both to file written submissions on the issues identified by the Trial Chamber and to discuss these issues further during status conferences.

Obviously, this process is a time-consuming one. This is especially the case for the first trial proceedings before the International Criminal Court, where most procedural issues must be settled without relying on a body of case-law or previous practice. The preparation of future proceedings should be more expeditious, as the first set of decisions can later be used as precedent, particularly those decisions that were subject to the scrutiny of the Appeals Chamber.

The development of the trial proceedings themselves will show whether the system put in place by the Trial Chamber is capable of ensuring a fair and expeditious conduct of the proceedings.

Appeal

Chapter 27 The First Jurisprudence of the Appeals Chamber of the ICC

*Franziska C. Eckelmans**

The judicial work of the International Criminal Court[1] gathered momentum with the arrest of Mr. Lubanga Dyilo on the 17th of March 2006, whose charges were confirmed on 29 January 2007. The first appearances of Mr. Katanga and Mr. Ngudjolo Chui took place respectively on the 22nd of October 2007 and the 11th of February 2008. Most of the decisions of the Court were therefore issued in the cases *Prosecutor v. Lubanga Dyilo* and *Prosecutor v. Katanga* by Pre-Trial Chamber I.[2] As the trial of Mr. Lubanga Dyilo is in the starting blocks,[3] the activities of the Appeals Chamber have focused on appeals arising from Pre-Trial Chamber decisions. The appeals were exclusively appeals arising under Article 82 (1) of the Rome Statute (the "Statute"),[4] a provision entitled "Appeal against other decisions".[5]

This contribution provides an overview of the jurisprudence of the Appeals Chamber until the beginning of 2008.[6] It addresses (i) issues relating to the merits of ap-

* Legal Officer, Appeals Division, International Criminal Court. The views expressed are those of the author alone and cannot be attributed to the International Criminal Court. This contribution is based on lectures held at the University of Cologne in April 2007 and at the meeting of the German working group on international criminal law (Arbeitskreis Internationales Strafrecht) in June 2007 in Berlin.

1 The abbreviation used for the International Criminal Court in this article is "Court".

2 Pre-Trial Chamber I was assigned by the Presidency with the situation in the *Democratic Republic of the Congo* on 5 July 2004 (ICC-01/04-01) in accordance with Regulation 46 (2) of the Regulations of the Court.

3 Trial Chamber I was constituted and assigned with the case of the *Prosecutor v. Lubanga Dyilo* by the Presidency on 6 March 2007 (ICC-01/04-01/06-842).

4 Articles cited without further reference are those of the Rome Statute of the International Criminal Court, circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

5 See the heading of Article 82. For an analysis of interlocutory appeals, see also the contribution by H. Friman in Ch. 28 of this volume.

6 Several appeals were pending at the time of the finalization of this article.

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peals mounted, (ii) the admissibility of an appeal under Article 82 (1) of the Statute and the powers of the Appeals Chamber and (iii) appeals proceedings under Article 82 (1), including participation of victims. This overview is preceded by a brief presentation of the composition and organisation of the Appeals Chamber.

1. Composition and organisation of the Appeals Chamber

Judge Pikis (Cyprus), Judge Pillay (South Africa), Judge Song (South Korea) and Judge Kourula (Finland) were assigned to the Appeals Division in accordance with Article 39 (1) and Rule 4 (1) of the Rules of Procedure and Evidence (RPE)[7] at the first plenary session of the 18 judges that took place in March 2003. Judge Song and Judge Kourula were re-assigned to the Appeals Division after their re-election[8] in January 2006 by the judges sitting in plenum. The President of the Court is *ex officio* a member of the Appeals Division under the terms of Article 39 (1). Judge Kirsch (Canada) serves currently in his second term as President of the Court.

The Statute provides in Article 39 (2) (a) that the "judicial functions of the Court shall be carried out in each division by Chambers". According to Article 39 (2) (b) (i), the Appeals Chamber is composed of all the judges of the Appeals Division.

Each application or appeal mounted before the Appeals Chamber is registered with a document number and an indication at which phase of the proceedings it has been filed. Appeals under rules 154 and 155 RPE are abbreviated with the code "OA" and are numbered consecutively in each situation or case.[9] The Appeals Chamber is currently dealing *inter alia* with the first and second appeal raised in the case *Prosecutor v. Katanga* and therefore with appeals OA and OA2 (Katanga).[10]

The Regulations of the Court (RoC)[11] provide in regulation 13 (1) that "[t]he judges of the Appeals Chamber shall decide on a Presiding Judge for each appeal". Each ap-

7 Rules of Procedure and Evidence of the International Criminal Court, adopted by the Assembly of States Parties at their first session in New York, 3-10 September 2002 (ICC-ASP/1/3).

8 Re-election was possible under the terms of Article 36 (9) (c) Rome Statute.

9 Regulation 26 (3) of the Regulations of the Registry (ICC-BD/03-01-06) states that the

> "following registration reference shall be indicated on the header of each page or on the material itself: […] (e) The letters indicating the phase of the proceedings during which the document, material, order or decision has been registered."

For those purposes the following letters shall be used, as determined by regulation 26 (4) (d) of the Regulations of the Registry: "'OA' for appeals under rule 154 or 155, preceded by the letter or letters indicating the phase of the proceedings in which the appeal is lodged. If more than one appeal in the same phase of the proceedings, and in the same situation or the same case is lodged, a consecutive number shall be included after the letters 'OA', starting with the number 2".

10 This is the manner in which reference will be made to the different appeals before the Appeals Chamber in this contribution.

11 The Regulations of the Court lay down the routine functioning of the Court as provided for in Article 52 (1) and were adopted by the judges at their fifth plenary session on 26

peal therefore requires a decision by all five Judges,[12] a decision that is usually signed by the President[13] of the Appeals Division.

The judges of the Appeals Chamber decide by majority. This is laid down in Article 83 (4) which is made applicable to appeals under Article 82 (1) and (2) by Rule 158 (2) RPE. When there is no unanimity, the judgment "shall contain the views of the majority and the minority but a judge may deliver a separate or dissenting opinion on a question of law". Separate or dissenting opinions have been issued, not only to judgments[14] but also to decisions and orders made in the course of an appeal. They are, in general, appended to the main judgment/decision. A dissent is recorded at the beginning of a decision before the tenor is given, while a separate opinion is often referred to at the end of the reasoning of the majority. The judgment of the majority is generally signed by the Presiding Judge.[15] In the decision on victims participation in the appeal OA8 (Lubanga), the Presiding Judge delivered a separate opinion and the

May 2004 (ICC-BD/01-01-04; amendments entered into force on 9 March 2005 and on 18 December 2007).

12 See for the decisions on the Presiding Judge: OA2 (Lubanga), 27 March 2006 (ICC-01/04-01/06-59), OA3 (Democratic Republic of the Congo, hereinafter referred to as "DRC") 27 April 2006 (ICC-01/04-142), OA3 (Lubanga) 27 June 2006 (ICC-01/04-01/06-168), OA4 (Lubanga) 11 October 2006 (ICC-01/04-01/06-557), OA5 (Lubanga) 11 October 2006 (ICC-01/04-01/06-558), OA6 (Lubanga) 19 October 2006 (ICC-01/04-01/06-591), OA7 (Lubanga) 23 October 2006 (ICC-01/04-01/06-609), OA8 (Lubanga) 31 January 2007 (ICC-01/04-01/06-799), OA (Katanga) 17 December 2007 (ICC-01/04-01/07-111), OA2 (Katanga) 20 December 2007 (ICC-01/04-01/07-118), OA (Darfur) 5 February 2008 (ICC-02/05-120), OA2 and OA3 (Darfur) 21 February 2008 (ICC-01/05-127 and ICC-01/05-128), OA4 (DRC) 6 February 2008 (ICC-01/04-443), OA5 and OA6 (DRC) 21 February 2008 (ICC-01/04-464 and ICC-01/04-465).

13 The President of a Division is in charge of overseeing its administration for the period of one year, as laid down in regulation 14 RoC. Judges Pikis, Kourula, Pillay and Song served or are serving in the order indicated as Presidents of the Appeals Division.

14 The terminology "judgment" has mainly been used when the Appeals Chamber made a determination on the merits of the appeal in accordance with rule 158 (1) RPE (confirming, reversing or amending a decision). When the Appeals Chamber dismissed an appeal (see decisions in OA8 (Lubanga) and OA2 (Lubanga)), the term "decision" was used instead. Whenever the Appeals Chamber used the term "judgment", it delivered the decision in open court. In this article, reference to a judgment will often be related to the number of the appeal in question (see *supra* note 9), e.g. Judgment OA4 (Lubanga), as only one judgment can arise from a specific appeal.

15 At the beginning of the judicial activity of the Appeals Chamber, a different approach had been taken: all Judges present at the seat of the Court at the day of signature signed, stating in the case of absence of a Judge that he/she was unavailable to sign the decision (see OA3 (Lubanga) "Order concerning the filing of a response by the Prosecutor to the Defence application for an extension of the time limit for the filing of the response to the document in support of the appeal" 4 July 2006 (ICC-01/04-01/08-181)); a practice taken up to some extent e.g. by Trial Chamber I in *inter alia Prosecutor v. Lubanga* "Order on 'Prosecution's request to extend the time limit for disclosure'", 17 December 2007 (ICC-01/04-01/06-1095)].

majority decision was therefore signed by one of the Judges establishing the majority.[16]

2. Jurisprudence of the Appeals Chamber on the merits of appeals mounted

The substance of the appeals before the Appeals Chamber related primarily to procedural issues, such as restrictions to disclosure,[17] interim release or the jurisdiction of the Court. Pending issues include judgments on victims' participation at the pre-trial stage raised by several appeals against decisions of Pre-Trial Chamber I.[18] In the following, reference will be made to the jurisprudence of the Appeals Chamber on selected legal questions arising from the discussion of the merits of the appeals raised before the Appeals Chamber. Three areas will be discussed first, in light of their fundamental importance: the jurisprudence in relation to the interpretation of the Rome Statute, the role of internationally recognized human rights and the law applicable under the Rome Statute.[19]

2.1. Interpretation of the Rome Statute – Internationally recognized human rights – Applicable law

In the proceedings OA3 (DRC), the Prosecutor filed an application for extraordinary review. In this context, the Appeals Chamber elaborated not only on the law applicable under the Statute but determined in its judgment[20] of the 13th of July 2007 that the provisions of the Vienna Convention on the Law of Treaties[21] (in particular Articles 31 and 32 of the Convention) are applicable to the interpretation of the Rome Statute, thus making the Rome Statute no exception to other treaties falling within its ambit.

Paragraph 33 of the judgment reads:

16 See OA8 (Lubanga) "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007", 13 June 2007 (ICC-01/06-01/04-925); similarly: OA (Kony a.o.) "Decision of the Appeals Chamber on the Unsealing of Documents", 4 February 2008, (ICC-02/04-01/05-266).

17 Appeals OA and OA2 (Katanga) are pending on issues related to restrictions to disclosure.

18 See appeals OA, OA2 and OA3 (Darfur) and OA4, OA5 and OA6 (DRC).

19 Note that these issues were not only discussed in judgments relating to the merits of an appeal but also in other decisions. See on the law applicable before the ICC also the contribution by G. Bitti above in Ch. 16 of this volume.

20 "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (ICC-01/04-168), hereinafter referred to as "Judgment OA3 (DRC)".

21 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.

> "…The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty."[22]

The Appeals Chamber also applied Article 32 of the Vienna Convention on the Law of Treaties to the Rome Statute in its judgment. It used the *travaux préparatoires* for the Rome Statute as a means of confirming the interpretation found.[23]

The same decision emphasizes the rule of interpretation that derives directly from the Rome Statute:

> "Like every other article of the Statute, article 82 must be interpreted and applied in accordance with internationally recognized human rights, as declared in article 21 (3) Rome Statute."[24]

The importance of Article 21(3) has been reiterated in many subsequent decisions of the Appeals Chamber, most eminently in the Judgments OA4 (Lubanga),[25] OA5

22 Footnotes omitted. The wording of a legal provision and its context was the interpretative guide of the Appeals Chamber in many subsequent judgments and decisions, see e.g. Judgment OA3 (Lubanga) "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'" 13 October 2006 (ICC-01/04-01/06-568), hereinafter referred to as "Judgment OA3 (Lubanga)", paras. 14 to 18; OA8 (Lubanga) "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007", 13 June 2007 (ICC-01/04-01/06-926), paras. 8 to 10 and 15; see also the separate opinion of Judge Pikis in "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" 13 June 2007 (ICC-01/06-01/04-925), p. 17, para. 12.

23 See Judgment OA3 (DRC), *supra* note 20, para. 40; compare also to *inter alia* P. Daillier, A. Pellet, *Droit International Public* (2002), para. 169.

24 Judgment OA3 (DRC), para. 38.

25 "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006 (ICC-01/04-01/06-772), hereinafter referred to as "Judgment OA4 (Lubanga)".

(Lubanga)[26] and OA6 (Lubanga),[27] where human rights were at the core of decision-making.[28]

Several decisions of the Appeals Chamber make reference to the law applicable under the Rome Statute. The Judgment OA3 (DRC)[29] elaborates upon the hierarchy of legal sources established by Article 21 (1).[30] The same judgment presumably provides an example for the application of Article 21 (1) (b) in that, as just explained, the Vienna Convention on the Law of Treaties was used as a means to interpret the Statute. The existence or non-existence of general principles of law referred to in Article 21 (1) (c) and comparative research played an important role in many judgments and decisions. This was the case not only in the just-mentioned Judgment OA3 (DRC) in relation to the question whether there exists a general principle of law according to which a decision of a lower court denying leave to appeal is reviewable by the higher court, but also in the Judgment OA4 (Lubanga)[31] with respect to the principle of abuse of process. Lastly, the question whether there is authority to stay proceedings before a hierarchically lower court was discussed in the decision[32] dismissing the proceedings raised by the Prosecutor in the appeal OA (Kony a.o.).[33] Article 21 (2) states that "the Court may apply principles and rules of law as interpreted in its previous decisions". This provision has not yet been interpreted by the Appeals Chamber as such. It may be observed that the Appeals Chamber applied its earlier jurisprudence

26 "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006 (ICC-01/04-01/06-773), hereinafter referred to as "Judgment OA5 (Lubanga)".

27 "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006 (ICC-01/04-01/06-774), hereinafter referred to as "Judgment OA6 (Lubanga)".

28 See also the separate opinions of Judge Pikis in Judgment OA7 (Lubanga), *infra* note 60, page 51, para. 16, and of Judge Song in OA8 (Lubanga) "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007", 13 June 2007 (ICC-01/06-01/04-925), p. 27, paras. 14 to 16.

29 See *supra* note 20.

30 Judgment OA3 (DRC), para. 23.

31 See *supra* note 25.

32 See "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review", 13 July 2006 (ICC-02/04-01/05-92).

33 It may be mentioned that Judge Pikis made reference to comparative research in his dissenting opinion to the Judgment OA3 (Lubanga), p. 35, paras. 17 to 19, relating to the principle of *res judicata* and in his separate opinion to OA8 (Lubanga) "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007", 13 June 2007 (ICC-01/06-01/04-925), p. 16, para. 11, with respect to the participation of victims.

on several occasions in practice.[34] In a separate opinion in the appeal OA (Kony a.o.), Judge Pikis made reference to the necessity to make judgments and decisions available to the public and stated with respect to Article 21 (2) that:

> "[j]udicial decisions identify the law applicable, determine its meaning, and delineate the range of its application as may be gathered from the object and purposes of the law revelatory of the spirit of a legislative enactment."[35]

2.2. Jurisdiction of the Court – Stay of proceedings

In the Judgment OA4 (Lubanga),[36] several issues of principle were raised and determined. They concerned the jurisdiction of the Court, the power to stay proceedings and the role of Article 21 (3). Mr. Lubanga Dyilo filed an appeal against a decision of Pre-Trial Chamber I relating to a "challenge to the jurisdiction of the Court". The Pre-Trial Chamber found that the Court had "personal jurisdiction" over the appellant and consequently refused to release him.[37] The Appeals Chamber (without stating it expressly) accepted the appeal as an appeal against a "decision with respect to jurisdiction" under Article 82 (1) (a). On the merits, the Chamber determined that the issue did not affect the jurisdiction of the Court. It held that the proceedings were of a *sui generis* character and aimed at the stay of the proceedings.[38] In making this determination, the Appeals Chamber reflected upon the ambit of the concept of jurisdiction as defined in the Statute and also addressed the concept of admissibility under Article 17. It stated:

> "22. The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and 13 (b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11.
> 23. The Statute itself erects barriers to the exercise of the jurisdiction of the Court, those set up by article 17, referable in the first place to complementarity (article 17 (1) (a) to (b)) in the second to *ne bis in idem* (articles 17 (1) (c), 20) and thirdly to

34 See e.g. with respect to the principles of interpretation, *supra* note 22 and the jurisprudence with respect to a reply to a response to a document in support of the appeal, OA (Katanga) "Decision on the Prosecution's Request for Leave to Reply", 18 January 2008 (ICC-01/04-01/07-148).

35 OA (Kony a.o.) "Decision of the Appeals Chamber on the Unsealing of Documents" 4 February 2008 (ICC-02/04-01/05-266), p. 10, para. 9 of Judge Pikis' separate opinion.

36 See *supra* note 25.

37 See *Prosecutor v. Lubanga Dyilo* "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute", 3 October 2006 (ICC-01/04-01/06-512).

38 See Judgment OA4 (Lubanga), *supra* note 25, para. 24.

> the gravity of the offence (article 17 (1) (d)). The presence of anyone of the aforesaid impediments enumerated in article 17 renders the case inadmissible and as such non-justiciable."

In the same judgment, the Appeals Chamber discussed the question whether the Court is vested with power – either conferred by the Statute or inherently – to stay judicial proceedings by virtue of the application of the principle of abuse of process or the establishment of a violation of the rights of the appellant based upon "concerted action" between the Prosecutor and the Democratic Republic of the Congo. Both notions were applied in the appealed decision. The abuse of process doctrine was derived from the International Criminal Tribunals for Rwanda and the former Yugoslavia.[39] The Appeals Chamber, however, did not establish that the principle of abuse of process is a principle inherent in the powers of a court of law. It found that the doctrine of abuse of process does not exist in all legal systems, but is in the first place a principle developed in English common law.[40] Nevertheless, the Appeals Chamber determined that proceedings can be stopped if no fair trial is possible. The Chamber referred to Article 21 (3) which requires "the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms".[41] According to the Appeals Chamber, the holding of a fair trial could become impossible "because of breaches of the fundamental rights of the suspect or the accused by his/her accusers".[42] In establishing this rule, the Appeals Chamber determined that:

> "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute."[43]

2.3. Reasoning of Decisions – Restrictions to Disclosure

On five occasions, Pre-Trial Chamber I granted leave to appeal under Article 82(1)(d) in relation to matters of disclosure. It gave leave for three appeals on this matter in the case of *Prosecutor v. Lubanga Dyilo* (OA3, OA5, OA6) and for two appeals in the case *Prosecutor v. Katanga* (OA, OA2).[44]

39 See *Prosecutor v. Lubanga Dyilo* "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute", 3 October 2006 (ICC-01/04-01/06-512), pp. 9-11.

40 See Judgment OA4 (Lubanga), *supra* note 25, paras. 26-35.

41 Judgment OA4 (Lubanga), *supra* note 25, para. 36.

42 Judgment OA4 (Lubanga), *supra* note 25, para. 37.

43 Judgment OA4 (Lubanga), *supra* note 25, para. 37 (footnotes omitted).

44 Both appeals were pending at the time of finalizing this article.

On appeal, the Appeals Chamber reversed two[45] of the decisions of Pre-Trial Chamber I because of a lack of reasoning. The Chamber held that a sufficient reasoning was not only required by various provisions of the legal texts of the Court but also a part of the fair trial guarantees of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the 4th of November 1950[46] – a fact that had also been recognized by the jurisprudence of the International Criminal Tribunal of the Former Yugoslavia.[47]

In the Judgment OA3 (Lubanga), the Appeals Chamber confirmed by majority[48] that the non-disclosure of the identity of witnesses to the person in respect of whom a confirmation hearing is being held is the exception.[49] It determined that any such request by the Prosecutor has to be assessed on a case-by-case basis by the competent Chamber.[50] In the Judgment OA5 (Lubanga), the Appeals Chamber established that a decision of the competent Chamber under Rule 81 (4) RPE should address at least the following three issues: (i) why a witness or victim is endangered by the disclosure of his/her name, (ii) whether for the rights of the accused less restrictive measures are sufficient and feasible (iii) whether such restrictions are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[51] The latter criterion is reflected in Article 68 (1) and (5) and was interpreted by the majority of the Appeals

45 Judgment OA5 (Lubanga), *supra* note 26, paras. 20 to 22; Judgment OA6 (Lubanga), *supra* note 27, paras. 30 to 32.

46 As amended by Protocol 11, 213 United Nations Treaty Series 221 et seq., registration no. 2889.

47 See Judgment OA5 (Lubanga), *supra* note 26, para. 20.

48 Judge Pikis dissented because he would have reversed the decision as a whole, a decision that, in his opinion, does not carry the attributes of a decision. By establishing "general principles" the Pre-Trial Chamber, to his mind, "did not resolve a matter or issue pending" before it and "did not dispose of an issue in the judicial cause". Therefore, the decision lacks "the attributes of judicial determination"; see Judgment OA3 (Lubanga), *supra* note 22, pp. 30 to 40, specifically paras. 22 to 38. The majority adverted to the problem of the "general principles" in passing in paras. 39 and 57 of the judgment of the majority.

49 See Judgment OA3 (Lubanga), *supra* note 22, paras. 33 to 38.

50 Ibid., para. 39.

51 See Judgment OA5 (Lubanga), *supra* note 26, paras. 21, 22 and 33. Pre-Trial Chamber I referred in *Prosecutor v. Katanga* "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 7 December 2007 (ICC-01/04-01/07-90), para. 4, to those criteria as a "test" established by the Appeals Chamber. By so doing, the Pre-Trial Chamber applied this test not only to Rule 81 (4) RPE but also to Rule 81 (2) RPE by substituting the endangerment of witnesses or victims – in making reference to paras. 31 to 33 of the Judgment OA6 (Katanga) (*supra* note 27) – with the criterion that the competent Chamber must establish why the investigation is prejudiced by the disclosure of the material or information in question.

Chamber in the same judgment as encompassing the principle of proportionality.[52] Judge Pikis did not agree with this interpretation.[53]

The Appeals Chamber further addressed the use at the confirmation hearing of summaries of statements of witnesses whose identities have not been disclosed to the defence prior to the confirmation hearing. The Chamber found that such a course is in principle permissible under the terms of the Statute and the Rules of Procedure and Evidence.[54] The majority of the Appeals Chamber thereby relied upon the interpretation of Article 68 (5) and referred to jurisprudence of the European Court of Human Rights.[55]

Importantly for the application of Rule 81 (2) RPE, the Appeals Chamber found in its Judgment OA3 (Lubanga) that the investigation should ideally be completed by the Prosecutor before the confirmation hearing, but that such completion was not required by the Statute and that the Prosecutor could continue his investigation beyond that point in time with respect to alleged new crimes or regarding alleged crimes that are encompassed by the confirmation hearing.[56]

In the Judgment OA6 (Lubanga) the Appeals Chamber decided by majority with respect to Rule 81(2) RPE that "the Prosecutor may, in principle, rely on the unredacted parts of witness statements and other documents at the confirmation hearing, even if they were disclosed to the defence prior to the hearing with redactions authorised pursuant to Rule 81 (2) of the Rules of Procedure and Evidence".[57] The Appeals Chamber came to this conclusion based upon its interpretation of the words "such material or information" in Rule 81 (2) RPE. It shared the understanding of the Prosecutor that Rule 81 (2) RPE "does not dictate … that redactions and/or disclosure must be determined inflexibly by the unit of the entirety of a 'statement' or 'document' such that the statement or document must either be disclosed in its entirety or not considered at the confirmation hearing at all".[58] Judge Pikis disagreed in his separate opinion with this interpretation. He argued that evidence cannot be fragmented and disclosure encompasses the whole of the evidence. Rule 82 (2) RPE, in his opinion, "makes no provision for partial disclosure of a set piece of evidence or information."[59]

52 See Judgment OA5 (Lubanga), *supra* note 26, para. 34.

53 Judge Pikis stated with respect to the interpretation of Article 68 (5) that "[i]f non-disclosure of any part of aspect of the evidence prejudices the rights of the accused, it is not permissible", doubting at the same time, whether this provision allows for any measure of proportionality, see Judgment OA6, *supra* note 27, para. 11 of Judge Pikis' separate opinion. (His separate opinions to the Judgments OA5 and OA6 (Lubanga) are combined in the separate opinion to the Judgment OA6 (Lubanga)).

54 See Judgment OA5 (Lubanga), *supra* note 27, paras. 40 to 51.

55 See Judgment OA5 (Lubanga), *supra* note 27, paras. 49 to 51.

56 See Judgment OA3 (Lubanga), *supra* note 22, paras. 49 to 57.

57 Judgment OA6 (Lubanga), *supra* note 27, para. 2.

58 Judgment OA6 (Lubanga), *supra* note 26, para. 45.

59 Judgment OA6 (Lubanga), *supra* note 26, para. 16 of Judge Pikis' separate opinion.

2.4. Interim release

The issue of interim release under Article 60 was addressed in the Judgment OA7 (Lubanga).[60] It arose in the context of the first appeal under the provisions of Article 82 (1) (b) mounted by Mr. Lubanga Dyilo. The Appeals Chamber made the following two determinations. First, it clarified that the periodic review of "its ruling on the release or detention" requires a preceding ruling under Article 60 (2) on an application for interim release pending trial.[61] It found that the 120-day period established by Rule 118 (2) RPE is not connected to the warrant of arrest.[62] Second, the Appeals Chamber found that paragraphs 4 and 2 of Article 60 Rome Statute stand apart and are applicable independently of each other. In other words, even when a person is lawfully detained according to paragraph 2, the criteria of paragraph 4 might be applicable and justify a release of the person.[63] In his separate opinion, Judge Pikis elucidated the human rights background of Article 60 and found that the provisions of the Rome Statute relevant to the detention of a person "viewed as a whole, give expression to internationally recognized human rights".[64]

3. Jurisprudence of the Appeals Chamber with respect to the admissibility of appeals under Article 82 (1) and the powers of the Appeals Chamber in such appeals

The first jurisprudence of the Appeals Chamber did not only provide guidance on the merits of the appeals; it also contained findings on the admissibility of appeals under Article 82 (1). Moreover, it provided some insights on the scope of powers that the Appeals Chamber may exercise in the context of an appeal under the provisions of Article 82(1).

3.1. Jurisdiction of the Appeals Chamber in appeals under Article 82

In its first judgment, the Appeals Chamber referred to its jurisdictional limitations. It determined that it did not have jurisdiction to deal with the Prosecutor's application for "extraordinary review" of Pre-Trial Chamber I's decision denying leave to appeal against its decision on victims' participation.[65] The Appeals Chamber found that the Rome Statute, and specifically Article 82, do not provide room to assume jurisdiction to review the negative decision of Pre-Trial Chamber I taken under the terms of

60 OA7 (Lubanga) "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007 (ICC-01/04-01/06-824), hereinafter referred to as "Judgment OA7 (Lubanga)".

61 See ibid., paras. 3, 94.

62 See ibid., paras. 95 to 100.

63 See ibid., paras. 4 and 118.

64 Ibid., para. 23 of the separate opinion of Judge Pikis.

65 See Judgment OA3 (DRC), *supra* note 20.

Article 82 (1) (d).[66] Although the Appeals Chamber is the highest tier of the Court, it does not have any supervisory powers towards the Pre-Trial or Trial Chambers of the Court them not being "inferior courts" in the sense of the common law system of England and Wales:

> "The inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions."[67]

In addition, the Appeals Chamber determined in the appeal proceedings OA (Kony a.o.) that it does not have the power to order the stay of proceedings before another Chamber.[68]

3.2. Admissibility of an appeal under Article 82 (1)

The phrase "admissibility of an appeal" cannot be found as such in the legal texts of the Court. Instead, the term "admissibility" is used with respect to a case under the terms of Article 17 and in relation to evidence, e.g. in Article 69 (4). Nevertheless, the Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court lay down specific prerequisites for the mounting of an appeal or the exercise of the right to appeal. The Appeals Chamber has coined the term "admissibility of an appeal" in the appeal proceedings OA3 (Lubanga) and OA8 (Lubanga). The Appeals Chamber has not, so far, adverted to all different factors that might have a bearing on the admissibility of an appeal. It developed its jurisprudence by reference to the issues immediately before it.

Questions of the admissibility of an appeal were discussed by the Appeals Chamber after the parties raised such problems in their submissions, e.g. in the appeal OA3 (Lubanga).[69] The decision[70] of the Appeals Chamber in the appeal OA8 (Lubanga) to direct the parties to address the issue of the admissibility of the appeal before submitting full arguments on the merits of the appeal might provide some indication that

66 See Judgment OA3 (DRC), *supra* note 20, paras. 34 to 41.

67 Judgment OA3 (DRC), *supra* note 20, para. 39.

68 See "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review'", 13 July 2006 (ICC-02/04-01/05-92); a finding repeated in OA8 (Lubanga) "Reasons for 'Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007' issued on 23 February 2007", 9 March 2007 (ICC-01/04-01/06-844), reasoning of the majority in para. 4, reasoning of the minority in para. 5.

69 See Judgment OA3 (Lubanga), *supra* note 22, paras. 12 to 23.

70 OA8 (Lubanga) "Directions and Decision of the Appeals Chamber", 1 February 2007 (ICC-01/04-01/08-800).

the Appeals Chamber assumes that it has the power to address such issues *ex officio*. The decision[71] dismissing the appeal OA2 (Lubanga) might support this conclusion.

The concept of the admissibility of an appeal was clarified in the proceedings OA8 (Lubanga). Mr. Lubanga Dyilo mounted an appeal under Article 82 (1) (b) against the decision of Pre-Trial Chamber I confirming his charges. Article 82 (1) (b) reads in conjunction with the *chapeau*:

> "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: … (b) A decision granting and denying release of the person being investigated or prosecuted".

The Appeals Chamber denied the appealable character of the decision confirming the charges under this provision and dismissed the appeal as inadmissible because Article 82 (1) (b) "confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest".[72] The use of the terms "appealability" of a decision and "admissibility" of an appeal is remarkable, since admissibility is obviously being considered as the broader of the two concepts.[73] Therefore, the appealability of a decision, i.e. the question as to whether a decision falls within the ambit of the jurisdiction of the Appeals Chamber as defined in Article 82 (1) can be considered as a criterion of the broader concept of the admissibility of an appeal. Its absence makes the right to appeal inexistent and the appeal inadmissible.

Article 82 (1) (d) is based on different prerequisites than sub-paragraphs (a) to (c) of paragraph 1. It provides for a right to appeal against a decision "that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings". When read in conjunction with the heading of rule 155 RPE ("Appeals that require leave of the Court"), this provision could be interpreted as requiring an appellant to always first request the Chamber issuing the decision for leave to appeal. The Appeals Chamber addressed this issue in a part of the Judgment OA3 (DRC) that may be considered as an *obiter dictum*. It stated that "the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue…on its own accord".[74] In other words, what is required is the certification of the first-instance Chamber. This certification might either occur upon request of a participant or by the Chamber without a prior request at the moment it issues the decision. Thus far, neither the Pre-Trial nor a Trial Chamber have

71 OA2 (Lubanga) "Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber / In the Alternative, Discontinuance of Appeal", 6 September 2006 (ICC-01/04-01/06-393).

72 OA8 (Lubanga) "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007", 13 June 2007 (ICC-01/04-01/06-926), para. 16.

73 See ibid., the phrasing in para. 2.

74 See Judgment OA3 (DRC), *supra* note 20, para. 20.

certified appeals on their own motion but Pre-Trial Chamber I granted leave upon requests of a party.[75]

In the same part of its judgment,[76] the Appeals Chamber gave an interpretation of the different elements of Article 82 (1) (d). Pre-Trial Chambers have made reference to these elements repeatedly in their decisions on applications to grant leave to appeal.[77]

In the appeal OA3 (Lubanga), the Appeals Chamber looked into some more prerequisites for the mounting of an appeal in answering the question of whether the merits of the appeal can be considered. But it could not establish non-compliance with any of those prerequisites:

> "The Pre-Trial Chamber granted the Prosecutor leave to bring this appeal under article 82 (1) (d) of the Statute (see paragraph 8, above). Furthermore, the Prosecutor has, as stipulated in regulation 64 (2) read with regulation 65 (4) of the Regulations of the Court, filed a document in support of the appeal setting out the grounds of the appeal and containing the legal and/or factual reasons in support of each ground. Grounds of appeal for appeals brought under article 82 (1) (d) of the Statute can include those grounds that are listed at article 81 (1) (a) of the Statute, which include errors of law. …The Prosecutor also complied with the time and page limits laid down for the document in support of the appeal, as set out in the Regulations of the Court and extended by the Appeals Chamber, following an application by the Prosecutor…."[78]

The Appeals Chamber addressed the question of the grounds of appeal because Article 82 is silent on the issue, as opposed to Article 81 (1) which provides for a comprehensive list of errors applicable only to appeals falling under this provision (appeals against a decision on acquittal, conviction or sentence). The majority of the Appeals Chamber limited the grounds of appeal in the terms cited above to the ones mentioned in Article 81 (1) (a) and confined their applicability to appeals under Article 82(1)(d). In his dissenting opinion to the judgment, Judge Pikus assessed the question in relation to all appeals within the ambit of Article 82(1) and (2). He found that

75 Appeals OA3, OA5, OA6 (Lubanga) and OA, OA2, OA3 (Katanga), OA, OA2, OA3 (Darfur), OA4, OA5, OA6 (DRC).

76 See Judgment OA3 (DRC*), supra* note 20, paras. 9 to 10.

77 See e.g. *Prosecutor v. Katanga* "Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation", 6 February 2008 (ICC-01/04-444). Noteworthy is also the interpretation given to Article 82 (1) (d) by Pre-Trial Chambers I and II before the issuance of the Judgment OA3 (Lubanga): *Prosecutor v. Kony a.o.* "Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on the Prosecutor's applications for warrants of arrest under Article 58" 19 August 2005 (ICC-02/04-01/05-20-US-Exp, unsealed); *Situation in the Democratic Republic of the Con*go "Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 5 et VPRS 6", 31 March 2006 (ICC-01/04-135).

78 Judgment OA3 (Lubanga), *supra* note 22, para. 19.

> "the grounds upon which a decision can be impugned are no different from those enumerated in article 81(1)(a) of the Statute. To these grounds one must necessarily add those affecting a fair trial that should pervade the judicial process as evident from the provisions of article 21(3) of the Statute."[79]

The above citation from the Judgment OA3 (Lubanga) has another interesting aspect. It makes compliance with the provisions of the Regulations of the Court a possible prerequisite for the admissibility of the appeal. Whether non-compliance with all of the mentioned provisions of the Regulations of the Court will lead to the dismissal of an appeal has not yet been answered by the Appeals Chamber. Judge Pikis stated, however, in a dissenting opinion, with respect to the effects of the violation of the provisions of Regulation 64(2) RoC that "non-compliance with or deviation from the relevant regulation on the part of the Prosecutor had no noticeable effect on the efficacy of the appeal nor did it deprive the respondent of the necessary knowledge of the case of his counterparty."[80]

Another issue that has been dealt with by the Appeals Chamber before addressing the merits of an appeal is the question of "*res judicata*".[81] Furthermore in the appeal OA2 (Lubanga), the Appeals Chamber decided to declare the appeal of Mr. Lubanga Dyilo under Article 82(1)(a) Rome Statute abandoned. The Chamber acted under Regulation 29 RoC and dismissed the appeal.[82] Instead of submitting a document in support of the appeal, the appellant had tried twice – unsuccessfully – to discontinue the appeal. What can be gathered from this decision of the Appeals Chamber is that the appellant forfeited his right to appeal by his non-compliance with the directions of the Appeals Chamber to submit further reasons for his document in support of the appeal.

Other criteria that may have a bearing on the admissibility of an appeal have not yet been discussed in the jurisprudence of the Appeals Chamber. A matter that may require clarification is the resolution of the question as to who qualifies as "either party" the terms appearing in the *chapeau* of Article 82 (1). This problem has been raised by the Prosecutor in the appeal OA2 (Lubanga), where the decision appealed by Mr. Lubanga Dyilo was issued in proceedings *ex parte*, Prosecutor only.[83] The Appeals Chamber dismissed the appeal for different reasons.

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79 Ibid., para. 14 of the dissenting opinion of Judge Pikis.

80 Ibid., para. 15 of the dissenting opinion of Judge Pikis.

81 See ibid., majority opinion in paras. 20 to 23, minority opinion in paras. 16 to 21 of the dissenting opinion of Judge Pikis.

82 OA2 (Lubanga) "Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber/In the Alternative, Discontinuance of Appeal" 6 September 2006 (ICC-01/04-01/06-393).

83 See ibid., para. 10. It may be mentioned in this context that the Appeals Chamber allowed the appeal of Mr. Lubanga Dyilo twice (and so did Pre-Trial Chamber I who granted leave to Mr. Lubanga Dyilo) – in the appeals OA5 and OA6 (Lubanga) – against decisions of Pre-Trial Chamber I issued publicly (in a redacted version) after "*ex parte*, Prosecutor only" pre-trial proceedings.

3.3. Powers of the Appeals Chamber – Standard of review

What are the powers of the Appeals Chamber in appeals under Article 82 (1)? The Appeals Chamber indicated that paragraph 1 of Article 83, which gives the Appeals Chamber the powers of the Pre-Trial Chamber, is not applicable to an appeal under Article 82 (1) (d). It determined further that Article 83 (2),[84] which specifies a standard of review, is not applicable to appeals under Article 82 (1) (d) either.[85]

Judge Pikis drew a similar conclusion but found that the provisions are inapplicable to other appeals under Article 82 (1) and (2) too.[86] This finding implies that the Statute itself fails to specify the powers of the Appeals Chamber in appeals under Article 82(1) and the standard of review for such appeals. Rule 158 (1) RPE, however, gives an indication of the powers of the Appeals Chamber. It states: "An Appeals Chamber which considers an appeal referred to in this section may confirm, reverse or amend the decision appealed." In addition, Rule 149 RPE provides: "Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber."[87]

The Appeals Chamber has exercised its powers in the following ways. In the context of Mr. Lubanga's request for interim release, the Appeals Chamber confirmed the decision of Pre-Trial Chamber I. It maintained the decision of the Pre-Trial Chamber but added to the reasoning given.[88] The Appeals Chamber also confirmed Pre-Trial Chamber I's decision on jurisdiction. But, in this case, it substituted the reasoning of the Pre-Trial Chamber by the reasoning of the Appeals Chamber.[89] Decisions of Pre-Trial Chamber I have been reversed twice because of lack of reasoning,[90] and once, a decision of Pre-Trial Chamber I has been partially confirmed and partially reversed, while the reasoning of the Pre-Trial Chamber was partly substituted and partly complemented.[91]

84 Article 83 (2) Rome Statute reads: "If the Appeals Chamber 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 …"

85 See Judgment OA3 (Lubanga), *supra* note 22, paras. 13 to 17; see also para. 12 of the dissenting opinion of Judge Pikis.

86 See ibid., para. 12 of the dissenting opinion of Judge Pikis.

87 Noteworthy with respect to the application of rule 149 RPE is the decision of the Appeals Chamber in OA (Kony a.o.) "Decision of the Appeals Chamber on the Unsealing of Documents", 4 February 2008 (ICC-02/04-01/05-266).

88 See Judgment in OA7 (Lubanga), *supra* note 60.

89 See Judgment OA4 (Lubanga), *supra* note 25.

90 See Judgments OA5 and OA6 (Lubanga), *supra* notes 26 and 27 respectively.

91 See Judgment OA3 (Lubanga), *supra* note 22.

One two occasions, the Appeals Chamber dismissed appeals, once because of the non-appealability of the decision in question[92] and once because the appeal was deemed to be abandoned. In the latter case, the Appeals Chamber acted by using its inherent powers mentioned in Regulation 29 RoC. As the Rome Statute, the Rules of Procedure and Evidence as well as the Regulations of the Court lay down criteria that can be regarded as prerequisites for the admissibility of an appeal, it can be inferred that the Appeals Chamber by giving effect to the law has the power to dismiss appeals or applications.[93]

In two appeals,[94] the Appeals Chamber decided to remit the cases back to the Pre-Trial Chamber to decide anew on the applications of the Prosecutor, after reversing the decisions of the Pre-Trial Chamber in question. The Appeals Chamber held that because of the lack of reasoning in the decision of the Pre-Trial Chamber it could not make a determination as to "whether the Pre-Trial Chamber came to correct or erroneous conclusions in relation to the specific redactions authorised".[95] The Appeals Chamber assumed that the Pre-Trial Chamber had to be directed to decide the issue anew because it felt that it could not determine the original applications itself and because it believed that the original applications would otherwise have remained undetermined.[96]

Until present, the Appeals Chamber has not yet decided to amend a decision of the Pre-Trial or Trial Chamber under the terms of Rule 158 RPE. Presumably, the Appeals Chamber makes use of this power whenever it changes the operative provisions of a decision in addition to the reasoning.

Another question that has not yet explicitly been addressed by the Appeals Chamber is the issue of the standard of review applied. The Appeals Chamber stated in the Judgment OA5 (*Lubanga*) which found that the decision of Pre-Trial Chamber I lacked sufficient reasoning that "this error materially affects the Impugned Decision because it cannot be established, on the basis of the reasoning that was provided, how the Pre-Trial Chamber reached its decision."[97] From that, it can be taken that the Appeals Chamber found it important to establish that the error in question – an error of law – did indeed affect the decision as a whole. The similarity to the wording of Article 83 (2) – that was previously declared to be not applicable to appeals under Article 82(1)(d) – "materially affected" – is evident.

In the appeal OA4 (Lubanga),[98] the Appeals Chamber, after deciding that the decision of Pre-Trial Chamber I was erroneous in the interpretation of the law (finding

92 See OA8 (Lubanga) "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007", 13 June 2007 (ICC-01/04-01/06-926).

93 See *supra* 3.2.

94 See Judgments OA5 and OA6 (Lubanga), *supra* notes 26 and 27 respectively.

95 Judgment OA6 (Lubanga), *supra* note 27, para. 66.

96 See Judgments OA5 (Lubanga), *supra* note 26, para. 53 , OA6 (Lubanga), *supra* note 27, paras. 65 and 66.

97 Judgment OA5 (Lubanga*), supra* note 26, para. 53, compare also Judgment OA6 (Lubanga), supra note 27, para. 65.

98 Judgment OA4 (Lubanga), *supra* note 25.

that a jurisdictional issue was concerned and applying the principle of abuse of process), confirmed the decision, seemingly because the operative provisions of Pre-Trial Chamber I's decision were correct. The Appeals Chamber substituted its reasoning for the legal interpretation given by the Appeals Chamber. Therefore, one could argue that the errors of the Pre-Trial Chamber did not "materially affect" its decision, meaning the operative provisions of the decision, which was therefore – with a different reasoning – confirmable.

4. Appeals procedure in appeals under Rules 154 and 155

Provisions regulating the procedure on appeal can be found in the Rules of Procedure and Evidence and the Regulations of the Court. While the Rules determine the time limits within which a party may appeal a decision, the Regulations envisage a notice of appeal as signifying the taking of an appeal, establishing the need to specify therein the relief sought. The grounds of appeal and arguments in support thereof are put in a second document, called "document in support of the appeal" in which the grounds of appeal and reasons founding them have to be elaborated upon.[99]

Time limits for the submission of the document in support of the appeal have been laid down in Regulation 64 RoC for appeals under Rule 154 RPE. With respect to appeals under Rule 155 RPE, a notice of appeal is not required but a document in support of the appeal should be submitted ten days after notification of the decision of the Pre-Trial or Trial Chamber granting leave to appeal.[100]

The Pre-Trial Chambers have stated that the request for leave to appeal should not yet contain any reference to the grounds of appeal but should concentrate exclusively on the prerequisites for leave established by Article 82 (1) (d).[101] Regulation 37 RoC stipulates for a page limit of 20 pages for all documents[102] unless otherwise

99 See also *supra* 3.2. with respect to the content of the document in support of the appeal. Noteworthy is the decision where a document without signature of counsel and being filed without knowledge or consideration of counsel was not accepted by the Appeals Chamber, see "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", 21 February 2007 (ICC-01/04-01/06-834), para. 6.

100 See e.g. Regulation 65 (5) RoC.

101 See *Prosecutor v. Kony a.o.* "Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on the Prosecutor's applications for warrants of arrest under Article 58" 19 August 2005 (ICC-02/04-01/05-20-US-Exp, unsealed), para. 22; *Situation in the Democratic Republic of the Congo* "Décision relative à la requête du Procureur solicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procedure de VPRS 1, VPRS 2, VPRS 3, VPRS 5 et VPRS 6" 31 March 2006 (ICC-01/04-135), para. 30. With respect to the interpretation of Article 82 (1) (d) Rome Statute, see *supra* 3.2.

102 The term "document" is defined in general terms in Regulation 22 RoC and is understood to include as such the notice of appeal, the document in support of the appeal and any response thereto.

provided.[103] The Regulations of the Court also make provision for the content of the response and the time limit for its submission.

4.1. Extension of page and time limits and supplementation of documents

All Chambers of the Court face requests for extensions of time and page limits for documents. The relevant provisions concerning the document in support of the appeal and the response thereto are contained in Regulation 35 RoC (which governs the extension of time limits) and Regulation 37 (2) RoC (which deals with the enlargement of page limits).

According to the scheme of the Regulations of the Court (i.e. Regulations 24 (1) and 34 (b) RoC), the Prosecutor and the Defence may file a response to any document within 21 days of notification, if not otherwise provided.[104] The same applies for participating victims (Regulation 24 (2) RoC). Since most time limits in appeals under rules 154 and 155 RPE are short, the Appeals Chamber abbreviated the time within which the other side must respond.[105] The Appeals Chamber has not yet addressed the question whether Regulation 35 (2) RoC (which states "and *where appropriate*, after having given the participants an opportunity to be heard" (emphasis added)), is perhaps *lex specialis* for requests for extension of time.

According to Regulation 35 (2) RoC, the participants must show "good cause" for the extension (or reduction) of the time limit. The Appeals Chamber, after having elaborated on several occasions on what amounts to a good cause,[106] defined it as follows:

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103 The Appeals Chamber decided that for appeals under Article 82 (1) (a) arising from a challenge to the jurisdiction of the Court, Regulation 38 (1) (c) RoC applies, allowing for a page limit of 100 pages. See OA4 (Lubanga) "Reasons for the Appeals Chamber's Decision of 16 November 2006 on the 'Prosecution's Request for an Extension of the Page Limit", 17 November 2006 (ICC-01/04-01/06-717) para. 9.

104 For the calculation of time limits, see Regulation 33 RoC.

105 *Time limits*: see as examples OA2 (Katanga) Order concerning the filing of a response by the Prosecution to the "Defence Application for Extension of Time to File Document in Support of Appeal" 20 December 2007 (ICC-01/04-01/07-119) and OA (Katanga) "Order concerning the Filing of a Response by the Defence to the 'Prosecution's Urgent Application for Extension of Time to file Document in Support of the Appeal", 17 December 2007 (ICC-01/04-01/07-112); *page limits*: OA4 (Lubanga) "Appeals Chamber's Directions", 13 November 2006 (ICC-01/04-01/06-698); different with respect to page limits, the approach of the Trial Chamber in *Prosecutor v. Lubanga Dyilo* "Decision rejecting prosecution's request for extension of page limit", 11 September 2007 (ICC-01/04-01/06-950) [but see "Decision on prosecution's request for extension of page limit", 10 December 2007 (ICC-01/04-01/06-1070)].

106 See *inter alia* OA2 (Lubanga) "Decision on the appellant's application for an extension of the time limit for the filing of the document in support of the appeal and order pursuant to regulation 28 of the Regulations of the Court" 30 May 2006 (ICC-01/04-01/06-129); OA3 (Lubanga) "Decision on the 'Prosecutor's Motion for Extensions of the Time and Page Limits'" 3 July 2006 (ICC-01/04-01/06-177) and "Decision on the application by Counsel

> "Such reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations."[107]

This definition has been applied by the Appeals Chamber.[108] Regulation 35 (2) RoC also makes provision for the reasons justifying the extension of a time limit after its expiry, when the participant demonstrates "that he or she was unable to file the application within the time limit for reasons outside his or her control." Although such a situation has not yet arisen before the Appeals Chamber, the provision was applied in a case of a request for supplementation of a document that could not be finalized because of the personal circumstances of the applicant but was submitted nevertheless.[109]

It is still unresolved whether the Appeals Chamber may, on its own motion, abbreviate or extend the time limit for the submission of the document in support of the appeal and the response thereto provided for in Regulations 64 and 65 (4) and (5) RoC, without an application of a participant to that effect. In a prelude to a possible resolution of this question, the Appeals Chamber asked the parties in the appeal OA4 (Lubanga) whether they were able to submit the document in support of the appeal and the response thereto within a time limit shorter than that provided and decided after hearing the parties not to reduce the time limit.[110] Pre-Trial Chamber I extended

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for Mr. Thomas Lubanga Dyilo to extend the time limit for the filing of the response to the Prosecutor's document in support of the appeal" 11 July 2006 (ICC-01/04-01/06-190); OA5 (Lubanga) "Decision on the Request by Mr. Thomas Lubanga Dyilo for an Extension of Time" 12 October 2006 (ICC-01/04-01/06-562) and the separate opinion of Judge Pikis in OA2 (Lubanga) "Decision on the appellant's application for an extension of the time limit for the filing of the document in support of the appeal and order pursuant to regulation 28 of the Regulations of the Court" 30 May 2006 (ICC-01/04-01/06-129).

107 See OA8 (Lubanga) "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007" 21 February 2007 (ICC-01/04-01/06-834), para. 7.

108 See OA (Katanga) "Decision on the 'Prosecution's Urgent Application for an Extension of Time to File Document in Support of the Appeal'" 18 December 2007 (ICC-01/04-01/07-115) and OA2 (Katanga) "Decision on the 'Defence Application for Extension of Time to File Document in Support of Appeal'" 21 December 2007 (ICC-01/04-01/07-121).

109 See OA8 (Lubanga), "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007" 21 February 2007 (ICC-01/04-01/06-834), para. 9.

110 See OA4 (Lubanga) "Appeals Chamber's Request and Directions" 13 October 2006 (ICC-01/04-01/06-569), "Appeals Chamber's Clarification"19 October 2006 (ICC-01/04-01/06-590).

the time provided for in rule 155 (1) RPE to request leave to appeal on its own motion without hearing the parties or having an indication that such leave would be requested.[111]

Regulation 37 (2) RoC stipulates that the circumstances underlying an extension of a page limit must be exceptional. The Appeals Chamber allowed an extension of five pages in the appeal OA3 (*Lubanga*) because of the complexity of the case.[112]

4.2. Reply to response to document in support of the appeal – Regulation 28 RoC

The question as to whether the Appeals Chamber may grant leave to reply to a response to a document in support of an appeal under Rules 154 and 155 RPE has been answered in the negative in the appeal OA3 (Lubanga).[113] It was inferred that a reply is meant to be excluded, since it is positively regulated for appeals under Rule 150 RPE in Regulation 60 RoC, but not specified in Regulations 64 and 65 RoC.[114] The Appeals Chamber stressed, however, that Regulation 28 RoC might apply, which leaves it in the hands of the Chamber to ask for clarifications or further submissions.[115] In appeal OA2 (Katanga), the Defence requested the Appeals Chamber to make an order under

111 See *Prosecutor v. Katanga* "Decision on the Starting date of the Timelimit provided for in Rule 155 of the Rules in relation to the Decisions Issued on 21 December 2007" 21 December 2007 (ICC-01/04-01/07-128); *Situation in the Democratic Republic of the Congo* "Decision on the Starting date of the Timelimit provided for in Rule 155 of the Rules in relation to the Decision Issued on 24 December 2007" 24 December 2007 (ICC-01/04-424). The underlying question, whether Regulation 35 RoC can apply to the time limits laid down in Rules 154 and 155 RPE (in comparison to the regulatory effect of Rule 150(2) RPE), has not yet been addressed.

112 See "Decision on the Prosecutor's Motion for Extensions of the Time and Page Limits" 3 July 2006 (ICC-01/04-01/06-177).

113 See OA3 (Lubanga) "Decision on the Prosecutor's Application for Leave to Reply to 'Conclusions de la defense en réponse au mémoire d'appel du Procureur'", 12 September 2006 (ICC-01/04-01/06-424).

114 See ibid., para. 6; Judge Pikis in his separate opinion (pp. 6 to 10) underlined that this interpretation is in conformity with the principle of equality of arms applicable under Article 21 (3) to the question in hand; see also OA (Katanga) "Decision on the Prosecution's Request for Leave to Reply" 18 January 2008 (ICC-01/04-01/07-148).

115 See OA3 (Lubanga) "Decision on the Prosecutor's Application for Leave to Reply to 'Conclusions de la defense en réponse au mémoire d'appel du Procureur'" 12 September 2006 (ICC-01/04-01/06-424), para. 7. The Appeals Chamber applied Regulation 28 of the RoC on several occasions in the course of the different appeal proceedings, see *inter alia* OA2 (Lubanga) "Decision on the Appellant's Application for an Extension of the Time Limit for the Filing of the Document in Support of the Appeal and Order pursuant to regulation 28 of the Regulations of the Court" 20 May 2006 (ICC-01/04-01/06-129); OA8 (Lubanga) "Directions and Decision of the Appeals Chamber" 1 February 2007 (ICC-01/04-01/06-800).

Regulation 28 RoC. This request was granted by majority which made at the same time provision for a response to be submitted by the Prosecutor.[116]

4.3. Classification of documents

Participants are classifying the documents addressed to the Court in accordance with Regulation 14 Regulations of the Registry by using the following categories: "public", "confidential" or "under seal". On two occasions, the Appeals Chamber decided to make its decisions public although the application had been filed confidentially.[117] It thereby stressed that "the mere labeling of a given proceeding as confidential without substantiation is not in itself conclusive".[118] It had already been noted before that "participants who are making filings confidentially should clearly set out the reasons for doing so".[119]

At the eight plenary session, the judges of the Court amended the Regulations of the Court. They included a new Regulation 23*bis* which is entitled "Filing of document marked *ex parte*, confidential or under seal". This regulation requires that filings must include reasons to justify why a document is filed with another classification than "public". It further clarifies that participants shall apply to the Chamber for reclassification, when the grounds for a classification as "under seal" or "*ex parte*" cease to apply. In its recent decision relating to the unsealing of documents and decisions in the appeal OA (Kony a.o.), the Appeals Chamber applied Rule 137(2) RPE in connection with Rule 149 RPE and Regulation 20(3) RoC as the legal basis for its decision.[120] It should be mentioned that the proceedings relating thereto were triggered before the just-mentioned amendment to the Regulations of the Court entered into force. In his separate opinion, Judge Pikis underlined the temporary character[121] of any measure taken to keep documents and decisions under seal, and stated in addi-

116 OA2 (Katanga) "Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities" 24 January 2008 (ICC-01/04-01/07-164), reasons for the order in the Judgment OA2 (Katanga).

117 See OA8 (Lubanga) "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007" 21 February 2007 (ICC-01/04-01/06-834), para. 12; "Reasons for 'Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procedure afin de permettre la designation d'un nouveau Conseil de la Défense' filed on 20 February 2007' issued on 23 February 2007" 9 March 2007 (ICC-01/04-01/06-844), para. 17.

118 See OA8 (Lubanga) "Reasons for 'Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procedure afin de permettre la designation d'un nouveau Conseil de la Défense' filed on 20 February 2007' issued on 23 February 2007" 9 March 2007 (ICC-01/04-01/06-844), para. 17.

119 See Judgment OA7 (Lubanga), *supra* note 60, para. 76.

120 See OA (Kony a.o.) "Decision of the Appeals Chamber on the Unsealing of Documents" 4 February 2008 (ICC-02/04-01/05-266).

121 See ibid., paras. 4 and 10 of the separate opinion of Judge Pikis.

tion that, "[t]he Statute confers no power to withhold publication of judgments/decisions of the Appeals Chamber".[122] He supported this finding by reference to human rights principles.

4.4. Participation of victims in appeal proceedings

The Appeals Chamber was also called upon to rule on the participation of victims in appeal proceedings. In the appeal OA7 (Lubanga), an appeal raised under Article 82 (1) (b), victims were allowed to participate in the proceedings but only after having filed an application to that end.[123] According to this decision, an application of victims must include: a statement (i) "in relation to whether and how their personal interests are affected by the particular appeal" and (ii) "why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented".[124] The parties were allowed to respond to that application within a set time limit.

The decision that a separate application of victims was necessary in order to participate in an appeal was taken by the majority of the Appeals Chamber.[125] Judge Song dissented, while making the time limits of Regulations 64 and 65 RoC applicable to victims without requiring a response of the parties thereto.[126] In the appeal OA8 (Lubanga) (also an appeal raised under Article 82 (1) (b)), the victims themselves reiterated in their application to participate, that, in their opinion, they had a right to respond to the submissions of all participants in the appeal.[127]

The grounds for permitting victims to participate were elaborated in more detail in a decision in the appeal OA8 (Lubanga).[128] The Appeals Chamber had presaged its reasoning already in the appeal OA7 (Lubanga) where victims were allowed to make submissions with respect to their personal interests concerning the issues raised on appeal.[129] In the appeal OA8 (Lubanga), victims were not allowed to participate in the

122 Ibid., para. 5 of separate opinion of Judge Pikis.

123 See OA7 (Lubanga) "Order of the Appeals Chamber" 4 December 2007 (ICC-01/04-01/06-751).

124 See Judgment OA7 (Lubanga), *supra* note 60, para. 2.

125 See ibid., pages 12 to 15, paras. 35 to 49.

126 Ibid., pages 55 to 57, paras. 1 to 8 of Judge Song's dissenting opinion.

127 See OA 8 (Lubanga) "Demande conjointe des victims a/0001/06 à a/0003/06 et a/0105/06 relative aux 'Directions and Decision of the Appeals Chamber' déposées le 1er février 2007" 2 February 2007 (ICC-01/04-01/06-802) page 4 ; several voices expressed criticism on the application procedure, see *inter alia*, War Crimes Research Office, *Victim Participation before the International Criminal Court* (November 2007), p. 61 ; G. Bitti 'Chronique de la jurisprudence de La Cour pénale internationale 2007' *Revue de science criminelle et de droit pénal comparé* [2007] No. 3, page 652.

128 "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" 13 June 2007 (ICC-01/06-01/04-925).

129 See OA7 (Lubanga) "Decision of the Appeals Chamber" 12 December 2007 (ICC-01/04-01/06-769); reasoning in Judgment OA7 (Lubanga), *supra* note 60, paras. 50 to 55.

preliminary issue dealt with, i.e. the question of whether the appeal of the Defence against the decision confirming the charges is admissible under Article 82 (1) (b). The majority of the Appeals Chamber did not see how the personal interests of the victims were affected by the question of whether the appellant had a right to appeal.[130] The Chamber further stated:

> "28. More broadly, any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis. Clear examples of where the personal interests of victims are affected are when their protection is at issue and in relation to proceedings for reparations. More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor. Even when the personal interests of victims are affected within the meaning of Article 68 (3) of the Statute, the Court is still required, by the express terms of that Article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[131]

Judge Pikis, while agreeing with the majority, stated his position on Article 68(3) in a separate opinion. He argued *inter alia* that the views and concerns of victims "are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings."[132]

Judge Song disagreed with the view expressed by the other four judges that the personal interests of the victims are not affected. He found that it is in the interest of victims "that justice is done" and that the question of whether an appeal is admissible is an "integral aspect of the appeal that cannot be separated from the other questions that are arising in the appeal".[133] However, he found it inappropriate under the specific circumstances of the appeal in question for victims to participate and therefore agreed to the outcome of the decision.[134]

In the case of the appeal OA4 (DRC) by the Office of Public Counsel for the Defence against a decision of Pre-Trial Chamber I on victims' applications, the Appeals Chamber made an order by which it applied the system established in the appeal

130 See OA8 (Lubanga) "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" 13 June 2007 (ICC-01/06-01/04-925), p. 10, paras. 26 and 27.

131 Ibid., para. 28 (footnotes omitted).

132 Ibid., p. 20, para. 16 of the separate opinion of Judge Pikis.

133 Ibid., p. 28, para. 19 of Judge Song's separate opinion.

134 Ibid., pp. 29, 30, paras. 21 to 23 of Judge Song's separate opinion.

proceedings OA7 and OA8 (*Lubanga*) in essence also to appeals under Article 82 (1) (d).[135]

Independently of the interpretation of Article 68 (3) Rome Statute, the Appeals Chamber also specified that victims were allowed to participate in appeal proceedings under Article 82 (1) (a) by making observations. The Chamber determined that such a right derives directly from Article 19 (3).[136]

4.5. Discontinuance of appeal proceedings

An appeal under Article 82 (1) or (2) can be discontinued in accordance with Rule 157 RPE. The Appeals Chamber decided in two separate decisions in the appeal OA2 (*Lubanga*) that the notice of discontinuance is valid only if it is unconditional. The Chamber excluded at the same time any condition that makes the validation of the notice dependant upon adjudication of the Chamber itself.[137]

5. Conclusion

The first jurisprudence of the Appeals Chamber of the ICC traced in this article has already addressed many essential aspects of the jurisdiction and powers of the Appeals Chamber and the procedure before it in appeals under Article 82 (1). Appeals pending before the Appeals Chamber at the time of the finalization of this article will further develop some of these aspects, including issues such as disclosure, interim release and other procedural matters relevant to the pre-trial or trial stage, such as the participation of victims in pre-trial and trial proceedings.

135 See OA4 (DRC) "Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representatives' request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor" dated 13 February 2008 (ICC-01/04-450). It is noteworthy that the Legal Representative of several victims asserted that the jurisprudence of the Appeals Chamber in the appeals OA7 and OA8 exclusively applied to appeal proceedings under Article 82 (1) (b) Rome Statute (see "Demande d'éclaircissements du BCPV en tant que représentant légal sur la participation des victimes à l'appel interlocutoire déposé par le BCPD en vertu de l'article 82(1)(d) du Statut de Rome", 6 February 2008 (ICC-01/04-442).

136 See OA4 (Lubanga) "Appeals Chamber's Request and Directions" 13 October 2006 (ICC-01/04-01/06-569); noteworthy in this context also the separate opinion of Judge Pikis in OA8 (Lubanga) "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" 13 June 2007 (ICC-01/06-01/04-925), p. 15, para. 8.

137 "Decision on Thomas Lubanga Dyilo's Brief relevant to Discontinuance of Appeal" 3 July 2006 (ICC-01/04-01/06-176); "Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber / In the Alternative, Discontinuance of Appeal", 6 September 2006 (ICC-01/04-01/06-393).

This article seeks to facilitate the understanding of pending and future appeal proceedings before the ICC. It will be of particular interest to see to what extent the Appeals Chamber will follow its first jurisprudence and how it will apply Article 21 (2) Rome Statute, which provides that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions".

Chapter 28 Interlocutory appeals in the early practice of the International Criminal Court

*Håkan Friman**

1. Introduction

The right of appeal is now generally acknowledged as a fundamental human right in criminal proceedings, at least as far as the convicted person's appeal against the conviction or sentence is concerned. Article 14 (5) of the International Covenant on Civil and Political Rights[1] provides, in quite general terms, "all persons convicted of a crime" with a right to appeal the conviction or sentence. In Europe, Article 2 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] sets forth a right to appeal and it has been argued that already the fair trial rights of that Convention indirectly give rise to such a right.[3] Similarly, the right to appeal the (criminal) judgment to a higher court is laid down in Article 8 of the American Convention on Human Rights.[4] The African Charter on Human and Peoples Rights,[5] Article 7, recognises the right of everyone to have his cause heard, comprising, *inter alia*, the right of appeal 'against acts of violating his fundamental rights'.

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1 Adopted by the General Assembly on 16 December 1966; UNTS Vol. 999, p. 171; see also M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd revised ed. 2005) at 348-352.

2 Adopted on 22 November 1984; ETS No. 117.

3 E.g. R. Nobles & D. Schiff, 'The Right to Appeal and Workable Systems of Justice', (2002) 65 *Modern Law Review* 676, 699; compare, however, P. van Dijk et al (eds.), *Theory and Practice of the European Convention on Human Rights,* 4th ed. (2006), at 564 (arguing, with reference to case law, that a right to appeal is not implied in Article 6 of the Convention).

4 Adopted on 22 November 1969; OAS Treaty Series No. 36.

5 Adopted on 26 June 1981; OAU Doc. CAB/LEG/67/3/Rev.5.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 553-561.

Moreover, a right of appeal that is afforded to both the accused and the prosecutor exists in many domestic systems as well as in the international criminal courts and tribunals.

One should bear in mind, however, that the nature and extent of the right of appeal vary considerably, both in domestic and in international criminal courts.[6] A clear example from domestic jurisdictions is the right of the prosecutor to appeal an acquittal.

Appeals are meant to safeguard and ensure the proper application and interpretation of the law as well as the fairness of the proceedings; correcting errors and ensuring uniformity are general functions of appellate courts.[7] Another function of appellate courts, albeit to a varying degree in different jurisdictions, is to announce and make law, which in part is linked to whether the jurisprudence of higher courts are binding for lower courts or not.

2. The legal framework of the ICC

At the ICC,[8] like in many domestic systems, not only errors of law but also errors of fact constitute grounds for appeal. In addition, procedural errors do so as well. The lower Chamber's decision may be reversed or amended, and even a re-trial before a different Chamber can be ordered, if the impugned decision was materially affected by error of fact or law, or of a procedural error.[9] Hence it is clear that the system is hierarchical and that the Appeals Chamber is meant to have a supervisory role.

Unlike the ICTY and ICTR, which have established a doctrine of precedent,[10] the ICC Statute provides that the Court may follow the principles set forth in its previous decisions, but without being bound to do so.[11] This discretionary opportunity to use its prior decisions as a source of law may be open to somewhat different interpretations.[12] Nonetheless, in practice the ICC Pre-Trial Chambers have frequently referred

6 For a comparative analysis of different systems for final review of lower courts' decisions, see e.g. S. Geeroms, 'Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal should not be Translated', (2002) 50 *American Journal of Comparative Law* 201.

7 E.g. M. Shapiro, 'Appeal', (1980) 14 *Law and Society Review* 629 and S. Trechsel, *Human Rights in Criminal Proceedings* (2005), at 362-363.

8 Article 81 (1) of the ICC Statute.

9 Article 83 (2) of the ICC Statute.

10 E.g. *Prosecutor v. Aleksovski*, Case No. IT-95/14-1-A, Judgment, A. Ch., 24 March 2000, paras. 107-111.

11 Article 21 (2) of the ICC Statute. See on the role of precedent also the contribution by V. Nerlich in Ch. 17 of this volume.

12 Cf. M. McAuliffe deGuzman, 'Article 21', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes* (1999) 445 and A. Pellet, 'Applicable Law', in A. Cassese *et al* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1065-1067.

to Appeal Chamber decisions as authoritative expressions of the law, not the least with respect to the requirements for leave to appeal.

However, what has now been said does not necessarily mean that each and every decision rendered throughout the criminal proceedings must be subject to a separate appeal. Indeed, with respect to international human rights norms the ICC Appeals Chamber has concluded that "[o]nly final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict are assured as an indispensable right of man".[13] Hence, only selected decisions might be open to interlocutory appeals, or perhaps no such appeals are allowed at all. To the extent interlocutory appeals are prevented, legal, factual and procedural errors can be reviewed only when the verdict, sentence or other final decision of that stage of the proceedings is being appealed. Of course, also errors at the pre-trial stage may have implications on the proceedings and affect the outcome of the trial.[14]

By prohibiting interlocutory appeals one will avoid the delays normally caused by appeal proceedings. Indeed, some would argue that interlocutory appeals are generally disfavoured and that the scope should be restricted to an absolute minimum, perhaps only to challenges to the court's jurisdiction, construed in a narrow sense.[15] But a major drawback of such a restrictive approach is that errors which affect the subsequent process might occur but cannot be remedied until much later; also errors that are so serious that the trial proceedings, and perhaps also the pre-trial proceedings, must be done again. Arguably, the potential delays caused by a too restrictive scope of interlocutory appeals are more severe than the delays caused by a carefully framed regime for appeals of that kind.

The ICTY and ICTR have introduced, in spite of lack of explicit support in their Statutes, schemes for interlocutory appeals in the Rules of Procedure and Evidence. The rules have been amended over the years in order to increase the effectiveness of the system and reduce the number of appeals.[16] Today they apply a system of certification to be determined by the Trial Chamber.[17]

Similarly, the ICC Statute limits the scope of interlocutory appeals.[18] Concerning a few issues, interlocutory appeals are provided for as a matter of right. A few such ap-

13 Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, A.Ch., 13 July 2006 ICC-01/04-168, para. 38.

14 This has also been underlined by the Appeals Chamber, see ibid. para. 11.

15 E.g. M. C. Fleming, 'Appellate Review in International Criminal Tribunals', (2002) 37 *Texas International Law Journal* 111, 144-145.

16 On the evolution of the ICTY rules, see J. Hocking, 'Interlocutory Appeals before the ICTY', in R. May *et al* (eds.), *Essays on ICTY Procedure and Evidence – In Honour of Gabrielle Kirk McDonald* (2001) at 459-472.

17 Rules 72 and 73 of the ICTY Rules of Procedure and Evidence and ICTR Rules of Procedure and Evidence.

18 Article 82 of the ICC Statute. On the negotiations, see H. Brady & M. Jennings, 'Appeal and Revision', in R. S. Lee, *The Rome Statute of the International Criminal Court – The Making of the Rome Statute* (1999), at 299-300.

peals, which do not require leave for appeal, have so far been decided by the Appeals Chamber; for example, appeals have been heard against the Pre-Trial Chamber's decision to reject an application for interim release,[19] and a decision that the Pre-Trial Chamber, but not the Appeals Chamber, considered as a challenge to the jurisdiction of the Court.[20]

All other decisions require leave for interlocutory appeal. The provision on leave to appeal, which has influenced subsequent provisions for other international courts,[21] reads:

> "A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".[22]

Nevertheless, a requirement of certification or leave for appeal, which the lower Chamber is to determine, could be questioned.[23] For example, leaving the question to many different Chambers instead of the one Appeals Chamber carries the risk of diverging practice. In addition, the decision maker of the impugned, or possibly impugned, decision and of the certification or leave to appeal will be the same, not having the benefit of a level of detachment from the prior decision when deciding the latter issue. One may note, as the Prosecutor has done,[24] albeit unsuccessfully (see below), that some domestic systems allow parallel routes: through the lower court as well as directly to the appellate court. Certain appeals in England and Wales may serve as an example of this approach.[25] In other domestic systems, deciding whether to grant a leave for appeal is always a matter for the appellate court; for example, this is the case in Sweden.[26]

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19 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007. ICC-01/04-01/06 (OA 7).

20 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06 (OA 4).

21 See Rule 73 (B) of the ICTY and ICTR Rules of Procedure and Evidence respectively.

22 Article 82 (1) (d) of the ICC Statute.

23 See also S. Zappalà, *Human Rights and International Criminal Proceedings* (2003), at 162-163.

24 Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 April 2006. ICC-01/04-141.

25 E.g. C. M. Bradley, *Criminal Procedure: A Worldwide Study* (2007), at 193.

26 See Ch. 51 s. 11 (Court of Appeal) and Ch. 55 s. 7 (Supreme Court) of the Swedish Code of Judicial Procedure.

Now be that as it may, this is the existing regime of the ICC and it must be accepted as *de lege lata*.

3. Practice

The statutory regime means that the Pre-Trial Chamber, or Trial Chamber, is designated as the gatekeeper to the Appeals Chamber concerning all decisions with respect to which leave to appeal is required. The ICC Statute does not provide for a parallel system whereby not only the lower Chamber but also the appellate Chamber may accept an appeal to be heard. Upon the Prosecutor's request for an 'extraordinary review', the Appeals Chamber found no basis for introducing dual roads to obtain a permission for interlocutory appeal, concluding *inter alia* that "[t]he Pre-Trial and Trial Chambers of the International Criminal Court are in no way inferior courts in the sense that inferior courts are perceived and classified in England and Wales".[27]

The Appeals Chamber has also dismissed the submission that the Statute leaves room for turning directly to that Chamber with the appeal against a decision not to grant leave.[28] The parties will, therefore, have to seek leave to appeal against the decision denying leave for appeal. But it is in fact the first decision which address the real issue that the party wants to be resolved by the Appeals Chamber. As a result, the focus of the determination of leave to appeal will in such a case rather be directed towards technical procedural questions, and not the real matter, procedural or otherwise, that is in dispute.

Let us look at an example. The Pre-Trial Chambers have repeatedly ruled out the possibility to seek its "reconsideration", or "clarification", of an earlier ruling.[29] Instead, the parties have been directed to seek leave for appeal, which in practice have thereafter been denied. Hence, the real contested issue is addressed in the first decision (decision 1). A subsequent request for reconsideration of decision 1 is denied in a later ruling (decision 2) and the party is referred to leave for appeal as the proper remedy. But due to time-limits the leave request can at this stage only be directed against decision 2. And decision 2 normally does not relate to an "issue" that satisfies the requirements for leave to appeal.[30] Consequently, the next decision (decision 3) is a rejection of the request for leave. Et voila! Hence, the first decision to refuse leave for appeal, by a single judge or a full Chamber, is truly final in practice and so regard-

27 Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 30.

28 Ibid.

29 E.g. Pre-Trial Chamber II, Decision on the Prosecutor's Position on the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, 28 October 2005, ICC-02/04-01/05; Pre-Trial Chamber I, Decision on the Prosecution Motion for Reconsideration, (Single Judge), 23 May 2006, ICC-01/04-01/06.

30 E.g. Pre-Trial Chamber I, Decision on the Prosecutor's Application for Leave to Appeal, 14 March 2005, ICC-01/04.

less of the merits of this first decision. A very unfortunate result, albeit not necessarily one that is wrong in law.

In addition, the early practice of the Pre-Trial Chambers has been very restrictive concerning leave for appeal;[31] only in a few instances have leave for appeal been granted.[32] Not even important decisions concerning the participation of victims,[33] or re-categorisation of the charges by the Pre-Trial Chamber *proprio muto* and other issues in the confirmation process,[34] have been considered to merit the granting of leave for appeal.

A detailed assessment of the criteria for leave to appeal in accordance with Article 82 (1) (d) of the ICC Statute is beyond the scope of this short note; the Appeals Chamber has made an authoritative interpretation of the requirements,[35] which thereafter regularly have been re-stated and applied by the Pre-Trial Chambers. It is not being suggested here that all applications for leave to date should have been granted.[36] But it

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On the question of an 'issue' that may be subject to an appeal, see e.g. Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04.

31 E.g. Pre-Trial Chamber II, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence Request for Leave to Appeal regarding the Transmission of Applications for Victim Participation, 6 November 2006, ICC-01/04-01/06; Pre-Trial Chamber II, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on the "Prosecution's Request for Leave to Appeal the Decision Denying the 'Application to Lift Redactions from Applications for Victims' Participation to be Provided to the OTP'", (Single Judge), 9 March 2007, ICC-02/04-01/05.

32 E.g. Pre-Trial Chamber I, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, (Single Judge), 23 June 2006, ICC-01/04-01/06; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Second Defence Motion for Leave to Appeal, (Single Judge), 28 September 2006, ICC-01/04-01/06; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Third Defence Motion for Leave to Appeal, (Single Judge), 4 October 2006, ICC-01/04-01/06.

33 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, , ICC-01/04-01/06; and Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Defence Motion for Leave to Appeal, 18 August 2006, ICC-01/04-01/06.

34 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 24 May 2007, ICC-01/04-01/06.

35 Appeals Chamber,, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04.

36 The reasoning behind denials to grant leave for appeal has sometimes been criticised, however, and it has been noted that the reasoning that the decision was of no prejudice

is worthwhile to note that a number of very important issues that one or more of the parties have considered – truly and *bona fide* – to require a resolution, and possible directions, by the Appeals Chamber, have not reached that Chamber. Accordingly, such a resolution may not be achieved until after the completion of the first level proceedings. It also means that the lower Chambers have ruled on important matters, and sometimes differently, without having the benefit of the Appeals Chamber pronouncing authoritatively on the issue.

The restrictive practice concerning leave for appeal has also led the parties to seek other, and more or less construed, avenues in order to reach the Appeals Chamber. Apart from the Prosecutor's already mentioned application for "extraordinary review", defendants have raised grounds for interlocutory appeal that, if accepted, do not require leave.[37] However, these attempts have been unsuccessful.

It is true that generally interlocutory appeals in international criminal procedures are of an exceptional nature. This applies not only to the ICC but is also established in the jurisprudence of the ICTY, ICTR and Special Court for Sierra Leone;[38] delays and unnecessary disruptions should be avoided. But such appeals are not ruled out altogether, also not when leave for appeal is required, and a proper balance must be struck between the benefit of an early and authoritative resolution of important issues and the possible inconvenience. An interpretation of the regime meaning that interlocutory appeals should be limited to "a few, strictly defined exceptions" appears far too narrow.[39]

Not the least the procedural regime of the ICC is new, and without domestic models to tap experience from, and at times this regime is also complex. It is illustrative that one of the first issues for which leave was granted, on disclosure (redactions), led to judgments by the Appeals Chamber whereby the impugned decisions were reversed and the Pre-Trial Chamber was directed to decide the issue anew.[40]

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to the fairness of the proceedings *de facto* is very close to an assessment of the merits of the challenged decision (rendered by the same Chamber); G. Sluiter & S. Vasiliev, 'International Criminal Court (ICC)', (2006) 24 *Netherlands Quarterly of Human Rights* 513, 521.

37 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admissibility of the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007, 13 June 2007, ICC-01/04-01/06.

38 For references, see Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06. para. 13 (and footnotes).

39 See Pre-Trial Chamber II, Under Seal – Ex Parte, Prosecutor Only – Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05, para. 19 (unsealed pursuant to a decision of 13 October 2005).

40 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81",

Moreover, the responsibilities and tasks of the Pre-Trial Chamber and the Prosecutor will inevitably be fraught by friction until the respective roles have been well established and settled; those conflicts are so to speak built into the system. The Appeals Chamber could speed up that development if allowed to intervene and settle certain issues as they arise.

The Appeals Chamber could contribute, particularly now during the early life of the Court, to the clarification and interpretation of different aspects of the procedures. The Chamber could thereby assist in the development of solutions that are effective, efficient, and fair, and very importantly, procedures that are applied in the same way by all Pre-Trial Chambers and Trial Chambers. Indeed, the Appeals Chamber itself has stressed, as part of the interpretation of the prerequisites for leave to appeal, that an authoritative determination by the Appeals Chamber which removes doubts about the correctness of a decision or "map[s] the course of action along the right lines" on the issue will move the proceedings forward by "ensuring that the proceedings follow the right course" and providing "a safety net for the integrity of the proceedings".[41]

But the Appeals Chamber can only play this important role if it is allowed to do so, or with other words, if leave for appeal is actually granted. It is therefore very encouraging that Pre-Trial Chamber I recently in a series of decisions has granted leave for appeal. Leave has been granted against different decisions relating to victim participation, the Pre-Trial Chamber noting, *inter alia*, that different (Pre-Trial and Trial) Chambers have interpreted the same statutory provisions in a significantly different manner and, thus, that an "authoritative determination" by the Appeals Chamber is needed.[42] The Trial Chamber has also, although on a limited number of issues,

14 December 2006, ICC-01/04-01/06 (OA 5); Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06 (OA 6).

41 Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04, paras. 14-16.

42 Pre-Trial Chamber I, Public Document – Urgent – Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of relevant Supporting Documentation Pursuant to Regulation 86 (2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", (Single Judge), 23 January 2008, ICC-02/05; Pre-Trial Chamber I, Public Document – Urgent – Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", (Single Judge), 23 January 2008, ICC-01/04; Pre-Trial Chamber I, Public Document – Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, (Single Judge), 6 February 2008, ICC-01/04.

allowed appeals against its decision on victims' participation.[43] Interestingly, one of the trial judges argued a broader approach to interlocutory appeals and stressed that concrete decisions by the Appeals Chamber on the issues of victim participation "will provide certainty for parties and participants in the advancement of cases before the court"; thus, he concluded that the scope of the leave granted should be extended.[44] This stands in stark contrast to the earlier and much more restrictive approach; in fact, leave for appeal was rejected by Pre-Trial Chamber II only a few weeks earlier concerning very similar issues.[45]

Moreover, the Pre-Trial Chamber has in early 2008 allowed appeals against decisions which concern the correct interpretation of the Statute and the Rules of Procedure and Evidence regarding redactions and regarding the defendants right to interpretation and translation into a certain language.[46] This is arguably a positive development.

43 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06.

44 Ibid. Separate and Dissenting Opinion of Judge René Blattmann, para. 12.

45 Pre-Trial Chamber II, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, (Single Judge), 19 December 2007, ICC-02/04.

46 Pre-Trial Chamber I, *Prosecutor v. Germain Katanga*, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, (Single Judge), 14 December 2007 ICC-01/04-01/07-108, Pre-Trial Chamber I, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, (Single Judge), 18 January 2008, ICC-01/04-01/07.

Specific Topics

Chapter 29 Contribution of the Registry to greater respect for the principles of fairness and expeditious proceedings before the International Criminal Court

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1. Introduction

Justice is credible only when it is efficient, expeditious and fair.[1] It is on the basis of the confidence[2] it instils in those who appear before it that a national judicial system can be characterised as credible and have its authority respected.

This starting premise, which most certainly applies to a national judicial system whose existence is inherent to that of the State, is very different in the specific context of the establishment of an international criminal court.

Accordingly, although the Rome Statute adopted procedural safeguards as provided for in international human rights conventions,[3] mere respect for those safeguards

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1 Accordingly, the European Court of Human Rights establishes a relationship between the respect for procedural guarantees and the credibility of national courts and in particular asserts that, by requiring under Article 6 (1) of the European Convention on Human Rights that proceedings be conducted "within a reasonable time", the drafters of the Convention wished to "underline […] the importance of rendering justice without delays which might jeopardise its effectiveness and credibility." See *inter alia*, *H. v. France*, *Judgment*, 24 October 1989, para. 58.

2 The European Court of Human Rights observed that "[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused". See *inter alia*, *Padovani v. Italy, Judgment*, 26 February 1993, para. 27.

3 In particular those enshrined in Article 6 of the European Convention on Human Rights, which stipulates that: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part

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(high as they may be) does not in itself seem sufficient to give the International Criminal Court (hereafter "the Court") the credibility it requires to exercise its powers.

Stated otherwise, where respect for the procedural safeguards is necessary and in certain respects sufficient for a national court to be credible and, therefore, to instil confidence in those subject to its jurisdiction, and to acquire the respect of its international partners, it is upstream that the credibility issue arises for a judicial body such as the Court, which must, first and foremost, justify the legitimacy of its existence.

In its resolve to enable the judicial body it was establishing to appear credible in the eyes of the international community, the Rome Statute went into detail in laying down a strict framework for the judicial procedures it set out, and in so doing envisaged the Court as a "model", both in terms of the rights of the Defence and those of the victims and the detention conditions. More specifically, it provided to those to appear before it the benefit of a detailed catalogue of rights for each stage of the proceedings (from investigation through to trial).[4] These standards will however remain

of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b. to have adequate time and facilities for the preparation of his defence; c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court." Equivalent provisions can be found in Article 10 of the Universal Declaration of Human Rights; Article 8 of the American Convention on Human Rights; Article 14 of the International Covenant on Civil and Political Rights (ICCPR); Article XXVI of the American Declaration of the Rights and Duties of Man, Article 7 of the African Charter on Human and Peoples' Rights; and in Article 40 of the International Convention on the Rights of the Child.

4 Article 55 of the Rome Statute ensures respect for the procedural rights of a person who is the subject of an investigation: "1. In respect of an investigation under this Statute, a person: (a) Shall not be compelled to incriminate himself or herself or to confess guilt; (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute. 2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the fol-

meaningless if the Court cannot demonstrate its legitimacy. It is on this sole condition that the judicial work can proceed in line with the high procedural safeguards enshrined in the Rome Statute and the Rules of Procedure and Evidence ("the Rules of Procedure").

Without such credibility, the Court will be unable to claim any legitimacy whatsoever to conduct trials in the place of national courts. And fears are warranted that any such credibility may be questioned when, five years since its creation, the Court has no tangible result to show the international community (that is, the acquittal or conviction of one of the persons arrested since its creation).

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lowing rights of which he or she shall be informed prior to being questioned: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel. " The rights of an accused person are guaranteed by Article 67: "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, para. 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".

Being credible in the eyes of the international community is the first challenge the Court must take on, so that States may no longer disregard its authority and prefer other ways of fighting immunity and thus obtaining peace.

If it wishes to gain credibility, the Court must first of all never depart from its most fundamental characteristic: that it is a judicial body. While there is naturally a political component inherent in the very idea of establishing an international court, it must become immaterial once the judicial process commences. For this reason, if the Court wants to achieve and then maintain a decisive international status, it must, once seized, refrain from giving in to any political overtures. Foregoing its judicial role for the benefit of, say, a diplomatic solution would be seen as a hijacking of the judicial machinery undermining the credibility of the system as a whole and relegating the Court to pawn status on the international chessboard when it should be perceived as being an indispensable partner.

Secondly, the Court will take its place by enhancing its visibility. To that end, developing its external relations seems essential to boosting its position among the key players of the international community. In this respect, the attendance of a Court observer at all international conferences on conflicts or peace processes in relation to situations which have been referred to the Court should be envisioned so that, at the very least, the Court can observe negotiations from which it is at present excluded. Just as the Court's credibility must appear unquestionable to international institutions and States, it must also be a tangible reality for the people who have witnessed the conflicts at the origin of the crimes the Court will judge. The outreach efforts on the ground, which have been initiated by the Registry's specialised units, should be pursued, as they are the sole means of giving the Court the visibility and transparency required to muster the support of the people – and in particular of the victims – concerned.

It is in the light of these preliminary remarks that, in the run-up to the review of the Rome Statute (hereafter "the Statute"), we would like to reflect on possible or desirable changes to the procedural system arrangements it has established.

As members of the Court's Registry, that is, from a position which is strategic in more ways than one, we would like to suggest a number of potential avenues of essentially practical reflection, for the purpose of contributing, from our own level and from mainly a technical perspective, to a broad effort to continue to strengthen respect for the principles of fairness and expeditious proceedings.

The Registry of the Court is different from the registries of domestic courts. While remaining essentially a provider of support to the work of the participants in proceedings and the Chambers, it was given many responsibilities which enable it to have a significant impact on compliance with the procedural principles applicable under the Rome Statute.

However, confining the Registry to "non-judicial aspects of the administration and servicing of the Court"[5] quite clearly limits its room for manoeuver, and it is in this light that we will take the liberty of making some suggestions which, while beyond

5 Article 43 of the Rome Statute.

the Registry's purview, could, if followed, make its task easier and secure fuller compliance with the procedural safeguards laid down in its basic documents.

For five years, three aspects of the Registry's work have had a major impact on the respect of these safeguards: the technical support provided to the participants and to the Chambers; the witness protection function it was assigned by the basic documents; and its specific mandate as regards the interests of the Defence and the protection of the rights of the victims.

2. An original contribution to respect for the principles of equity and expeditious proceedings: The Registry's technical divisions

2.1. A constant linguistic challenge

The creation of an international judicial organisation such as the Court, whose scope and jurisdiction are considerable, required the development of various technical instruments that are essential to comply fully with the principle of equity and the rights of the Defence.

Firstly, insofar as proceedings may be initiated against people of different nationalities and cultures who therefore speak a host of languages, it is imperative that an appropriate interpretation and translation section be established. The Court's interpretation and translation section (STIC) was accordingly set up with a view to meeting major challenges.

Indeed, pursuant to Article 67 of the Statute, "the accused has the right 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".[6]

In order to meet that theoretical standard, STIC had to implement new concrete approaches. For instance, it created a legal dictionary in Acholi in order to be able to translate arrest warrants relative to the situation in Uganda. The undertaking was anything but easy because the Acholi language is not codified or, more precisely, only partially codified in certain areas, including the legal and judicial fields. The terms required to apprehend the complex legal notions contained in these documents, which did not necessarily correspond to any Uganda reality, did not exist in Acholi. STIC was therefore obliged to set up a panel of experts who ultimately managed to codify these notions.[7]

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6 In fact, the exercise of the rights of the accused set forth in Article 67 of the Statute, including the right to translations in a language which the person fully understands and speaks, must not be unreasonable. The accused is therefore obliged to specify *in good faith* the language of his or her preference for the purpose of the proceedings. In particular, see the *travaux préparatoires*, Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L2/Add.6 (11 July 1998), p. 3, fn. 5.

7 Amongst other documents in Acholi, see the Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-01/05-53-tAC-Corr.

Another obstacle STIC encountered was the absence of available[8] interpreters in languages such as Kingwana[9] and Acholi. The unit therefore undertook to train people recruited in the field who knew those languages but had no interpretation experience. The training lasted an entire year, at the end of which the candidates who passed an end-of-training examination received a certificate. They were subsequently given a contract as para-interpreters at the Court to service hearings. They may also meet interpretation needs in the event a person speaking one of those languages is arrested or for witnesses at a trial.

Quite clearly, for such an undertaking to be successful, it is crucial that major investments be made in terms of time and human resources and that accordingly there be a degree of forward-planning capability so as to be in a position to meet a variety of language needs. By way of example, there are roughly 2011 languages in Africa.[10]

A central issue, language was the subject of an appeal as of the second case referred to the Court. Following an Appeals Chamber decision, Pre-Trial Chamber I decided that Germain Katanga should continue to be assisted by an interpreter during hearings before the Chamber.[11] This decision has been implemented by the Registry during the entire pre-trial phase.

2.2. Equality of e-arms

The Registry must moreover meet the technology challenge involved in setting up an electronic court. The notion of an e-court reflects the idea of managing the judicial process as extensively as possible using electronic means, which allows for significant savings in time and material resources for research and accordingly more time for the preparation of the defence as such. In particular, this project includes the development of e-tools to facilitate document searches, the electronic submission and registration of documents, secure links between participants in proceedings amongst themselves and with the Registry's staff, as well as the possibility of testifying via video-conferencing and the presentation of evidence in electronic format. The development of this unprecedented tool unquestionably contributes to the procedural rights of participants in proceedings before the Court being more fully taken into account.

There are two main considerations behind the e-court option. First, it should enable participants to work more efficiently. This means, for instance, that counsel may work remotely in secure mode. It must also allow participants to work quickly. When case-files are very large,[12] electronic means are a great help because they make it pos-

8 Interpreters who are able to interpret simultaneously in a booth at hearings.

9 Kingwana is a dialect of Swahili spoken in the East of the Democratic Republic of the Congo and is a hybrid of Swahili, Lingala and French.

10 From the statistics available at <www.populationdata.net>.

11 Pre-Trial Chamber I, Decision Implementing the Appeals Chamber Judgment concerning Languages, 2 June 2008, ICC-01/04-01/07-539.

12 Cases before international criminal tribunals are particularly complex and involve voluminous case files. This is particularly the case for trials of former heads of state. For example, the *Milošević Case* before the ICTY ran to almost 50,000 pages of transcripts.

sible to search in databases in order to identify evidence or to search via keywords in legal documents, to share the findings of searches, to comment on specific documents and to organise databases in a minimum amount of time and space.

In legal terms, setting up this e-court is regulated by the basic documents. Regulation 26 of the Regulations of the Court provides that the Court shall set in place a reliable, secure and efficient computer system. Paragraph 2 of that regulation establishes that the e-version shall be authentic. Finally, Regulation 24 of the Regulations of the Registry clearly states that participants in proceedings may register documents electronically by way of electronic signatures. These provisions greatly facilitate the work of defence counsel and of legal representatives of victims who are not at the seat of the Court, either because they are carrying out investigations in situ or because their law offices are not in The Hague.

Concretely, it is not merely a question of supplying the participants in proceedings and the judges with e-tools; they must also be able to use them effectively. This is why the Registry has to see to it that its technicians work for all the participants in the proceedings, and to provide them with initial training on how to use e-tools. It is true that their use is so complex that it does seem that the defence team needs to recruit an IT expert to be able to do its work effectively. It does not seem that, at the time Rule 22 (1) of the Rules of Procedure and Evidence[13] was adopted, its drafters had an IT expert in mind. However, construed in a continuously evolving manner in the light of technical progress and in general context of the Court's instruments which provide for the implementation of a modern IT system,[14] and having regard to the principle of equality of arms,[15] this provision could no doubt permit such a recruitment.

Technological facilities are moreover made available to those in custody, who have access to a computer in the detention centre and to IT training. Detained persons may thus at any time work on their case and communicate with their counsel.

In the courtroom, technical means such as simultaneous transcription of hearings have been made available to the participants in the proceedings. This tool is now under discussion because the simultaneous transcripts, unlike transcripts filed several days later, are available only in English. This means that a non-English-speaking defence team would not have the same technological arms as the Office of the Prosecutor. The Registry is at present reviewing how this requirement may be met.[16]

See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, transcript of the last hearing in the case of 14 March 2006.

13 Regulation 22 (1) states that "a counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise".

14 See Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

15 Insofar as the Office of the Prosecutor has a specialist in computer databases.

16 See Pre-Trial Chamber I, Order requesting the Registrar to file submissions on the issue of the simultaneous provision of LiveNote in French, ICC-01/04-01/06-1011, 1 November 2007.

Furthermore, the advisability of making such a tool available to the participants is an issue, since real-time transcripts, like the other IT tools, are not a concrete implementation of rights recognised in the basic documents. For instance, a State has never been convicted for procedural non-compliance because it did not make simultaneous transcripts available to the Office of the Prosecutor, the Defence or victims. However, once this prerogative has been granted, it seems difficult, not to say impossible, to deny it.[17] It creates a dilemma for the Registry because as it is held to the high standards it has set itself, it may be compelled to cover the costs of particularly expensive materials. This also raises the question of priority-setting when drafting the Registry's budget. What needs to be considered, in other words, is whether funds should not be allocated first and foremost for the implementation of rights recognised in the Statute (such as witness protection) rather than for achieving high standards designed to facilitate the participants' work.

From the perspective of a fair trial, public hearings are also a key safeguard. Accordingly, audio or video broadcasts via radio, the internet, or national and international television networks take on special significance in that they allow the people concerned to follow hearings from, say, the Democratic Republic of Congo (DRC), and thus to see for themselves that the standards of a fair trial are met. However, it should be noted that this system has its limits. For example, given that Internet is not widely available locally and that television remains an exclusive form of communication in the DRC, radio is the only news medium widely available. In this context, with a view to co-operation, the Registry must find a national radio station that is politically independent and has a large audience, which is not easy because of the country's political situation. In technical terms, the ongoing power outages in the DRC constitute an additional problem for communications with the Netherlands. The Registry is therefore under an obligation to make appropriate arrangements to see to it that, these difficulties notwithstanding, judicial hearings are broadcast.

3. A delicate balance between the principles of equity and expeditious proceedings: Witness protection

Article 43 (6) of the Statute provides for the establishment of a Victims and Witnesses Unit (VWU) whose mandate is to provide protection and assistance to "witnesses who appear before the Court and others who are at risk on account of testimony given by such witnesses."[18] This unit ensures the *prima facie* validity of testimony obtained by guaranteeing that decisions concerning protective measures are completely impartial. As a party to an elaborate and time-consuming protection mechanism, the

17 Although States are not obliged under the ECHR to adopt particular standards, once these standards have been adopted, they must ensure that the guarantees under Article 6 are respected. This is the case of the establishment of a right to appeal in civil matters, *Delcourt v. Belgium*, 17 January 1970, para. 25.

18 See Articles 43 (6), 68 (4), Rules 16 to 19,Regulation 41 of the Regulations of the Court and Rules 79 et seq. of the Regulations of the Registry.

VWU should now benefit from some thoughts about ways to accelerate the proceedings.

3.1. The VWU, the guarantor of reliable testimony

The intervention of the VWU is a guarantee of neutrality vis-à-vis all the participants in the proceedings.[19] Composed of specialists in the field of witness protection and security pursuant to Rule 19 of the Rules of Procedure and Evidence, the VWU has the requisite experience to assess applications for protection filed by participants. It proceeds with this assessment with the remove required for such demanding decision-making. Were the Office of the Prosecutor or the defence teams themselves to see to the resettlement of their witnesses as a protective measure, the impression might arise that witnesses were under pressure or receiving incentives to testify. In this respect, the wording of Article 43(6) to the effect that "the VWU shall provide, *in consultation with the Office of the Prosecutor* (…) counselling and other appropriate assistance for witnesses" should be amended when the Rome Statute is reviewed. How can the Registry be required to consult the Office of the Prosecutor about taking protective measures for defence witnesses, for instance?

Moreover, another guarantee of the VWU's neutrality is the fact that it also offers its services to the defence and to victims appearing before the Court. This is progress as compared with domestic systems, whose protection programmes usually are open only to the prosecutor's witnesses.[20] The VWU must conduct itself such that it keeps the confidence of all the beneficiaries of its services and must act impartially.

3.2. Witness protection measures and expeditious proceedings

Although the oversight of protective measures by the Registry and especially the Chambers provides additional guarantees to the Defence, all the protective measures impact on the duration of the proceedings and in particular on the time limits for the disclosure of evidence by the Office of the Prosecutor to the Defence.

19 During the Statute's *travaux préparatoires*, a proposal for a Victims and Witnesses Unit to be set up was initially put forward by the Preparatory Committee, which, taking into account the precedent set by the ad hoc tribunals, envisaged the establishment of a Victims and Witnesses Unit in the Registry or in the Office of the Prosecutor (see Doc. A/51/22 (1996), Vol. I, para. 281). This idea was elaborated upon during the work of the Preparatory Committee, which inserted the provisions on the Victims and Witnesses Unit in the article which pertains to the Registry. Nevertheless, some delegations emphasised the need for a separate section in the Office of the Prosecutor for the prosecution witnesses, but these proposals were unsuccessful. See Doc. A/AC.249/1998/L.13 (4 February 1998), p. 79, and Doc. A/CONF.183/2/Add.1 (14 April 1998), pp. 69-70.

20 At the national level, one of the most sophisticated witness protection programmes is the one adopted by the United States under the Organized Crime Control Act of 1970 and amended by the Comprehensive Crime Control Act of 1984. It allows for the possible relocation of witnesses, the provision of new identity documentation and other protective measures. However, this scheme is only open to prosecution witnesses.

One of the exceptions to the obligation on the Office of the Prosecutor relative to the disclosure of evidence is the protection of witnesses.[21] In this regard, the Office of the Prosecutor may submit applications for witness protection with the VWU,[22] or directly request Chamber[23] to authorise the redaction of the identifying information of certain witnesses.

Given the difficult situations in the field, the VWU's assessment necessarily takes some time, since the VWU must carefully analyse the application before making a request for protection. *Inter alia*, it performs a risk and threat analysis, a psycho-social evaluation of the witness, and ensures that his or her consent is well informed in respect of the protective measures taken. Added to the time required to implement all the protective measures, this step inevitably somewhat slows down the proceedings. From this angle, certain developments might be considered with a view to allowing the proceedings as a whole to take place within a reasonable timeframe.

First, a reduction in the number of witnesses in the pre-trial phase might be envisioned, insofar as the requirements in terms of the standard of evidence are not the same as at trial. In this way, if a limited number of witnesses was required by the Chamber or called by the Office of the Prosecutor, the VWU could grant protection to all the witnesses requiring it and no redacting would be necessary vis-à-vis the defence. The disclosure of evidence could then be expedited and this strategy would have the advantage of shortening a procedural stage in which a person is in custody but where the charges against him or her have not yet been confirmed.

The bulk of the disclosure of evidence would occur after the decision to confirm the charges but prior to the commencement of the trial and the possibility for the accused to plead guilty.[24] It is noteworthy that in the *Lubanga* case the Pre-Trial Chamber could decide to confirm the charges[25] even though it had decided not to take account of some evidence provided by the Office of the Prosecutor following two rulings by the Appeals Chamber.[26]

Moreover, as regards the trial phase per se, a system of rolling disclosure where the identity of protected witnesses would be revealed to the opposite party only very shortly before they appear,[27] would, by reducing the workload on the VWU, also expedite the proceedings. This option was in fact chosen by the *ad hoc* Tribunals for

21 Rule 81 (3) and (4) of the Rules of Procedure and Evidence.

22 Regulation 80 of the Regulations of the Registry.

23 See Appeals Chamber, ICC-01/04-01/06-568, 13 October 2006.

24 Article 64 (8) (a).

25 Pre-Trial Chamber I, ICC-01/04-01/06-803-tEN, 29 January 2007.

26 See Appeals Chamber ICC-01/04-01/06-773 and ICC-01/04-01/06-774, 14 December 2006, first and second decisions on the Prosecution requests and amended requests for redactions under rule 81 of the Rules.

27 The time limits vary, for example from 8 to 42 days.

the Former Yugoslavia and for Rwanda,[28] and by the Special Court for Sierra Leone.[29] The judges there considered that such an option would enable the interests of witnesses to be protected while complying with the principle of fair proceedings for the accused. The Court's basic documents allow non-disclosure of the identity of witnesses, victims and their family members prior to the commencement of the trial where disclosure might create the risk of putting them in serious danger.[30] These provisions do therefore constitute a legal basis for the adoption of the practice of rolling disclosure within the Court. Furthermore, the authors are in favour of the adoption of a practice of disclosure of identity 30 days before the actual testimony, or eight days in exceptional cases.

For these reasons, a balance must be struck between the protection of witnesses, the difficulty for the Office of the Prosecutor to identify its key witnesses at an early stage owing to the fact that it can continue to investigate after the arrest of the person in question, and the necessary respect for the rights of the defence. This balance can be found only by using a case-by-case approach.

4. An extended benefit of the principles of fairness and expeditiousness: Support to the Defence and to the Victims

The right to defence counsel is fundamental to ensure a fair trial. The Court's Statute thus guarantees to the accused or suspect being questioned the standard array of rights of the Defence.[31] Further, for the first time before an international criminal court, victims whose personal interests are affected may participate in the proceedings and be assisted by legal representatives.[32]

In the context of international criminal proceedings, the role of counsel, whether of the accused or the victims, is particularly ambitious, as the international setting

28 See, *inter alia, Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, paras. 15-16; *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-1, Decision on Prosecution Motion for Protective Measures, 3 June 2005.

29 Special Court for Sierra Leone, *Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-2003-13-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims, 24 November 2003; *Prosecutor v. Augustine Gbau*, SCSL-2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 10 October 2003.

30 See Article 68 (5) of the Statute and Rule 81 (4) of the Rules of Procedure.

31 Articles 55 (2) (c) and 67 (1) (d) of the Statute.

32 Under Article 68 of the Statute, "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 an 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."

means that counsel are far more dependent on the Court's assistance than counsel at national level. It is for this reason that the Court's Registry has been assigned unique responsibilities as regards the protection of the rights of the Defence and the victims.

4.1. The rights of the Defence at the heart of the Registry's concerns

The Rules of Procedure and Evidence assign to the Registry a specific function in respect of the protection of the rights of the Defence. Rule 20 sets out the Registry's responsibility in this area, stating that "in accordance with Article 43, paragraph 1, the Registrar shall organise the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute".[33]

The Registry thus appears as a key contact point for persons subject to proceedings before the Court as well as for their defence teams.

It will in particular ensure that the defence teams have the same resources as the Office of the Prosecutor. This role is primordial insofar as there is no equivalent of the Office of the Prosecutor for the Defence at the Court.[34] Some might argue that there is a significant imbalance between the two parties at the trial, in particular as regards resources for conducting investigations.[35]

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33 Rule 20 then enumerates the responsibilities which the Registrar may be required to exercise, which are namely to: "[f]acilitate the protection of confidentiality, as defined in Article 67, para. 1 (b); Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence; Assist arrested persons, persons to whom Article 55, para. 2, applies and the accused in obtaining legal advice and the assistance of legal counsel; Advise the Prosecutor and the Chambers, as necessary, on relevant defence-related issues; Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence; Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations … to promote the specialization and training of lawyers in the law of the Statute and the Rules."

34 During the Statute's *travaux préparatoires*, the issue of setting up an office, equivalent to the Office of the Prosecutor, for the defence was raised during informal discussions, but no official proposal was ever put forward. Accordingly, a proper discussion on the creation of such an office took place during the drafting of the *Rules of Procedure and Evidence*. France, Canada, Germany and the Netherlands put forward their drafts, as did as the NGOs with particular interests in the matter (such as the International Criminal Defence Attorneys Association, *Avocats sans Frontières* and the Lawyers Committee for Human Rights). These proposals eventually only resulted in the Registry's responsibilities for the rights of the defence being expressed in rather general terms in rule 20. See R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes & Rules of Procedure & Evidence* (2001), pp. 277-278.

35 Deploring the lack of such an office at the international criminal tribunals, Elise Groulx, the President of the International Criminal Defence Attorneys Association, stated: "The Office of the Defence could play an important role helping to ensure that the prosecution

Admittedly, this imbalance is partly offset by the fact that under Article 54 of the Statute, the Prosecutor "shall investigate incriminating and exonerating circumstances equally" and must, to counterbalance this accumulation of functions, "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".[36] While this obligation constitutes progress over the systems at the *ad hoc* Tribunals for the Former Yugoslavia and for Rwanda or the Special Court for Sierra Leone,[37] it still puts the Office of the Prosecutor in a position that could be termed schizophrenic, as one of its effects is to task the said organ to investigate with a view to establishing the criminal responsibility of an individual and thus provide a sound basis for the prosecution, and concomitantly search for and pass on to its future opponent at trial any probative evidence in the latter's favour.[38]

Installing a firewall[39] might prove healthy in this respect. In such a system the Office of the Prosecutor could have two totally separate investigation teams, one seeking incriminating, the other exonerating evidence. Failing such a strict splitting of functions within the Office of the Prosecutor, there is the danger of giving rise to suspicions of partiality in cases in the investigation stage in the minds of the public and those indicted before the Court. The Registry must therefore seek to protect as

is equally matched by the defence in terms of independence, resources and facilities, and standing before the Court. Without an organization to guarantee the proper functioning of the defence, equality of arms could become a meaningless abstraction". See E. Groulx, *A Strong Defence Before the International Criminal Court*, Speaking Notes – Presentation to a Conference of Defence-Related Issues, The Hague, November 1-2, 1999, p. 9, available at <www.hri.ca/partners/aiad-icdaa/reports/defence.htm>.

36 Article 67 (2) of the Statute.

37 In these systems, the Office of the Prosecutor is not obliged to seek out exonerating evidence, but merely to disclose to the Defence evidence which is likely to establish the innocence of the accused or to affect the credibility of prosecution evidence. See Rule 68 of the respective Rules of Procedure and Evidence of these three courts.

38 The jurisprudence of the ECHR with respect to the *juge d'instruction* [investigating judge] is informative in this regard. Indeed, in inquisitorial legal systems, this judge is responsible for conducting an incriminating and exonerating investigation. However the ECHR judges stated that the judge responsible for the investigation of a case could not preside as an appeal-court judge in this case without disregarding the principle of impartiality enshrined in Article 6 (1) of the Convention (see *De Cubber v. Belgium*, *Judgment*, 26 October 1984, para. 30).

39 According to B. A. Gardner, *A Dictionary of Modern Legal Usage*, 2nd ed. (1995), p. 152, this mechanism can be described as a "screening mechanism that protects client confidences by preventing one or more lawyers within an organisation from participating in any matter involving that client". "Typically, the procedures used in erecting a Chinese wall include prohibiting the lawyer (who is working or has been working in an other organisation which my represent the adversary party) from any contact with the case, no access to files, no share in any fees derived from the case, and sometimes even sequestration from the handling the case." In this regard, see also C. Hollander & S. Salzedo, *Conflict of Interest & Chinese Walls* (2000).

effectively as possible the rights of the Defence so as to maintain the balance required for the effective respect for the principle of fairness.

The Registry strives to do so by using all the powers provided to it in the basic documents.

4.1.1. The setting up of specific divisions tasked to meet the Defence's technical and legal needs

Traditionally, within the Court's Registry there is a defence support unit which provides technical assistance to counsel. Similar units exist within the registries of other international criminal courts.[40]

By contrast, the establishment of an Office of Public Counsel for the Defence is a real novelty. This unit "reports to the Registry only administratively and operates as a fully independent office[41] whose members shall receive no instructions from the Registry concerning the exercise of their functions".[42]

This office consists of experts in international criminal law who meet the qualification standards required of counsels before the Court and of their assistants as laid down in rule 22 of the Rules of Procedure and Evidence and Regulation 67 of the Regulations of the Court.

The main task of the members of this office is to represent and protect the rights of the Defence during the initial stage of the investigation, as well as to provide help and assistance to counsel; they may also represent persons receiving legal assistance who have not yet chosen a counsel from the list. They are empowered in particular to do searches and give legal advice and to appear before a Chamber in connection with specific issues bearing on the rights of the defence.[43]

The legal status of the office and of its members within the Court is very specific. For instance, when exercising their functions pursuant to Regulation 77 of the Regulations of the Court, they are bound solely by the Code of Professional Conduct for counsel and the Court's basic documents, whereas in respect of any other matter office members must comply with the provisions applying to all staff members.[44] By the same token, the office is obliged to provide to the Registry reports on administrative issues, while remaining independent in other respects.[45]

It should be mentioned that the path towards the construction of this "judicial pillar" of assistance to the Defence was not uncontroversial. Neither the Rome Statute nor the Rules of Procedure and Evidence expressly provide for the creation of such an office, which reflects States' reservations about the need for a distinct organ to service the Defence. Nonetheless, the ultimate establishment of such an independ-

40 The ICTY has an Office for Legal Aid and Detention Matters, while the ICTR set up a Lawyers and Detention Facilities Section. It should be noted that the ICC's Registry comprises a specific detention section.

41 Regulation 77 (2) of the Regulations of the Court.

42 Regulation 144 (1) of the Regulations of the Registry.

43 Regulation 77 (5) of the Regulations of the Court.

44 See Regulation 144 (2) and (3) of the Regulations of the Registry.

45 Regulation 146 of the Regulations of the Registry.

ent office is no doubt a major step towards effective achievement of the right to the equality of arms.

4.1.2. The Right to Legal Assistance

In the event a suspect or the accused does not have the resources to pay for their defence counsel, provision is made for counsel to be paid by the Court.[46] Given the particularly high cost of defence teams acting on behalf of persons accused of the most serious international crimes,[47] it is no exaggeration to say that before the Court practically everyone is shown to be indigent and entitled, at least partially, to assistance from the institution.[48] The fact is, a defence or prosecution team costs 35,000 euros a month to try one person,[49] which means that, in light of their salaries, even the Court's judges could be found to be indigent. It is therefore no surprise that this status has been granted to the three persons now in custody.

The Court's various legal instruments govern the functioning of the indigence system and spell out the principles and procedures for the assignment of counsel.[50] The Registry must manage the legal assistance while ensuring confidentiality and the professional independence of counsel. It compiles up and updates a list of counsel meeting the criteria set out in the basic documents. The person in question is thus free to choose his or her defence counsel from that list or any other counsel meeting the criteria and having agreed to be listed as duty counsel.

Moreover, as part of the indigence system, the Registry makes available to the defence highly qualified investigators to provide it with assistance or expertise, and in particular to carry out investigations in the field, to question potential witnesses or assist the counsel in his or her analysis of the evidence.[51] Finally, the training programme on the Court's case law and general international criminal law, as well as IT tools, premises and necessary facilities are all an integral part of the legal assistance scheme.

However, it is worth noting that at present the cost of visits by family members are not borne by the legal assistance scheme. Yet this right can be effective for indigent detainees only if the Court covers travel expenses, which for a family of four amount to 12,000 euros per 10-day visit.

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46 Articles 55 (2) (c) and 67 (1) (d) of the Statute.

47 See the Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, 31 May 2007.

48 See the Report on the principles and criteria for the determination of indigence for the purposes of legal aid, ICC-ASP/4/CBF.1/2, 21 February 2005.

49 See the Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, 31 May 2007, Annex VI.

50 Rules 20 (3), 21 and 22 of the Rules of Procedure and Evidence, Regulations 67-78 and 83-85 of the Regulations of the Court and Regulations 130-139 of the Regulations of the Registry.

51 On the list of professional investigators, see Regulation 137 of the Regulations of the Registry.

Criticism has however been levelled by certain States Parties as to the need for such visits, their fear being that the standards upheld before the Court may impact also on their domestic standards. But does that really mean that depriving persons – who are moreover deemed to be innocent – of the right to see their family for years should be envisioned? Would that not be an infringement of the right to a family for children of detainees?[52]

4.1.3. The requirement of a high-quality defence

The Registry also sees to it that all persons brought before the Court receive high quality legal assistance. Thus, pursuant to Rule 22 of the Rules of Procedure and Evidence and regulation 67 of the Regulations of the Court, to be listed as such, a counsel must have 10 years' relevant experience in the field of international law or criminal law in respect of procedural matters, and have the requisite experience of criminal trials.

This high standard is meant to secure a high-quality Defence to persons accused of complex crimes.[53] It also seeks to limit cases of abuse by the Defence of the procedural rights provided to the accused by the basic documents, and in particular to preclude certain unfounded, frivolous or abusive applications lodged merely for the purpose of slowing the proceedings.[54] From another angle, a high standard in respect of counsel's qualifications has the effect of restricting the number of competent counsel, which could be interpreted as an infringement of the right of the accused to choose his or her counsel freely. From this vantage point, the issue arises as to whether by attempting to enhance one of the rights of the accused, there is not a risk of breaching another of his or her intangible rights.

4.1.4. The need for expeditious proceedings

Respect for the rights of the Defence requires that the person appearing before the Court is entitled to proceedings which will not last an unreasonable amount of time.[55]

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52 See Articles 9 (3) and 10 of the International Convention on the Rights of the Child.

53 The requirements of rule 44 of the Rules of Procedure of the ICTY are less stringent in relation to counsel's qualifications. The rule does not contain a specific provision on the professional experience of counsel. Moreover, before the ICTY, the accused is entitled to select a professor of law as principal counsel, and in some cases a lawyer who does speak one of the tribunal's working languages, which is not the case before the ICC. The wording of the corresponding provisions of the ICTR rules differs: rule 45 in particular sets an additional criterion of 7 years of relevant experience.

54 In fact, such abuse on the part of the Defence has been in evidence before the *ad hoc* tribunals. See for example, Appeals Chamber, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment of 28 November 2007, Annex A (Background to the appeals proceedings).

55 In this regard, the European Court of Human Rights has set certain criteria. So, in order to assess whether the time is reasonable, several factors were taken into account by the ECHR such as the complexity of the case, the conduct of the applicant and of the judicial authorities, as well as the stake in the proceedings. See, *inter alia*, the following judg-

In this regard, everything should be done to reduce the procedural time limits which, in view light of the nature of the cases and the quality requirements of the proceedings, may prove excessively long and consequently prejudicial to the rights of the person subject to the proceedings. Put differently, entitlement to a fair trial must not mean that the person in question should be subjected to excessively long procedural time limits. In this respect, the Chambers could take a number of measures which would make it possible to accelerate the proceedings.

As regards the Pre-Trial Chamber, at the situation stage, it might explore the possibility of obtaining an investigation plan from the Prosecutor by virtue of regulation 48. Such a measure would make it possible to accelerate the investigation because the oversight exercised by the Pre-Trial Chamber would preclude the possibility of unwarranted changes in the investigation policy. In addition, this would enable the Chamber assigned to a case to assess *inter alia* its complexity and, in the absence of defence representatives, would be a guarantee that the investigation is conducted with respect for its rights.

Furthermore, the basic documents are somewhat vague as regards the procedural time limits immediately following arrest; for instance, Article 61 (1) of the Statute does not set a time limit for holding the confirmation hearing, but merely indicates that it shall be held within a reasonable time.[56]

As a result, from the day after the initial appearance, the Office of the Prosecutor is not subject to any binding deadline for complying with its disclosure obligation. Accordingly, not until 30 days prior to the confirmation hearing[57] do a detailed report of the charges and the evidence to be produced at the hearing have to be presented to the Chamber and the person concerned. The date of disclosure of evidence by the Prosecutor may therefore vary depending on any changes affecting the date of the confirmation hearing.

It would be advisable for a preliminary status report of the charges to be disclosed as quickly as possible to the defence so that it can prepare itself. Thus the Court might usefully consider the ICTY's Rules of Procedure, Rule 66 (A) (i) of which provides that the Prosecutor discloses to the Defence "within 30 days of the initial appearance, copies of the supporting material which accompanied the indictment when confirmation was sought as well as prior statements obtained by the Prosecutor from the accused". Such a 30-day time limit would compel the Prosecutor to pass the evidence very quickly to the Defence (not the evidence supporting the charges but the

ments: *Neumeister v. Austria*, 27 June 1968, para. 21, *Triggiani v. Italy*, 19 February 1991, *Sałapa v. Poland*, 19 December 2002, para. 88, *Zimmerman and Steiner v. Suisse*, 13 July 1983, para. 29, *Kudla v. Poland*, 26 October 2000, para. 124, and *Kalashnikov v. Russia*, 15 July 2002, paras. 114-135.

56 Rule 121 (1) of the Rules of Procedure states that the Chamber shall set the date on which it intends to hold this hearing.

57 Under Rule 121 (3) of the Rules of Procedure, "[t]he Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing."

evidence the Chamber used to rule on the application for an arrest warrant) and in a language understood by the person concerned. This and a preliminary status report would enable the Defence to be more active and especially more reactive in preparing for the confirmation hearing.

While the Registry is responsible for the protection of the rights of the Defence, it also has a responsibility to the victims.

4.2. Victims' rights, a new priority for the Registry

Adhering to the classical meaning of the principles of fairness and expeditious proceedings,[58] in their wording the drafters of the Statute restricted the benefit thereof to persons brought before the criminal court.[59]

It would seem even, given the terms of Article 68 (3),[60] that the Statute weighs the participation of the victims against the requirements of a fair and impartial trial. We would argue rather that such a juxtaposition is unfounded and that the victims must be entitled to benefit to a certain extent from the guarantees of fairness and expeditious proceedings.

The Registry's organisation does in fact reflect the will to reconcile the rights of all participants. For example, it is worth noting that in the Registry's organisational chart, each support section for the Defence, whether technical or legal, has its counterpart for the victims. On that basis, the Defence Support Section's counterpart is the Victims Participation and Reparations Section,[61] and the Office of Public Counsel for the Defence's counterpart is the Office of Public Counsel for Victims.

Moreover, victims with the standing of participants in the proceedings pursuant to Article 68 (3) of the Statute are entitled to benefit, just like the accused, from the Court's indigence scheme.[62] In addition, truly taking into account the rights of the

58 Interestingly, in this respect the texts of Articles 55, 66, 67 are similar to Articles 5 and 6 of the European Convention on Human Rights.

59 Under Article 6 of the European Convention on Human Rights, such guarantees are confined to those persons who are the subject of criminal proceedings or to disputes involving rights and duties in civil cases. This leaves little room for victims of criminal offences, who can lay claim to the rights guaranteed by the provision only in those systems which enable them to join criminal proceedings as a *partie civile* [civil party] and to consequently claim a civil right (and more specifically a pecuniary right to compensation). See *Perez v. France*, 12 February 2004, paras. 47-75. In contrast, the Rome Statute grants victims a genuine right to participate in proceedings before the Court which is separate from any application for reparations.

60 Under Article 68 (3) of the Statute, "[w]here 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*" (Emphasis added).

61 This section also has an outreach role in the field.

62 Rule 90 (5) of the Rules of Procedure.

victims assumes that proceedings are conducted as expeditiously as possible, in particular in the light of the difficult situations they face.

For the victims, seeing justice done is in effect part of the reconstruction process.[63] Endless proceedings can only add to their dismay and give them the impression that the international community does not have their interests at heart.

From this perspective, even prior to considering a guarantee of expeditious proceedings as a whole, the Court should endeavour to respond as quickly as possible to victims as regards their right to participate in the proceedings and the ways and means of exercising that right.

For instance, a reporting judge could be in charge of dealing with the applications for participation, take decisions on the basis of a report drafted by the Victims Participation and Reparations Section and then report to the Chamber. This would speed up the acknowledgement of a status and the appointment of legal representatives, thus ensuring the victims' effective participation more rapidly.

It may also be deemed unfortunate that no deadline by which a Chamber must rule on an application for participation is to be found in the basic documents.[64] Failing such a time-limit, victims who have filed their applications for participation must often wait several months before their status is recognised. Rule 89 should accordingly be amended to include a binding time limit for the Chambers.

Likewise, the lack of a set time limit for establishing the practical details for the participation of victims in the proceedings often leaves them in a state of uncertainty as to their status for too long, which also impedes their effective participation.[65]

5. Conclusion

The Court has been innovative in many ways and from the outset set its sights high. In five years, it has demonstrated that it can be creative in taking on many challenges, including the major one of implementing the principles of fairness and expeditious proceedings.

Still, it must be borne in mind that the safeguards enshrined in the Rome Statute constitute a delicate mosaic, where enhancing one particular right may mean destabilising another. In the face of criticism one is tempted to recall the old adage, "Let well enough alone".

However, when it comes to guaranteeing fundamental rights, the Court cannot be satisfied with doing "well enough". In application of the principle of complementarity,

63 In her report entitled *Rapport sur la bientraitance des victimes* submitted to the Minister of Justice of the French Republic in March 2002, Liliane Daligand states that: "[TRANSLATION] acknowledging their status during proceedings, particularly during criminal proceedings, provides them with relief and helps their psychological recovery through symbolic reparations"<www.jac.cerdacc.uha.fr/internet/Recherche/JCERDACC.nsf/d7bc740ed06c069cc1256958033c878/13495ba27a259733c1256bca0047dd8b?OpenDocument>.

64 See rule 89 of the Rules of Procedure.

65 Ibid.

the Court must serve as a model for the States Parties and apply high standards. The Registry intends to work to that end, and it is on that basis that avenues for reflection have been suggested in this paper with the aim of continuing to improve the Court system.

Chapter 30 A review of the experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court regarding the disclosure of evidence

*David Scheffer**

1. Introduction

One of the more reliable constants of criminal procedure – domestic or international – is the discord among the prosecutor, defense counsel, and judges over the timing and manner of disclosure of evidence to each of them. This is and will be no less true for the International Criminal Court. In this paper I examine some of the issues that have arisen in the Pre-Trial Chamber and Appeals Chamber of the ICC on disclosure of evidence and offer some ideas on how to improve the overall procedure.

First, however, to emphasize the universality of the problem, I point to a very recent proceeding in the United States. On June 29, 2007, Federal District Court Chief Judge Mark L. Wolf in Boston filed an unusual disciplinary complaint against Assistant U.S. Attorney Jeffrey Auerhahn for misconduct that "required the release from prison of a capo [Vincent Ferrara] in the Patriarca family of La Cosa Nostra."[1] That misconduct was Auerhahn's failure to turn over to defense counsel for Ferrara a police detective's handwritten memo recording a hitman's testimony that he fled Boston after he and another man killed a Mafia figure without Ferrara's permission. Ferrara was convicted after the same individual's testimony that Ferrara had ordered the murder and Ferrara had pled guilty. He was serving a 22-year sentence, but Chief Judge Wolf ruled that he be released from prison in April 2005.

The Justice Department's Office of Professional Responsibility had concluded in a secret report that the memorandum included exculpatory information and should have been turned over. The Justice Department's public position, however, when it appealed Chief Judge Wolf's release order, has been that its lawyers had no duty to

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1 Letter by Chief Judge Mark L. Wolf to Attorney General Alberto Gonzales, June 29, 2007, available at <www.masslawyersweekly.com/archives/pdf/ma/07/letter2.pdf>; Letter by Chief Judge Mark L. Wolf to Constance Vecchione, Board of Bar Overseers, June 29, 2007, available at <www.masslawyersweekly.com/archives/pdf/ma/07/letter.pdf>.

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disclose the detective's memorandum because it contained no material information. The conflicting positions did not amuse Chief Judge Wolf, particularly after Auerhahn received only a secret mild reprimand from the U.S. Attorney in Boston. Chief Judge Wolf wrote on June 29: "A mere secret, written reprimand would not ordinarily be a sufficient sanction for the serious, intentional, repeated and consequential misconduct by Mr. Auerhahn".[2]

Nothing so serious appears to have arisen between the judges of the International Criminal Court and Prosecutor Louis Moreno Ocampo over the disclosure or nondisclosure of evidence. But the regular eruption of such miscarriages of justice in national courts, including in the United States, suggests that it is an issue that should remain in the forefront of serious examination by the ICC judges, particularly in the Court's early years of litigation. The front line of defense is the Pre-Trial Chamber.

2. Origins of the Pre-Trial Chamber

Among the origins of the Pre-Trial Chamber in the negotiations leading to the Rome Statute of the ICC was the U.S. delegation's strong opposition to legislating *proprio motu* powers for the Prosecutor. The primary position of the United States at the start of the Rome Conference in June 1998 was to oppose a *proprio motu* prosecutor.[3] Despite gaining some support among governments, the U.S. delegation knew by the second week in Rome that it probably would not gain the necessary support for that position. Knowing that the *proprio motu* prosecutor had become a *fait accompli* in the negotiations, we knew that we needed to create an oversight mechanism to ensure that the Prosecutor would have to act responsibly and within well-defined limits. The U.S. position morphed into strong support for a Pre-Trial Chamber ("PTC") that would regulate the Prosecutor's efforts – be they under *proprio motu* authority or in response to a State Party or U.N. Security Council referral of a situation – to confirm charges against alleged perpetrators. In Rome, U.S. negotiators seized every opportunity to strengthen the PTC's oversight powers of the Prosecutor. The PTC essentially would be the brake on Prosecutor's accelerator.

But negotiators in Rome (including in the U.S. delegation) did not see*k* a PTC that itself would become the investigatory engine of the Court. That would have defeated the purpose underpinning the PTC and substituted activist judges for an activist Prosecutor. It also would have tilted the ICC too far in the direction of the type of civil law court that relies heavily on the role of an investigating judge and minimizes the prosecutor's functions. The balance was critical: The Prosecutor has to meet evidentiary standards and thresholds for warrants of arrest while the PTC stands as the reasoned gatekeeper, ensuring that the Prosecutor is not a zealot, that he proves reasonable or substantial

2 Adam Liptak, '*Federal Judge Files Complaint Against Prosecutor in Boston*', N.Y. Times, July 3, 2007, at A11.

3 See D. J. Scheffer, 'The United States and the International Criminal Court', (1999) 93 *American Journal of International Law* 12, 15; id, 'Staying the Course with the International Criminal Court', (Nov. 2001-Feb. 2002) 35 *Cornell International Law Journal* 47, 76, 81-82.

grounds based on the evidence (depending on what is being sought), and that he or she stands on solid legal reasoning before the gate is opened by the PTC judges.

The PTC was never intended to be the trial chamber where all relevant evidence is examined. The PTC has a limited but *vital* purpose that demands professional due diligence by the Prosecutor. The PTC stands primarily as a defendant-friendly chamber and a watchdog for compliance with due process requirements. The best case scenario would have the Prosecutor using his or her discretion cautiously and responsibly and within the parameters set by the PTC, which itself acts within its statutory boundaries.

3. Context of atrocity crimes

Evidence of atrocity crimes (genocide, crimes against humanity, or war crimes)[4] collected by Prosecutor with respect to a referred situation or in his capacity of a *proprio motu* prosecutor necessarily will far exceed the individual role of the accused. But the context of such atrocity crimes is vital to meeting the subject matter jurisdiction of the ICC for a single prosecution. A significant magnitude of criminality must have occurred before the situation or *proprio motu* initiative merits ICC scrutiny. At this early stage of the investigative process, it is far too early for the relative convenience of "stipulated facts" to smooth the way for individual prosecutions. The Prosecutor is compelled to compile a substantial quantity of evidence relating to the totality of crimes within the situation and then to present to the PTC the slice of evidence attributable to the accused along with enough of the larger body of evidence to satisfy jurisdictional requirements of the Rome Statute.

If evidence is viewed in isolation of the larger atrocity crimes – the situation – then the ICC will have no jurisdiction. The act would be a common crime suited for national court prosecution. For a warrant of arrest, there must be submitted to the PTC "evidence and any other information which establish *reasonable* grounds to believe that the person committed those crimes."[5] (Emphasis added.) For confirmation of the charges, the Prosecutor must show that an atrocity crime was committed in which there is "sufficient evidence to establish *substantial* grounds to believe that the person committed the crime charged."[6] (Emphasis added.) Depending on the atrocity

4 For an explanation of the term "atrocity crimes," see D. Scheffer, 'Genocide and Atrocity Crimes,' (2006) 1 *Genocide Studies and Prevention*, 229-250; id., 'The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law"', (2007) 2 *Genocide Studies and Prevention*, 91. The purpose in using such terminology is to simplify the description of relevant crimes falling within the jurisdiction of the international and hybrid criminal tribunals and to avoid the errors that often occur when referring to only one category of crimes (e.g., genocide) when in fact the broader range of atrocity crimes (including crimes against humanity and war crimes) is the intended area of inquiry. This need for terminological accuracy and comprehensive application is particularly true for the International Criminal Court.

5 Rome Statute, Article 58 (2) (d).

6 Rome Statute, Article 61 (5).

crime and the situation that has been referred (or examined under *proprio motu* authority), the amount of evidence filed with the PTC could be overwhelming. In contrast to national prosecutions, it is, in no small measure, a different judicial landscape. Hence, there is no perfect symmetry between the national and international procedures. One has to presume that the full extent of the accused's criminal conduct may not be discoverable given the magnitude of the atrocity crimes framing the situation. The Court thus defers to the Prosecutor's discretion regarding which slice of the accused's conduct will be prosecuted, and how the larger purpose (leadership accountability for atrocity crimes and, indirectly, state responsibility for such crimes) will be achieved through such a prosecution.

4. A new methodology?

Do atrocity crimes demand a modern methodology of evidence submission and evaluation in pre-trial stages? Probably. International criminal tribunals necessarily must bridge the evidentiary magnitude of atrocity crimes with a pragmatic focus on one person's role, including individual or command responsibility. The ICC Prosecutor should not need to conquer the world with each warrant of arrest or confirmation hearing.

A new methodology for the ICC, in particular its PTC, could arise from at least one of two options. The first option would be to amend the Rome Statute, perhaps as early as the scheduled 2010 Review Conference. The amendment could provide for the creation of an investigatory commission that would investigate any referred situation or *proprio motu* application with neutrality, objectivity, and unmatched expertise. Proponents of this option might argue that just because a State Party, the U.N. Security Council, or *proprio motu* Prosecutor thinks a situation exists, should not dictate whether it actually does as a matter of fact or law. In the Former Yugoslavia, Rwanda, Cambodia, and Lebanon, investigatory expert commissions preceded the establishment or authorization of a criminal tribunal. But once the atrocity crime situation is confirmed through the work of such an investigatory commission, the ICC Prosecutor would narrow the search for evidence to individual suspects. The task would be immensely simplified if the Prosecutor could submit some form of stipulated facts drawn from the commission's report in order to establish the context for arrest warrants of individual alleged perpetrators. The PTC would examine a far smaller body of evidence with greater speed.

This first option, however, is highly unlikely to attract sufficient support among States Parties and could become the wrecking ball of the Review Conference if it were to be introduced. If implemented through amendment to the Rome Statute and the Rules of Procedure and Evidence, the ICC would be transformed into a largely civil law mechanism rather than a more balanced integration of common law and civil law principles and procedures. Yet some scholars of the ICC are attracted to the notion.[7]

7 See e.g., W. Pizzi, 'Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals', (2006) 4 (1) *Fairness and Evidence in War Crimes Trials*, Article 4.

The second option, which also could supplement the first option or more likely stand on its own, would operate from the existing statutory premise that the PTC requires a minimum amount of evidence showing "reasonable grounds to believe that the person has committed" an atrocity crime before an arrest warrant would be issued or "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged" in order to confirm the charges. The accused is entitled, solely for confirmation hearings, to the same evidence, including any exculpatory evidence, held by the Prosecutor[8] "as soon as practicable."[9] The PTC judge would make full use of status conferences and the requirement that such conferences "ensure that disclosure takes place under satisfactory conditions."[10] The PTC judge would (i) aggressively narrow the charges and focus the Prosecutor on the requirement of minimal evidence to meet the sufficiency standard for the remaining charges; (ii) direct the Prosecutor to share existing and emerging evidence with the accused in a timely manner and not wait until 30 days prior to confirmation hearing;[11] and (iii) use his or her statutory power to ensure timely non-disclosure requests and determinations.[12]

The second option can become operational through an interpretation of Rule 121(3) as an invitation for the PTC judge, in status conferences, to press for the Prosecutor's earlier delivery of the description of charges and lists of evidence so that the defense counsel has a reasonable period of time to review charges and the evidence list.

The same would be true regarding the defense obligation to submit lists of evidence under Rule 121(6). PTC judges who thus act aggressively, but within the limits of their authority, can help ensure far greater efficiency and, indeed, accuracy in the presentation of the evidence.

5. Cambodian experience

The newly created Extraordinary Chambers in the Courts of Cambodia (ECCC), which became fully operational in June 2007 with adoption of its Internal Rules (i.e., rules of procedure and evidence), offers an interesting example of how judicial intervention at the investigative stage has been institutionalized without adopting a full-fledged civil law model for an international or hybrid criminal tribunal.[13] The ECCC has a unique structure of two Co-Prosecutors and two Co-Investigating Judges. While the Co-Prosecutors (one Cambodian and the other international) prepare

8 Rome Statute, Article 121 (3).

9 Rome Statute, Article 67 (2).

10 ICC Rules of Procedure and Evidence, Rule 121 (2) (b).

11 The same principle would hold true for the person under investigation and the 15-day condition for disclosure set forth in Rule 121 (6).

12 Rome Statute, Article 57 (3) (c).

13 See D. Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia', in C. Bassiouni, ed., *International Criminal Law*, 3rd ed. (2008); the documents of the Extraordinary Chambers in the Courts of Cambodia can be accessed at <www.eccc.gov.kh/english/default.aspx>.

files on suspects, it is the Co-Investigating Judges (one Cambodian and the other international) who undertake the bulk of investigative work to determine whether the evidence meets the requirements for an indictment. If the indictment is approved by the Co-Investigating Judges, then the Co-Prosecutors proceed with the prosecution of the suspect. The Pre-Trial Chamber of the ECCC resolves disputes between Co-Prosecutors and between Co-Investigating Judges and it considers certain appeals from the orders of the Co-Investigating Judges;[14] it does not oversee and discipline the investigative work of either the Co-Prosecutors or the Co-Investigating Judges beyond the arena of internal disputes – which are unique to the ECCC because of its mixed composition of Cambodian and international staff.

The ECCC requires that the Co-Prosecutors essentially work with the Co-Investigating Judges to fulfill the entire investigative mandate of the pre-indictment and pre-trial phases of the proceedings, and it leaves the bulk of the investigative work in the hands of the Co-Investigating Judges. In theory this should produce an objective and balanced investigation which examines inculpatory and exculpatory evidence with equal, or at least properly balanced, efforts on the part of the Co-Investigating Judges. Internal Rule 55(5) states: "In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory." So while the ECCC Law and Internal Rules do not task a Pre-Trial Chamber judge to investigate the evidence, they do designate the Co-Investigating Judges to undertake what, in a civil law courtroom, normally would be the responsibility of the investigating judge. The difference, in the case of the ECCC, is that the Co-Prosecutors play critical roles prior to, sometimes during, and immediately after the "neutral" investigation by the Co-Investigating Judges.

The ECCC experience demonstrates there is a way, at least in theory and very soon perhaps in practice as well, for a fusion of common law and civil law in the pre-indictment phase of atrocity crime investigations. The ICC judges should monitor the ECCC proceedings very closely because the dynamic relationship between the Co-Prosecutors and the Co-Investigating Judges, and how the ECCC Pre-Trial Chamber resolves disputes during the investigations, should prove instructive for at least some of what the ICC Pre-Trial Chamber considers when reviewing the investigative work and disclosure of evidence by the ICC Prosecutor and by defense counsel.

6. Pre-Trial Chamber I's performance so far – Restraint or overreach?

The PTC I and Appeals Chamber already have had a number of opportunities, in *The Prosecutor v. Thomas Lubanga Dyilo*, to handle issues pertaining to the disclosure of evidence in that case which doubtless will resonate in the future practice of the Court.

14 ECCC Internal Rules, Rules 71-74.

With considerable boldness, the PTC I issued its first decision, on 17 February 2005, in which it applied a broad interpretation to Article 57 (3) (c) of the Rome Statute[15] and convened a status conference in order "to provide inter alia for the protection of victims and witnesses and the preservation of evidence."[16] The aim of the status conference, as directed by PTC I, was to accelerate the Prosecutor's investigation of the situation in the Democratic Republic of the Congo and to offer more protection for the rights of the defense. Such aim, however, is a delicate one to achieve within the four corners of the Rome Statute and the Rules of Procedure and Evidence. The Pre-Trial Chamber's functions and powers are explicitly provided for in Article 57 of the Rome Statute and additional powers are set forth in Articles 15 (3), 19 (6), 53 (3) (a) (b), 56 (1) (b) & (3) (a), 58, 60 (2), and 62. One scholar, Lecturer Michela Miraglia at the University of Genoa, has described this basket of powers as showing "that the role of the Pre-Trial Chamber is akin to an 'umpire' that should intervene only to a very limited extent in the merits of investigations and prosecutions. Moreover…it appears that the Pre-Trial Chamber, leaving aside the mentioned occasions when it can act on its own initiative, has mainly a 'passive' role – one related to very specific moments of the pre-trial phase – that has to be stimulated by a request submitted, or act performed by the Prosecutor (or the defence). By the same token, Article 57 (3) (c) of the Statute envisions very general *proprio motu* powers that the Pre-Trial Chamber can exercise over the course of the pre-trial phase, paving the way for a more active and 'interventionist' attitude, beyond the minimum limits specified by the other provisions of the Statute."[17]

The extent of the PTC's "more active" and "interventionist attitude", however, is open to serious scrutiny, particularly in light of the negotiators' intent, as already described, to create a PTC that would properly limit an overly-ambitious Prosecutor from over-reaching with his powers and check any zealotry in his investigations. PTC I in the *Lubanga* case appears to have focused on an opposite priority – how to spur the Prosecutor on to new investigative leads and, in a sense, stage manage the pace and delivery of his investigative work so as to accelerate towards the trial. This is accomplished by interpreting Article 57 (3) (c) to enable the judge to probe in a manner similar to an investigating judge in the civil law tradition. If fully implemented by Pre-Trial Chambers at the ICC, such an interpretation and initiative would stand on its head the original intent of the negotiators by substituting an activist PTC single judge for the activist Prosecutor feared during the Rome negotiations and thereafter, when negotiators further strengthened the PTC's oversight (contra investigative) powers in the Rules of Procedure and Evidence. Nonetheless, the activism of the PTC

15 Rome Statute Article 57 (3) (c) reads: "3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:…(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information."

16 Pre-Trial Chamber I, Decision to Convene a Status Conference, 17 February 2005, ICC-01/04.

17 M. Miraglia, 'The First Decision of the ICC Pre-Trial Chamber', (2006) 4 *JICJ* 188.

I single judge may be directed more often towards the interests of the defense and the persons under investigation, thus introducing a useful cautionary signal to the Prosecutor's investigatory efforts. The line between prudent oversight and activist interventionism has yet to be fully drawn, but PTC I certainly started drawing it on 17 February 2005.

In the *Lubanga* case, the PTC I single judge used the status conference as an interventionist weapon, relying on Article 57 (3) (c) of the Rome Statute.[18] One might conclude that in the result the Prosecutor was inspired to seek Article 56 measures to seize a unique investigative opportunity relating to a forensic examination.[19] But an equally significant development was described by Lecturer Miraglia in these terms: "In trying to control the Prosecutor's work and appointing the 'counsel of the defence', i.e. utilizing the most protective measure among those listed in Article 56, Pre-Trial Chamber I showed great concern about the 'inequality of arms' during the investigation phase and its willingness to take care of the protection of defence rights, especially when the Prosecutor is working only on a 'situation', i.e., when a 'suspect' is not yet formally identified such that his or her counsel has not entered into the proceedings and cannot act as a 'watchdog'."[20] Despite the logic that might underpin such an evaluation, it remains a huge leap for PTC I to intervene into the Prosecutor's discretionary power as the investigator of a situation and determine, from the judge's relatively detached vantage point, that the investigation should be intensified or accelerated or broadened.

The PTC I single judge examined and decided upon the final system of disclosure and the establishment of a timetable in an extraordinarily lengthy decision dated 15 May 2006.[21] In great detail the procedures for disclosure of evidence are set forth by the single judge in a manner that almost serves as a supplement to the Rules of Procedure and Evidence. This particular decision doubtless will serve as a guide to all concerned in future proceedings. It does reflect, however, the instincts of an activist judge willing to dig deep into the investigative procedures and direct the parties in how the evidence will be managed in the future rather than await their performance and judge accordingly.

On 4 October 2006 the PTC I single judge ruled against the Prosecutor who had sought to prevent disclosure (by redaction) of certain information in a document of summary evidence to the defense in order to protect the identity of Prosecution witnesses. PTC I held that to adequately protect the four Prosecution witnesses whose safety would be threatened if identified (and who had not given consent to be identified), their statements, transcripts of their interviews and investigator's reports and notes must be declared inadmissible for the purpose of the confirmation hearing, and

18 Pre-Trial Chamber I, Decision to Hold Consultation Under Rule 114, 21 April 2005, ICC-01/04.

19 Pre-Trial Chamber I, Decision on the Prosecutor's Request for Measures Under Article 56, 26 April 2005, ICC-01/04.

20 See Miraglia, *supra* note 17.

21 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, ICC-01/04-01/06.

in turn, the Prosecution cannot rely on such evidence at the confirmation hearing. PTC I also held that other summary evidence would be admissible except that summary evidence tied to the transcripts, interviews, etc. of the Prosecution witnesses. Finally, PTC I ruled that the Prosecutor's duty to disclose exculpatory or even potentially exculpatory information remains enforceable.

The Appeals Chamber delivered a judgment on 13 October 2006 that in large part reversed some of the PTC I single judge's bolder efforts to shrink the Prosecutor's discretionary powers in the investigative realm, particularly as to the duration of investigations.[22] At stake was the PTC I decision of 19 May 2006.[23] The Appeals Chamber confirmed PTC I's decision to require the Prosecutor to seek approval before restricting disclosure of names and/or portions of statements of witnesses on whom the prosecution intends to rely at the confirmation hearing. PTC I will need to evaluate the Prosecutor's request and the infeasibility or insufficiency of less restrictive means.

However, the Appeals Chamber reversed PTC I's decision of 19 May 2006, which had imposed the requirement that before the PTC considers the Prosecutor's request for non-disclosure of certain witnesses due to concerns for the witnesses' safety, the Prosecutor must (i) seek protective measures from the Victims and Witnesses Unit, and (ii) show that due to exceptional circumstances, non-disclosure remains necessary due to the infeasibility of protective measures. The Appeals Chamber found that such prior application by the Prosecutor to the Victims and Witnesses Unit for protection measures is not required by either the Rome Statute, the Rules of Procedure and Evidence (notably Rule 81(4)), or the Regulations of the Court as a prerequisite for an application for non-disclosure of the identity of a witness. The Appeals Chamber stressed that "whether a request for non-disclosure will be successful will depend on the Pre-Trial Chamber's case-by-case evaluation". The Appeals Chamber continued:

> "…[T]he Pre-Trial Chamber's decision that disclosure is the rule and non disclosure is the exception cannot but be upheld because it can and should be read as allowing for a case-by-case evaluation of the merits of all future applications….[I]t is the duty of the Pre-Trial Chamber pursuant to rule 121(2)(b) of the Rules of Procedure and Evidence to hold status conferences 'to ensure that disclosure takes place under satisfactory conditions."

These provisions give the Pre-Trial Chamber important functions with respect to the regulation of the disclosure process prior to the confirmation hearing, which might involve, within the confines of the applicable law, the issuing of procedural directions to facilitate the disclosure process. These provisions, however, do not vest a Pre-Trial Chamber with the competence to pre-determine the merits of future applications

22 Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence," 13 October 2007, ICC-01/04-01/06.

23 See *supra* note 21.

for authorization of non-disclosure pursuant to Rule 81 (4) of the Rules of Procedure and Evidence. It is fundamental to the exercise of judicial power that applications are adjudicated on a case-by-case basis.[24]

The Appeals Chamber also reversed the PTC I's decision that redactions of statements (due to concern for witness identification and safety) would be temporary and in any event not maintained beyond 15 days, and that all future applications would be *inter partes* so that the defense may know of the application and its legal basis. The new rule established by the Appeals Chamber stipulates that the limitation of time for sustaining redactions of statements will apply only if the ongoing investigation into a matter is finished at the time of the confirmation hearing. The Appeals Chamber held that the Prosecutor's investigation certainly could extend beyond this time frame, so the Prosecutor should not be required to cut short the investigation by reason of being forced to disclose redactions.

Significantly, the Appeals Chamber prevented the PTC from hijacking a key component of the investigative process through an unrealistic rule that essentially would mandate that the entire process be terminated by the time of the confirmation hearing before the PTC. As the judges concluded:

> "The Appeals Chamber is not persuaded by the Pre-Trial Chamber's interpretation of Article 61(4) of the Statute. The Pre-Trial Chamber is correct in stating that while Article 61(4) of the Statute mentions investigations before the confirmation hearing, nowhere in the Statute are post-confirmation hearing investigations mentioned. To give this omission as much importance as the Pre-Trial Chamber does, is, however, not warranted.…[T]he Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation…[T]he possibility to amend the charges after their confirmation, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the confirmation of the charges.…The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing…"[25]

This ruling was a heavy brake on the PTC's perhaps inadvertent attempt to dictate the character and temporal nature of investigations in a manner that evoked images of a probing investigating judge rather than a pre-trial judge of limited authority.

The Appeals Chamber further held that there must be flexibility for the PTC to decide whether to make such an evidentiary hearing *ex parte* or *inter partes* and then make a decision based on the facts and circumstances of a particular case. It ruled:

> "The decision of the Pre-Trial Chamber…does not provide for any flexibility. The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that

24 See above, *supra* note 22.

25 Ibid., paras. 53-54.

> an application for ex parte proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by Article 21(3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases."[26]

Subsequent PTC I decisions on disclosure of evidence in the *Lubanga* case reflect considerable deference to the due process rights of the defense but also some concessions to the Prosecutor's and victims' requests during the investigatory stage. PTC I granted extra time for the defense to study exculpatory evidence,[27] an expansive defense request for exculpatory materials,[28] and the Prosecutor's request to redact some material although certain transcripts and interviews were ordered to be disclosed.[29] PTC I ruled that video evidence must be in one of the Court's official languages[30] and that the defense must file formal requests with the PTC (hence creating a public record) for access to evidence and not rely solely on email requests.[31] PTC I also granted a procedure for the legal representatives of victims to gain access to the defense application for leave to appeal so that victims could respond.[32] (But in the *Kony et al. Case* (Uganda), PTC I denied the Office of the Public Counsel for Victims any access to non-public documents bearing on the security or safety of witnesses.[33])

All in all, these subsequent PTC I decisions reflect sound management of the pre-trial stages of the *Lubanga* case and of the types of decisions that necessarily must

26 Ibid., para. 67.

27 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision Convening a Hearing on the Defence Request for Order to Disclosure [sic] Exculpatory Materials, 1 November 2006, ICC-01/04-01/06-640.

28 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Defense Request for Order to Disclose Exculpatory Materials, 2 November 2006, ICC-01/04-01/06-649.

29 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Prosecution Application Pursuant to Rule 81 (2) of 3 November 2006, 3 November 2006, ICC-01/04-01/06-658.

30 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages", 7 November 2006, ICC-01/04-01/06-676.

31 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision on Defence Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718.

32 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision Ordering the Defence to File a Public Redacted Version of its "Application for Leave to Appeal the Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges'", 7 February 2007, ICC-01/04-01/06-813.

33 Pre-Trial Chamber II, *Prosecutor v. Josephy Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen*, Decision on the OPCV's 'Request to access documents and materials', 16 March 2007, ICC-01/04-01/05-222.

be made at the PTC level. The totality of PTC I and Appeals Chamber decisions and judgments in the *Lubanga* case demonstrates that the original intent of the negotiators of the Rome Statute has been honored, but also challenged. The Appeals Chamber has confirmed that the Prosecutor remains the investigator of situations and cases, including after the confirmation hearing, which is the apex of PTC engagement in a case. The Pre-Trial Chamber has used its statutory authority to closely monitor and in various ways essentially supervise the investigation – results which can cut both ways: On the one hand, the PTC holds the Prosecutor "in check" and guards against any zealous conduct he may be tempted to undertake, and the PTC does this by itself zealously protecting the due process rights of the defense. On the other hand, it remains essential that the PTC not substitute itself for the Prosecutor and strive to become the investigatory arm of the Court. That was never the intent of the negotiators. Indeed, the PTC enables achievement of another intent of the negotiators, namely, that the Prosecutor have sufficient discretion and latitude to effectively, and accurately, investigate that which is referred to him for investigation under Article 13 (a) or (b) of the Rome Statute or which he initiates with PTC approval under Articles 13 (c) and 15 of the Rome Statute.

7. In conclusion, brief answers to brief questions

Set forth below are some brief tentative answers to some of the questions that have arisen in this inquiry. I hope these points might set the stage for further reflection in the future as the ICC's docket grows and issues pertaining to pre-trial disclosure of evidence multiply. The questions and answers are admittedly short and are as follows:

How much access should the PTC have to prosecution documents to enforce and deter potential non-disclosures?
The PTC should have access only to those documents that are required to satisfy the threshold requirement of providing sufficient evidence to establish substantial grounds. The objective would be to have access only to what is required for the confirmation of charges.

What can and should the PTC do if there is a failure to disclose? The PTC should:
– immediately issue an order to disclose,
– take disciplinary action, or
– delay the approval of warrants of arrest and the confirmation of charges.

What is the best way to balance this oversight duty with the ICC's status as a court integrating civil and common law principles and yet designating no single judge as an investigating judge?
– The PTC can take a more aggressive stance and yet remain within its statutory mandate.
– The PTC can narrow the charges through status conference consultations.

– The PTC can encourage the Prosecutor to develop an internal protocol on disclosure of evidence and question the Prosecutor about compliance with such protocol during PTC proceedings. The Trial Chamber also can question the Prosecutor about compliance with the internal protocol.

How much merit is there in the accusation that by invoking Article 57 (3) (c) of the Rome Statute to convene a status conference at the pre-trial hearing, when that was not necessarily the intent of such statutory provision, the PTC has broadened its role and transformed itself into an investigating judge?

– It was never the negotiators' intent to expand the PTC role into investigatory functions and powers.
– However, in a U.N. Security Council referral of a particular situation, there might be good reason to mandate a more expansive Article 57 (3) (c) role for the PTC.

Before the confirmation hearing, does the Prosecutor have a duty to disclose all the evidence? Should the Prosecutor do so as a practical matter?

– The Prosecutor has no statutory duty to disclose all of the evidence prior to the confirmation hearing. The Prosecutor has the duty to disclose only the evidence that is relevant to the charges being considered for confirmation and exculpatory information.

Regarding evidentiary standards, what constitutes "reasonable grounds to believe" in the context of arrest warrants?

– The PTC in the Darfur arrest warrants (April 2007) decided that the appropriate interpretation and application of the expression "reasonable grounds to believe" must be in accordance with internationally recognized human rights. The judges view as their guidance "the 'reasonable suspicion' standard under Article 5 (1) (c) of the European Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under Article 7 of the American Convention on Human Rights.[34]

34 See D. Scheffer, 'International Criminal Court: Introductory Note to Decision on the Prosecution Application under Article 58(7) of the Statute In the Case of The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb") ICC Pre-Trial Chamber I', (2007) 46 *International Legal Materials* 532.

Chapter 31 "Witness proofing" before the ICC: Neither legally admissible nor necessary

*Kai Ambos**

1. The object of the contention

In their jurisprudence, Pre-Trial Chamber (PTC) I and Trial Chamber (TC) I distinguish between "familiarisation" and "proofing" of witnesses.[1] The distinction goes back to a recent English Court of Appeal decision where it was described as "dramatic".[2] The essence of familiarisation is to make the witness generally familiar with the court's infrastructure and procedures in order to prevent him or her being totally taken by surprise or even re-victimised. Thus, the underlying idea of familiarisation is generally to prepare the witness to enable her to give oral evidence at trial in a satisfactory manner.[3] For this purpose the Court's Victims and Witnesses Unit ("VWU") has been set up and its functions can be summarized, based on Article. 57 (3) (c), 68 (1) ICC Statute, Rules 16 (2), 17 (2) (b) and 87, 88 of the Rules of Procedure and Evidence ("RPE"), as follows:[4]

- Assisting witnesses when they are called to testify before the Court;
- Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings;
- Informing witnesses of their rights under the Statute and the Rules;

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1 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the practices of witness familiarisation and witness proofing, 8 November 2006, ICC-01/04-01/06, para. 18 et seq., 28 et seq.; Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007, ICC-01/04-01/06, para. 28, 53, 57.

2 *R. v. Momodou*, [2005] EWCA Crim 177 (England & Wales), para. 61; see more detailed *infra* fn. 54 et seq. and main text. Pre-Trial Chamber I, *supra* note 1, refers to this decision in para. 19, 39.

3 Pre-Trial Chamber I, *supra* note 1, para. 27.

4 Cf. Pre-Trial Chamber I, *supra* note 1, para. 22; conc. Trial Chamber I, *supra* note 1, para. 29.

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 ISBN 978 90 04 16655 4. pp. 599-614.

– Advising witnesses where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
– Assisting witnesses in obtaining medical, psychological and other appropriate assistance; and
– Providing witnesses with adequate protective and security measures and formulating long-term and short-term plans for their protection.

After initial confusion[5] it is now clear that there is no disagreement between OTP and Chambers (PTC I and TC I) as to this practice. With its recent submission the OTP, reacting to the PTC I's decision of 8 November 2006, explicitly concurred with the PTC's characterisation of familiarisation and the respective competence of the VWU.[6] In the result, one can say that familiarisation is not only allowed, but even required to a certain extent to comply with the Statute's obligations with regard to the protection of victims.[7]

As to the definition of proofing, there also seems to be agreement now. The OTP – following the case law of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[8] – understands witness proofing as the "practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony."[9] More generally it is said that witness proofing serves to "discuss issues related to that witness's anticipated evidence."[10] With this definition the OTP distinguishes proofing from familiarisation in that the former fundamentally focuses on the concrete evidence to be presented at trial. In fact, the OTP abandons its former, much broader definition whereby it did

5 See for the initial submission of the OTP the summary in Pre-Trial Chamber I, *supra* note 1, para. 11 et seq.

6 Prosecution submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06-952, 12 September 2007, para. 14.

7 See Pre-Trial Chamber I, *supra* note 1, para. 20: "there are several provisions … in order to assist the witness … so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of his or her ignorance …"; and the Trial Chamber allows "the Victims and Witnesses Unit to work in consultation with the party calling the witness, in order to undertake the practice of witness familiarisation in the most appropriate way". See Trial Chamber I, *supra* note 1, para. 34. See also the recent decision of Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, para. 38 et seq. where the Chamber concretely determines the scope of familiarisation, in particular whether the witness may receive a copy of his/her earlier statement made to an investigator.

8 See the definition in *Prosecutor v. Haradinaj* et al., Decision on Defence requests for audio-recording of prosecution witness proofing sessions, 23 May 2007 (IT-04-84-T), para. 8 which, however, includes preparing and familiarizing the witness.

9 See Prosecution submissions, *supra* note 6, para. 15.

10 See Prosecution submissions, *supra* note 6, para. 9.

not distinguish between familiarisation and proofing.[11] In the result, the OTP's definition concurs with TC I, according to which the gist of proofing lies in "preparing a witness in a substantive way for … testimony at trial".[12] Thus, in sum, there is now a general agreement that witness proofing is substantive preparation with a view to giving testimony at trial.

2. *The remaining contention with regard to "witness proofing": Legality and necessity*

The remaining contention between the OTP and the Chambers refers to the proofing of lay (common) witnesses as opposed to professional (expert) witnesses. For the latter, there is general agreement between the parties (OTP and Defence) and the TC that they may be instructed jointly (by the parties) or, if this is not possible, separately (by each each party respectively).[13] As to ordinary witnesses the disagreement is twofold.

First, there is disagreement as to the legal basis of proofing in the *lex lata*: Does one exist in the ICC Statute or can proofing be considered a general principle of law and be as such part of the applicable law according to Article 21 of the Statute?

Second, from a *de lege ferenda* perspective, one may argue about the practical necessity of this practice.

2.1. Lex Lata*: Legal basis of witness proofing*

The requirement of a legal basis for proofing is uncontroversial. Even the OTP does recognize it trying to construe if directly from the Statute (see infra). In substance, the requirement follows from the mixed adversarial-inquisitorial structure of the ICC procedure[14] which does not allow for a partisan witness concept in the sense of witnesses of the prosecution and the Defence. We will return later to this structural issue.

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11 See the summary of the OTP information in Pre-Trial Chamber I, *supra* note 1, para. 11 et seq.

12 Trial Chamber I, *supra* note 1, para. 28.

13 See Prosecution submissions, *supra* note 6, para. 2 et seq. and Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for instructing expert witnesses, 10 December 2007, ICC-01/04-01/06 where the Chamber refers (para. 12), *inter alia*, to Regulation 44 (2) and (4) of the Court (adopted by the Judges of the Court on 26 May 2004, Doc. ICC-BD/01-01-04) according to which the Chamber "may direct" the instruction of expert witnesses or instruct them proprio motu; further, it refers to Regulation 54 (m) providing for an order by a Trial Chamber regarding the "joint or separate instruction by the participants of expert witnesses". – On the situation in the USA see J. S. Applegate, 'Witness preparation', (1989) 68 *Texas Law Review* 277, at 295 et seq., 348.

14 See infra note 40 with main text.

2.1.1. No explicit provision in the Statute or complementary instruments

Neither the Statute nor any of the additional instruments contain an explicit provision on the evidence-related preparation of common witnesses. The most explicit rules on the question of witness *instruction* are Regulations 44 (2) and 54 (m) of the Regulations of the Court but they only refer to *expert* witnesses.[15] Rules 16 (2) and 17 (2), already mentioned above in relation to the functions of the VWU, do not refer to evidence related instruction but only to general assistance in the sense of familiarisation.[16]

Despite this absence of any rule, the OTP construes an *e contrario* argument based on a joint reading of Article 70 (1) (c) and 54 (3)(b) of the Statute.[17] For the OTP the fact that, on the one hand, it has the power to request the presence and question witnesses according to Article 54 (3) (b) and, on the other, witness proofing is not explicitly criminalized in Article 70 (1) (c) leads to the conclusion

> "that an informed reading of the Statute actually supports the proposition that witness proofing, which does not run afoul of Article 70, ought, absent exceptional circumstances, to be permitted."[18]

Yet, this view is not convincing. Article 54 (3) precisely circumscribes the Prosecutor's authority with respect to certain investigatory measures, including its power "to request the presence of and question" witnesses (subpara. (b)). This power leaves no room for additional powers not contained therein; in particular, it cannot be extended to a substantially different measure which may change the underlying concept of witness of the Statue converting her from a witness of the court to a witness of the parties (in this case of the Prosecution). Indeed, PTC I expressed the view that

> "…the attribution of the practice of witness familiarisation to the VWU is consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor of the Defence and that they should therefore not be considered as witnesses of either party, but as *witnesses of the Court*."[19]

In other words, the concept of witness as a witness of the Court or, as some may say, of the truth, prohibits not only the evidence related preparation of this witness but even his/her much more general familiarisation by one party. While one may take a more liberal view with regard to familiarisation – given that it does not entail a direct influence over the witness as to his/her testimony – the opposite is the case with re-

15 See *supra* note 13.

16 See in particular Rule 17 (2) (b): "(i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony; (ii) Assisting them when they are called to testify before the Court".

17 See Prosecution submissions, *supra* note 6, para. 28 et seq.

18 Prosecution submissions, *supra* note 6, para. 30.

19 See Pre-Trial Chamber I, *supra* note 1, para. 26; conc. Trial Chamber I, *supra* note 1, para. 33-34.

gard to proofing since it implies the conversion of a potentially neutral witness into a witness of one party. We will come back to this fundamental conceptual issue but at this juncture it suffices to conclude from the mere wording of Article 54 (3) (b) that proofing is not covered by this provision.[20]

The absence of an explicit criminalization of proofing in Article 70 (1) (c) does not change this legal situation. First, it is arguable that proofing may be covered by subpara. (c) if it is practised in an abusive way eventually leading to "corruptly influencing a witness" or "tampering with" the evidence provided by him/her. Secondly, the mere absence of a certain practice in a criminal prohibition does not warrant the conclusion that this practice is, *e contrario*, permitted; in other words, there is no legal rule, as the OTP seems to suggest, that allows for the construction of a permission by reason of the absence of an explicit (criminal) prohibition.[21] On the contrary, the thin line between punishability and non-punishability of proofing calls for an explicit permissive norm of this practice.

Thus, in sum, each of the OTP's arguments is flawed on its own merits and their joint reading reinforces this result.

2.1.2. A general principle of law?

Given the absence of an explicit provision in the relevant instruments, including international or supranational rules (Article 21 (1) (b)), the question arises whether a general principle of law within the meaning of Article 21 (1) (c) with regard to witness proofing exists. Interestingly, the importance of general principles with regard to evidence is acknowledged by Rule 63 (5) of the RPE according to which national evidence law must only be applied in accordance with Article 21. From this it follows that the general discretion of a Chamber with regard to the relevance or admissibility of evidence (Rule 63 (2) in conjunction with Article 64 (9) (a) ICC Statute) is not absolute but limited by general principles of law within the meaning of Art. 21. As to witness proofing this means that the practice can only be accepted from an evidentiary perspective if a general principle to that effect can be established. Such a principle may be inferred from the national law of the most important legal systems in the sense of Article 21 (1) (c). Before examining this law, it may be helpful to look briefly at the practice of the *ad hoc* tribunals since it may contribute to such a principle.

2.1.2.1. Practice of the ad hoc tribunals

Contrary to PTC I and TC I, the case law of the ICTY and ICTR considers witness proofing as an important and useful practice "accepted since the inception of this

20 For the same result, see Trial Chamber I, *supra* note 1, para. 36.

21 For the same result, see Trial Chamber I, ibid.

Tribunal";[22] the Special Court for Sierra Leone takes, in principle, the same view.[23] The most important legal difference with regard to the ICC consists of the fact that the *ad hoc* Tribunals do not dispose of a general *renvoi* to the law outside their Statutes and Rules as provided for by Article 21 ICC Statute. In fact, given the absence of any specific rule on witness proofing in their Statutes and Rules, the case law applies Rule 89 (B) – the parallel rule to the just mentioned Rule 63 (2) RPE ICC – according to which a Chamber has discretion to make use of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[24] Despite the reference to "general principles" in this provision and the interpretation of Rule 63 RPE ICC in this regard, explained above, the ICTY and ICTR Chambers, using their broad discretion, never gave much weight to national law or practice;[25] instead they focused on the fairness of the proofing practice and held that it enhances the fairness and expeditiousness of proceedings "provided that these discussions are a genuine attempt to clarify a witness' evidence".[26] Further, they stated that this practice does not amount to rehearsing, practising or coaching a witness[27] and does not *per se* prejudice the rights of the accused.[28] Clearly, the Tribunals do not turn a blind eye to the problem of manipulation of witnesses – in fact, this very danger was repeatedly stressed by Defence

22 ICTY, *Prosecutor v. Limaj et al.*, Decision on the defence motion on Prosecution practice of 'proofing witnesses', 10 December 2004, p. 2; in a similar vein *Prosecutor v. Milutinović et al.*, Decision on Ojdanić motion to prohibit witness proofing, 12 December 2006, IT-05-87-T, para. 15 ("on a daily basis for the last thirteen years"); ICTR, *Prosecutor v. Karemera et al.*, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, ICTR-98-44-AR73.8, para. 9 et seq. For this practice see also R. Karemaker et al., 'Witness proofing in international criminal tribunals: a critical analysis of widening procedural divergence', (2008) 21 *Leiden Journal of International Law* 683.

23 Special Court for Sierra Leone, *Prosecutor v. Sesay* et al., Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005 (SCSL-04-I5-T), para. 33 referring to *Prosecutor v. Limaj* et al., *supra* note 22, and stating that proofing is a "legitimate practice that serves the interests of justice".

24 *Prosecutor v. Karemera* et al., *supra* note 22, para. 8.

25 In fact, apart from the Limaj Trial Chamber's reference to the practice in "jurisdictions where there is an adversary procedure" (*Prosecutor v. Limaj* et al., Decision on defence motion on prosecution practice of "proofing witnesses", 10 December 2004, [IT-03-66-T], p. 2; conc. *Prosecutor v. Karemera et al.*, Decision on defence motions to prohibit witness proofing, 15 December 2006 [ICTR-98-44-T], para. 13) national practice has not been taken into account. See also *Prosecutor v. Milutinović* et al., *supra* note 22, para. 13 stressing the difference between the ICTY and the ICC with regard to the recourse to national law.

26 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 16; conc. *Prosecutor v. Karemera* et al., supra note 5, para. 14.

27 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 16.

28 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 22; conc. *Prosecutor v. Karemera* et al., *supra* note 25, para. 14.

submissions[29] –, and the possible distortion of truth by the proofing practice,[30] but they prefer to assume the risks instead of renouncing on this practice completely. Thus, in fact, the Tribunal's admission of this practice rests on the assumption that its advantages outweigh its risks.

2.1.2.2. National law, in particular England and Wales and the United States

Be that as it may, as to the legal basis of proofing for the ICC, its qualification as a general principle within the meaning of Article 21 (1) (c) would require that it were recognized in the major "legal systems of the world" (Article 21 (1) (c)), i.e., at least in the Anglo-American and Romano-Germanic legal systems.[31] This is, however, not the case. In fact, the ICTY and the ICC-OTP themselves concede that this practice is used only in "jurisdictions which are principally adversarial in nature";[32] the OTP enumerates explicitly five countries (Australia, Canada, England and Wales and the United States) where this practice is applied.[33] While a main feature of an adversarial procedure is, *inter alia*, the domination of proceedings, in particular the production and presentation of evidence, by the parties while the judge remains passive,[34] in the so called inquisitorial systems, rooted in the Romano-Germanic tradition of an *ex officio* and judge-led procedure,[35] the production and presentation of evidence is mainly in the hands of the judge. Thus, in these systems witness proofing is, as a matter of principle, inadmissible since witnesses do not belong to one party (Prosecution or Defence) but are witnesses of the Court or the truth.[36] In addition, witnesses are not examined in the same way as in the adversarial trial, in particular, cross-examina-

29 See, e.g., *Proscutor v. Karemera* et al*., supra* note 25, para. 21-2.

30 See e.g. *Prosecutor v. Karemera* et al*., supra* note 25, para. 12, 15; *Prosecutor v. Karemera* et al., *supra* note 22, para 9, 12.

31 I prefer this terminology over "common law" and "civil law" since it better expresses the roots of these two traditions, better accounts for the modern "common law" (being mainly in the ex-colonies of the English motherland statute law) and avoids the misunderstanding that "civil law" refers only to this section of the law (namely the law regulated in the Civil Code etc. instead of the whole tradition).

32 Prosecution submissions, *supra* note 6, para. 24; see also *Prosecutor v. Limaj* et al., as quoted supra note 25; conc. *Prosecutor v. Karemera* et al., *supra* note 25, para. 13.

33 Prosecution submissions, *supra* note 6, para. 24.

34 Cf. P. Roberts & A. Zuckerman, *Criminal Evidence* (2004), at pp. 47-48. Interestingly, this passivity of the judge is based on the belief that it is a guarantee for a fair trial. See R.J. Delise & D. Stuart, *Learning Canadian Criminal Procedure*, 7th ed. (2003), at p. 523.

35 For terminology and structure see K. Ambos, 'International criminal procedure: adversarial, inquisitorial or mixed?' (2003) 3 *International Criminal Law Review*, at 2 et seq.; see for a innovative comparative analysis of both the "inquisitorial" and "adversarial" traditions R. Vogler, *A world wide view of criminal justice* (2005), at 1 et seq.

36 In contrast, it may be argued that witness familiarisation in the above sense (*supra* note 3 and main text) cannot be objected to even in these systems since it is a useful and necessary practice to assist witnesses to cope with their function in open court adequately.

tion, highly relevant to verify the authenticity of a witness statement,[37] is not a common practice.[38] It comes, therefore, as no surprise that the OTP does not refer to "any citations from the Romano-Germanic legal system."[39] In any case, the structural difference of the inquisitorial and adversarial systems with regard to the production and presentation of evidence shows the underlying "system dimension" of proofing. If one conceives the ICC procedure, as does this author,[40] as a mixed procedure, with Prosecution and Defence committed to the truth but not to their respective cases (see Article 54 (1) (a)) and, as understood by PTC I,[41] with witnesses of the truth instead of one party, witness preparation in the sense of proofing by one party is a structural contradiction; the only possible preparation would be a joint one, as recognized by TC I for expert witnesses,[42] or a preparation by an independent organ like the VWU.

Even if one identified a mainly adversarial tendency in the ICC procedure, a general principle in the sense of Article 21 (1) (c) would still be required and such a principle cannot be established. Apart from the absence of this practice in the Romano-Germanic systems even in the so-called adversarial systems this practice is by no means uniform.[43] I shall demonstrate this with regard to the most important ones, namely England and Wales and the United States. The situation in England and Wales is characterized by the formal separation of pre-trial and trial functions between solicitors and barristers.[44] As the latter are, as specialised litigation lawyers, in charge of the conduct of a case only during the trial phase, they are not allowed to interview witnesses during the pre-trial phase.[45] Interviewing includes discussing

37 Cf. on the importance of preparation for cross-examination L. Ellison, 'Witness preparation and the prosecution of rape', (2007) 27 *Legal Studies* 171, at 175 et seq. with regard to rape cases and *infra* note 79.

38 Take for example the German case where § 239 of the StPO provides for a form of cross-examination with regard to witnesses called by the prosecution or the Defence but which, in practice, is never applied.

39 Critically Trial Chamber I, *supra* note 1, para. 41.

40 Cf. Ambos, The structure of international criminal procedure: Adversarial, inquisitorial or mixed?, in M. Bohlander (ed.), *International criminal justice: a critical analysis of institutions and procedures* (2007), at 431 and passim with further references.

41 See *supra* note 19.

42 See *supra* note 13.

43 Trial Chamber I, *supra* note 1, para. 39-42; Pre-Trial Chamber I, *supra* note 1, para. 12: "number of expression", "greatly differs from jurisdiction to jurisdiction".

44 F. Lyall, *An Introduction to British Law*, 2nd (2002), p. 42; A. Sanders, in P. Tak, *Task and Powers of the Prosecution Services in the EU Member States*, Vol. 1 (2005), p. 121; R.C. Wydick, 'The ethics of witness coaching', (1995) 17 *Cardozo Law Review* 1, at 5 et seq.

45 The relevant rules are paras. 704 to 708 (notably para. 705) of the Code of Conduct (Bar Council, Bar Standards Board, 8th ed. October 2004, <www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct>. They have been put into more concrete form by the Code's section 3 Written Standards for the Conduct of Professional Work <www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct/writtenstandardsfortheconductofprofessionalwork/> and the Guidance on Witness Preparation,

with any witness the substance of his or her evidence or the evidence of other witnesses.[46] A barrister may contact a witness only for reasons unrelated to the specific evidence to be given in court, e.g. he may explain the court procedure to a witness.[47] Only when acting as prosecution counsel may a Barrister, if instructed to do so, interview potential witnesses.[48] Solicitors are mainly active in the pre-trial phase and thus necessarily have contact with witnesses at this stage.[49] They are allowed to interview and take statements from any witness or prospective witness at any stage in the proceedings.[50] However, both for a Barrister acting as prosecution counsel and for a solicitor, the respective Codes establish clear *limits* for the interviewing of witnesses, namely, they are not allowed to

> "(a) place witnesses who are being interviewed under any pressure to provide other than a truthful account of their evidence;
> (b) rehearse, practise or coach witnesses in relation to their evidence or the way in which they should give it".[51]

To put pressure on a witness in the sense of (a) above may result in punishment according to section 7 of the Perjury Act 1911.[52] The testimony of a coached witness is regarded as unfair evidence and therefore is not admitted into evidence at trial.[53] In fact, the Court of Appeals in *R. v Momodou and Limani,* a fundamental decision already mentioned at the beginning of this essay,[54] explicitly prohibited witness training and coaching.[55] The Court saw a "dramatic distinction" between the former and

prepared in October 2005 in light of the Momodou decision (*supra* note 2) <www.barstandardsboard.rroom.net/standardsandguidance/codeguidance/witnesspreparationmomodouandlimani/>.

46 Para. 6. 3. 1. Written Standards, *supra* note 45.

47 Para. 6. 1. 3 Written Standards, *supra* note 45; for more examples see para. 6. 1. 4.

48 Cf. para. 6.3.2 Written Standards, *supra* note 45.

49 See generally The Law Society, Code for Solicitor Advocates, last amended 13 January 2003 <http://lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf>.

50 Principle 21.10 of the Law Society's Guide to Professional Conduct as quoted in CPS, Pre-trial Interviews by Prosecutors, A Consultation Paper, para. 4; the same follows, *e contrario*, from para. 6 (5) of the Law Society's Code for Solicitor Advocates, *supra* note 49, since this provision refers to "interviewing a witness out of court".

51 Cf. para. 6 (5) Code for Solicitor Advocates, *supra* note 50; see also para. 705 (a), (b) Code of Conduct, *supra* note 45.

52 Section 7 holds liable the aider and abettor to an act of perjury within the meaning of sect. 1, i.e., a knowingly objectively or subjectively false statement by a witness <www.englandlegislation.hmso.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga_19110006_en_1>.

53 See Ellison, *supra* note 37, at 182 referring to *R. v. Salisbury* and section 78 of The Police and Criminal Evidence Act 1984.

54 See *supra* note 2, para. 61-65.

55 Ibid., para. 61.

familiarisation, emphasizing the "inherent" risks of witness training with a view to the desired uninfluenced witness statement:

> "Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. … Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited."[56]

Thus, while training is prohibited, familiarisation is allowed, even to be welcomed on condition that it does not involve discussions about evidence.[57]

A Code of Practice issued by the Crown Prosecution Service[58] provides for more detailed guidance as to the precise content of a witness pre-trial interview. The interview shall assist the Prosecutor "to assess the reliability of a witness's evidence or to understand complex evidence."[59] For this purpose, the witness may be asked about the content of his or her statement, which may include "taking the witness through his/her statement, asking questions to clarify and expand evidence, asking questions relating to character, exploring new evidence or probing the witness's account."[60] The attendance of a witness at such an interview is "voluntary and cannot be compelled", the prosecutor must remain "objective and dispassionate at all times",[61] in particular with regard to the responses given by the witness.[62] As to the limits of such an interview it is, first, stated generally that it "must not be held for the purpose of improving

56 Ibid.

57 Ibid., para. 62: "Pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants (…) are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works." Guidance for this practice is then given in para. 63-65.

58 CPS, Pre-trial witness interviews: Code of practice, December 2005, <www.cps.gov.uk/victims_witnesses/interviews.html>. The Code of practice is based on a Attorney General Report of 2004 and provides guidance to prosecutors in certain CPS areas as part of a pilot scheme.

59 Ibid., para. 2.1.

60 Ibid., para. 2.3.

61 Ibid. para. 6.1., 6.2.

62 Ibid., para. 7.3.

a witness's evidence or performance."[63] More specifically, undue influence or pressure amounting to "training" and "coaching" is prohibited:

> "Prosecutors must not under any circumstances train, practise or coach the witness or ask questions that may taint the witness's evidence. Leading questions should be avoided."[64]

Any departure from the "dispassionate" standard mentioned above entails "the risk of allegations that the witness has been led or coached in their evidence."[65] If there are contradictions between witness statements, "alternative accounts" may be offered but it must not be suggested to the witnesses that "they adopt the alternative account".[66]

A different picture is presented in the United States.[67] Here, witness preparation is widely practised and precise limitations are still to be established. In fact, witness preparation is understood as an umbrella term encompassing familiarization as well as proofing[68] and thus the term does not entail a clear cut distinction between permitted and prohibited conduct. Indeed, the difficult question as to where to draw the line between permitted preparation (in the sense of familiarization) and prohibited coaching (in the sense of altering "a witness's story about the events in question"[69]) has generated an intense debate about the ethical limitations of witness preparation,[70] a debate which goes back to the famous *dictum* of Judge Francis Finch of the New York Court of Appeals in 1880 where it was held:

> "While a discrete and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral, to go fur-

63 Ibid., para. 2.2.

64 Ibid., para. 7.1.

65 Ibid., para. 7.3.

66 Ibid., para. 7.2.

67 Cf. A. Watson, 'Witness preparation in the United States and England & Wales,' (2000) 164 *Justice of the Peace* 816, at 816 et seq., 820-21.

68 Cf. Applegate, *supra* note 13, at 278: "any communication between a lawyer and a prospective witness (…) that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing."

69 See Wydick, *supra* note 44, at 2 further distinguishing between three grades of coaching according to the lawyer's mens rea and his acting overtly or covertly (at 3-4, 18 et seq.). All these grades interfere with the truth-seeking function of the court but grades one and two even amount to inducing the witness to a false testimony and to perjury.

70 See Applegate, *supra* note 13, at 281 and passim; Wydick, *supra* note 44, at 1 et seq.; L. R. Salmi, 'Don't walk the line: Ethical considerations in preparing witnesses for deposition and trial, (1999) 18 *Review of Litigation* 136, at 136 et seq.; Watson, *supra* note 67, at 818 et seq.; P.J. Kerrigan, 'Witness preparation', (1999) 30 *Texas Tech L. Re*view 1367, at 1369 et seq.; F.C. Zacharias & S. Martin, 'Coaching witnesses', (1999) 87 *Kentucky Law Journal* 1001, at 1011 et seq.

> ther. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."[71]

Similarly, in a recent decision, the Maryland court in *State v. Earp* said that

> "[b]ecause the line that exists between perfectly acceptable witness preparation ... and impermissible influencing of the witness ... may sometimes be fine and difficult to discern, attorneys are well-advised to heed the sage advice ... [to] exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."[72]

There is general agreement that witness preparation is an integral part of the adversarial system[73] – given its central features of partisan fact seeking and a passive tribunal –,[74] and that it is even a lawyer's obligation to prepare his witnesses.[75] However, whereas there is an institutional necessity and strategic duty of witness preparation,[76] it is equally recognized that this practice interferes with the truth-seeking function of the court[77] and may ultimately distort the witness's memory and thus the truth.[78] The efficacy of cross-examination to counter these dangers is, to say the least, doubtful.[79] For some scholars this expectation is even "nothing more than an Article of faith".[80] In fact, the intrinsic tension between partisan representation and truth-seeking is the underlying reason for the difficulty in drawing a clear-cut line between the permitted and the prohibited.[81] In practice, the law is ambivalent and the ethical limits of witness preparation are controversial and blurred. The American Bar Association's Model Rules of Professional Conduct, adopted in nearly all US states, contain only a

71 In re Eldridge, 37 N.Y. 161, 171 (N.Y. 1880), quoted according to Wydick, supra note 44, at 52.

72 State v. Earp, 571 A.2d 1227, 1234-35 (Md. 1990).

73 See e.g. Applegate, *supra* note 13, at 341: "child of the adversary system".

74 Applegate, *supra* note 13, at 282, 324, 333 et seq., 341, 342, 352; conc. Wydick, *supra* note 44, at 12-13; Kerrigan, *supra* note 70, at 1367-68; Salmi, *supra* note 70, at 141; Zacharias & Martin, *supra* note 70, at 1010.

75 Applegate, *supra* note 13, at 287; Salmi, *supra* note 70, at 141.

76 Applegate, *supra* note 13, at 338.

77 Applegate, *supra* note 13, at 328, 334; Watson, *supra* note 67, at 819.

78 Applegate, *supra* note 13, at 282, 328 et seq.; Wydick, *supra* note 44, at 9 et seq.; Watson, *supra* note 67, at 818-19, 822.

79 Cf. Applegate, *supra* note 13, 307 et seq. (311); critically also Salmi, *supra* note 70, at 142-43. Too uncritical Karemaker et al., *supra* note 22, at 695, referring to cross-examination as the most important tool to mitigate the perceived risk of witness proofing.

80 J. H. Langbein, The German Advantage in Civil Procedure, (1985) 52 *U. Chi. L. Rev*. 823, at 833 n.31; conc. Applegate, *supra* note 13, at 311.

81 Applegate, *supra* note 13, at 326, 341.

few provisions generally applicable to witness preparation[82] which, in sum, prohibit the creation of false evidence by inducing a witness to false testimony and perjury.[83] Yet, given the unclear ethical limits, almost every technique of witness preparation can be converted into unethical conduct once it is applied with the objective to alter or distort the facts.[84] Thus, for example, refreshing the witness's memory is considered "[O]ne of the most fragile areas in ascertaining a witness's version of the facts" since a "witness's perceptions of critical events are easily eroded and distorted with time."[85] Also, rehearsal, "the ultimate witness-preparation technique",[86] for some necessary "to make the witness feel comfortable"[87] and prepare him or her for cross-examination,[88] is most controversial since it treats the trial as "a play scripted by the lawyers"[89] and "comes uncomfortably close to the line between the lawyer's knowing what would help the case and the lawyer's advising the client how to help the case."[90] In sum, an individual analysis of each technique leads to opposing conceptual pairs – refreshing/contamination, advising/memorisation, developing/creating facts, familiarization/coaching etc. – expressing the permitted and the prohibited but showing at the same time how thin the line between the two is. This situation has for some scholars touched upon the very foundations of the criminal justice system:

> "In recent years, the American legal profession's reputation has suffered because lay people do not trust lawyers, and they believe that all attorneys are crooks who will tell their witnesses and clients to say anything in order to win a lawsuit".[91]

2.1.3. Conclusion

From the above it clearly follows that proofing has no legal basis in the ICC Statute or complementary instruments. In particular, given the limited and even inconsistent practice of witness preparation in the adversarial system, PTC I is correct in stating that "the practice of witness proofing … is not embraced by any general principle of

82 Model Rules of Professional Conduct (2007), see for example Rules 1.2 (d) stating that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" or Rule 3.4. (b) mandating that a "lawyer shall not ... assist a witness to testify falsely." <www.abanet.org/cpr/mrpc/mrpc_toc.html>.

83 See also R. D. Rotunda & J. S. Dzienkowski (eds.), *The Lawyer's Deskbook on Professional Responsibility 2007* (2008), § 3.4.-3(e): "Lawyers may interview witnesses and prepare them for trial, but lawyers may not "suggest" that a client or witness testify falsely"; see also Salmi, *supra* note 70, at 138.

84 See Salmi, *supra* note 70, at 154 et seq.; on the importance of knowledge see also Applegate, *supra* note 13, at 343 and Wydick, *supra* note 44, as quoted *supra* in fn. 69.

85 See Salmi, *supra* note 70, at 157.

86 See Applegate, *supra* note 13, at 323.

87 See Salmi, *supra* note 70, at 165.

88 See Watson, *supra* note 67, at 818.

89 See Applegate, *supra* note 13, at 323; also Salmi, *supra* note 70, at 165.

90 See Applegate, *supra* note 13, at 323; crit. also Wydick, *supra* note 44, at 15-16.

91 See Salmi, *supra* note 70, at 178.

law"[92] referring to such different jurisdictions as Brazil, France, Germany, Spain, on the one hand, and England and Wales and the United States, on the other.[93] In fact, the forms of proofing suggested by the OTP, e.g., refreshing the witness's memory or enabling a more orderly and efficient presentation of the evidence at trial,[94] would go directly against the principles established by the recent rules in England and Wales[95] and by some of the ethical considerations discussed in the United States. The incompatibility with these standards is aggravated by the fact that the pre-trial interviews conducted by the OTP directly relate to the *Lubanga* case and thus conflict with the general principle that "… training of this kind … should not be arranged in the context of nor related to any forthcoming trial" and the "trainers" should have no personal knowledge of the case in hand to avoid any impact on it.[96] Against this background one may even argue that "it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing".[97] In any case, given the absence of a general principle and thus a legal basis of proofing this practice must be considered "prohibited" under the current legal regime of the ICC.[98]

2.2. De Lege Ferenda: *Is witness proofing necessary?*

While it is true that the ICC and the ICTY/ICTR are not mutually bound by their case law[99] and the procedural framework established by the ICC Statute deviates substantially from the one of the *ad hoc* tribunals[100] the ICTY/ICTR's practice triggers the question whether the advantages of proofing are so overwhelming that it should be provided for in the ICC Statute. According to the OTP the advantages are the following:[101]

> "(i) Providing a detailed review of relevant and irrelevant facts in light of the precise charges to be tried;

92 See ICC-PTC I, *supra* note 1, para. 42.

93 Ibid., para. 37.

94 Prosecution submissions, *supra* note 6, para. 16.

95 See also Pre-Trial Chamber I, *supra* note 1, para. 40. For a different view, see Karemaker et al., *supra* note 22, p. 689 with fn. 36 who do not, however, analyse the practice in England and Wales and fail to mention the controversial discussion in the United States.

96 See *R v. Momodou, supra* note 2, para. 62; Ellison, *supra* note 37, at 186.

97 See Pre-Trial Chamber I, *supra* note 1, para. 42.

98 See Trial Chamber I, *supra* note 1, para. 57.

99 See from the perspective of ICTY/ICTR: *Prosecutor v. Karemera* et al., *supra* note 22, para.7; *Prosecutor v. Milutinović* et al., *supra* note 22, para. 13; from the ICC perspective: Trial Chamber I, *supra* note, para. 44-45. It is therefore irrelevant that, as submitted in *Prosecutor v. Karemera* et al., *supra* note 25, para. 8, the *Lubanga Dyilo* Chamber has no comprehensive knowledge of practice of *ad hoc* tribunals.

100 See Trial Chamber I, *supra* note 1, para. 44-45. For a comparative analysis see, Ambos, *supra* note 40, pp. 453 et seq., 475 et seq.

101 Prosecution submissions, *supra* note 6, para. 16.

(ii) Refreshing the witness's memory of past events through a review of previous statements;
(iii) Ensuring the witness is aware of any issues on which he/she is not permitted to testify about (for instance, due to a previous ruling by the Chamber on inadmissibility of evidence);
(iv) Enabling a more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial;
(v) Identifying and putting the Defence on notice of any differences in recollection, thereby preventing undue surprise."

Further, by "clarifying the evidence to be called, assessing the credibility of the witness and by disclosing to the defence any new, additional or contradictory information, proofing can result in significant improvements in judicial economy and the accuracy of the testimony."[102] The OTP even goes so far to state that proofing "within limits, advances the Court's ability to ascertain truth."[103] The same view has been advanced in a recent paper by Don Taylor, Karemaker and Pittman.[104]

Yet, while it cannot be denied that witness preparation, in principle, can be a "useful practice",[105] its advantages do not outweigh its risks set out above. First of all, the national practice in England and Wales and the United States does not indicate that witness proofing will contribute to the truth, it rather, as correctly assessed by TC I, entails the serious risk of distorting the truth given the advance "rehearsal of in-court-testimony" and the consequent lack of "helpful spontaneity" during testimony at trial.[106]

102 Ibid., para. 17.

103 Ibid., para. 9.

104 See Karemaker et al, *supra* note 22, espec. at 693-694.

105 See also ICTR, *Prosecutor v. Karemera*, supra note 25, para. 17-18; ICTY, *Prosecutor v. Milutinović* et al., *supra* note 22, para. 20.

106 See Trial Chamber I, *supra* note 1, para. 46-52. For Karemaker et al, *supra* note 22, 694, with fn. 64 this view is "puzzling" but they argue from the perspective of an adversarial trial with a specific role of the parties in adducing evidence (see ibid.: "If the parties are to have any meaningful role in presenting the evidence …") and ignore, contrary to their statement at the beginning ("not … casting the *Dyilo* Decision in the simple terms of an 'adversarial v. inquisitorial' struggle …", 1.), the different (mixed) nature of the ICC procedure with a less active role for the parties. They also dismiss the inherent risks in witness proofing too apodictically stating that "proofing is not rehearsing, practicing or coaching" (at 693) thereby ignoring the controversial discussion in England and Wales and even the U.S. They further enumerate four "principles" that may mitigate the risks of proofing but while these principles may have had the desired effect at the *ad hoc* tribunals it is unclear what effect they will have at the ICC, especially because two of them (cross-examination, contempt of court) are typical practices of adversarial trial and will not necessarily – apart from their questionable efficiency even in these jurisdictions – receive the same acceptance at the ICC. See also my reply in (2008) 21 Leiden Journal of International Law, Issue 4 (forthcoming).

In addition, witness proofing conflicts with various fair trial principles.[107] On the one hand, the principle of public trial is violated since evidence is partly rehearsed before the actual trial, in private between a party and a witness. On the other hand, proofing conflicts with the equality of arms principle. While the Defence may practice pre-trial interviews[108] (and in this context "prove" their witnesses) and indeed does so in the adversarial systems, in international criminal procedure with its mixed system this practice, it is of much more use to the prosecution given its superior infrastructure and manpower. It is therefore not surprising that the *Lubanga* defence rejected this practice.[109] The disclosure obligations of the Prosecution compensate the disadvantages of the defence only if proofing is completed during the pre-trial stage[110] and disclosure takes place early enough.[111] The problem of late proofing and thus late disclosure has even been acknowledged by the *ad hoc* tribunals.[112] Last but not least, a thorough and adequate familiarization may account for a great part of the OTP concerns. Indeed, the OTP still does not grasp the full potential of familiarisation since it relies too much on the case law of the *ad hoc* tribunals which did not distinguish between familiarisation and proofing.[113] Be that as it may, familiarisation is sufficient to guarantee that witnesses fulfil their role at trial, i.e., give evidence in the most impartial and comprehensive manner, always recalling the truth and nothing but the truth.

107 Theses concerns are ignored by Karemaker et al, *supra* note 22, who state quite apodictically in fn. 73 (referring to the timing of the discovery of new evidence) that "such concerns are extraordinarily important" but "do not directly implicate the relative merits of proofing as international judges unquestionably possess the tools to remedy any due process deprivations."

108 ICTY, *Prosecutor v. Krstić*, Decision on application for subpoenas, 1 July 2003, IT-98-33-A; ICTR, *Prosecutor v. Karemera*, *supra* note 25, para. 18.

109 See Trial Chamber I, *supra* note 1, para. 17 et seq.

110 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 23.

111 *Prosecutor v. Karemera* et al., *supra* note 25, para. 13 with fn. 26.

112 *Prosecutor v. Limaj* et al., *supra* note 25, p. 3; *Prosecutor v. Milutinović* et al., *supra* note 22, para. 21.

113 In the early *Prosecutor v. Limaj* et al. decision, *supra* note 25, the notion "familiarization" was not even mentioned; in *Prosecutor v. Karemera* et al., *supra* note 25, para. 10 (mentioning familiarization separately) and para. 15 (putting it together with refreshing the witness' memory with regard to evidence etc.) both concepts have been mixed up in one definition; this same definition is quoted in *Prosecutor v. Karemera* et al., *supra* note 22, para. 4. Only in *Prosecutor v. Milutinović* et al., *supra* note 22, para. 7 the differentiation was made (but without limiting familiarization to VWU, para. 10).

Chapter 32 Anonymous witnesses before the International Criminal Court: Due process in dire straits

*Michael E. Kurth**

1. Introduction

The International Criminal Court (ICC) has started its first trials. Although most cases are still at the pre-trial phase, the Court has already had an opportunity to rule on some important issues concerning basic procedural rights of the defendant. The case against the former Congolese militia leader *Thomas Lubanga*[1] has presented the Court with issues concerning due process guarantees.[2] Among these is the scope of the participation and protection of victims and witnesses in the proceedings. In its decision of 18 January 2008, Trial Chamber I not only acknowledged but extended the rights of victims laid down in the Rome Statute[3] to a questionable degree.[4] In particular, the ruling on the possibility of witness anonymity during the trial[5] is difficult to reconcile with the defendant's due process rights as laid down in Article 67 of the Rome Statute.

The concept of due process has a long history and dates back to the English Magna Charta Libertatum of 1215.[6] This principle, which has become synonymous with the right to a fair trial, is a key component of any form of adjudication. Due process

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1 *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06. For a general first account of this case see M. Happold, 'Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', (2007) 56 *International and Comparative Law Quarterly* 713.

2 See the International Bar Association's (IBA) Monitoring Report on the ICC (November 2007), 33-42.

3 UN Doc. A/CONF.183/9 of 17 July 1998.

4 Trial Chamber I, *Prosecutor v. Lubanga*, Decision on Victims Participation, 18 January 2008, ICC-01/04-01/06, paras. 95-122. See also the contribution by S. Vasiliev in this volume, below Chap. 33.

5 *Ibid*., para. 131.

6 M. Nowak, *U.N. Covenant on Civil and Political Rights*: *CCPR Commentary* (2004), Article 14, MN 1 with further references.

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rights can be found in both national constitutions[7] and in all major human rights treaties. Some of the key elements of the right to due process are: the presumption of innocence, the right to an expeditious trial, the equality of arms, the independence and impartiality of the judges, the right to counsel or the right to present witnesses on one's own behalf and to cross-examine the other side's witnesses.[8] The European Court of Human Rights (ECtHR) has repeatedly pointed out that "[t]he right to a fair trial holds such a prominent place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 (1) of the Convention restrictively."[9] Nonetheless, the exact scope of this right is still highly contested and the divergent jurisprudence by human rights bodies demonstrates that due process is characterized by significant ambiguity. The situation gets even more complicated when it comes to international criminal proceedings. The unaltered transposition of domestic legal practices and the application of the jurisprudence of the human rights bodies by international criminal courts has been questioned because of the unique overall context and purpose in which the international criminal courts operate.[10] In the *Tadić* case, the Trial Chamber of International Criminal Tribunal for the Former Yugoslavia (ICTY)[11] held by majority vote that the situation of armed conflict that existed in the former Yugoslavia was an exceptional circumstance *par excellence* which allowed some derogation from recognized procedural guarantees.[12]

This conclusion can be criticized on the grounds that international criminal law is mainly supposed to serve as a protection against any form of human rights violations.[13] Not only the human rights of the victims have to be protected but also the human rights of anyone accused of even the most egregious crimes. It is vital to ensure

7 See, e.g., the 5th and 6th Amendments of the United States Constitution, Article 20 (3) of the German Basic Law, Article 45 (1) of the Polish Constitution or Article 11 of the Canadian Charter of Rights and Freedoms (Constitution Act 1982). The newly established Charter of Fundamental Rights in the European Union foresees such a guarantee in Article 47 (2).

8 See P. van Dijk and M. Viering, 'Right to a Fair and Public Hearing (Article 6)', in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (2006), 511 at 578-596; S. Trechsel, *Human Rights in Criminal Proceedings* (2005), 84-116.

9 *AB v. Slovakia*, Appl. No. 41784/98, Judgment of 4 March 2003, para. 54; *Moreira de Azevedo v. Portugal*, Appl. No. 11296/84, Judgment of 23 October 1990, para. 66.

10 For the extent by which international criminal courts are bound by human rights law see A. Zahar and G. Sluiter, *International Criminal Law*: *A Critical Introduction* (2008), 276-281; L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms…or Tied Down?' (2006) 19 *Leiden Journal of International Law*, 847.

11 See UNSC Res. 827 of 25 May 1993.

12 Trial Chamber II, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 61.

13 See I. Tallgreen, 'The Sense and Sensibility of International Criminal Law', (2002) 13 *European Journal of International Law* 561, at 569-579; C.J.M. Safferling, *Towards an International Criminal Procedure* (2001), 44-48.

equality of arms between the Prosecution and the Defence to ensure the legitimacy of international criminal tribunals. This has been highlighted by the Appeals Chamber in the *Barayagwiza* case, in which the International Criminal Tribunal for Rwanda (ICTR)[14] failed to resolve the *writ of habeas corpus* in a timely manner:

> "The Tribunal – an institution whose primary purpose is to ensure that justice is done – must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal […] would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results."[15]

Such clear support for the human rights of a defendant by the ICTY and the ICTR has unfortunately been a rare exception. The most vulnerable part of the proceedings to possible breaches of procedural rights is the question of the admissibility of evidence. The use of anonymous witnesses in criminal trials has been a bone of contention between the Prosecution and the Defence in this regard. In sum, neither the *ad hoc* tribunals nor the ECtHR have outright rejected the use of such evidence but indeed have allowed it under special circumstances.[16] As for the ICC, neither its Statute nor its Rules of Procedure and Evidence (RPE)[17] explicitly foresee the use of anonymous testimonies. This topic had been discussed at the Rome Conference and in the subsequent Working Group on the RPE, but the delegations were unable to reach consensus and eventually left the issue open. They entrusted the Court with the task of resolving the problem in its future practice. Whether the ICC will adopt the same approach as the *ad hoc* tribunals remains to be seen.

This contribution argues that the ICC should refrain from permitting the use of anonymous witnesses. If such witnesses are permitted to testify, the accused or his counsel's opportunity to cross-examine such witness is severely hampered. Such a drastic diminution of the basic procedural rights of the accused is impermissible and should not be outweighed by any interest of active victim participation or witness protection. If the concerned witness will only testify in full anonymity, this evidence should not be admissible.

14 UNSC Res. 955 of 8 November 1994.

15 Appeals Chamber, *Barayagwiza v. Prosecutor*, Case No. ICTR-99-52-T, Decision, 3 November 1999, para. 112.

16 See Trial Chamber II, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 62-66 and *Doorson v. The Netherlands*, Appl. No. 20524/92, Judgment of 26 March 1996, para. 73.

17 UN Doc. PCNICC/2000/1/Add.1 (2000).

Another unresolved matter is the question of possible remedies of a defendant whose human rights have been infringed upon in the course of international criminal proceedings.

Before addressing these issues, I will first set out the basic concept of the fair trial guarantee before international criminal courts.

2. The scope of the right to fair trial in international criminal proceedings

Fairness of judicial proceedings is indispensable for the establishment of confidence in national or international adjudication. In the context of a criminal trial, this guarantee is vital for every defendant. Only due process will give the defendant a chance to prove his innocence and ensure that the trial is not a mere means to an end (a "show trial"). Accordingly, the fair trial guarantee can be found in Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR),[18] Article 6 (1) of the European Convention of Human Rights (ECHR),[19] Article 8 (1) of the American Convention of Human Rights (ACHR)[20] and Article 10 of the Universal Declaration of Human Rights (UDHR) of the United Nations General Assembly,[21] as well as in the statutes of international criminal courts, i.e. Article 20 (1) of the ICTY Statute, Article 20 (4) of the ICTR Statute and Article 67 of the Rome Statute.[22] While some scholars see the fair trial guarantee as a customary rule of international law, others qualify it as a general principle of international law.[23] Be that as it may, most of the scholarship focuses on identifying the specific guarantees that form the right to a fair trial.

One of the fundamental parts of the guarantee is the equality of arms.[24] The equality of arms obliges the court to ensure that neither the Defence nor the Prosecution is put at a disadvantage when presenting its case.[25] The accused must have appropriate

18 999 UNTS 171 (16 December 1966).

19 ETS No. 5 (4 November 1950).

20 OAS Treaty Series No. 36 (22 November 1969).

21 UNGA Res. 217 (A) (III) of 10 December 1948.

22 The main general difference between the fair trial guarantee of human rights treaties and those laid down in criminal court statutes is that the former only apply to the defendant while the latter afford such a right also to the prosecution.

23 See Safferling, *supra* note 13, 25-27 with further references.

24 For an overview of all the specific rights that are encompassed by the fair trial guarantee see S. Zappalà, *Human Rights in International Criminal Proceedings* (2003), 109-129; A. Cassese, *International Criminal Law* (2008), 383-389; C. Hoss, 'Das Recht auf ein faires Verfahren und der Internationale Strafgerichtshof für das ehemalige Jugoslawien: Zwischen Sein und Werden', (2002) 62 *Heidelberg Journal of International Law* 809; D. J. Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', (1967) 16 *International and Comparative Law Quarterly* 352.

25 Trial Chamber II, *Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para. 45; *Gorraiz Lizarraga and others v. Spain*, Appl. No. 62543/00,

time and facilities to prepare his/her case and also be given ample opportunity to influence the outcome of the proceedings. The equality of arms principle is rightly seen as the most important component of a fair trial.[26] The ICTY has repeatedly stated that it goes to the heart of the fair trial guarantee.[27] This does not mean, however, that the accused and the Prosecution must possess equal financial and personal resources.[28] In addition, it does not entitle the accused to precisely the same amount of time or the same number of witnesses as the Prosecution.[29]

Nonetheless, when it comes to the presentation of evidence, the equality of arms plays a pivotal role. Article 6 (3) (d) of the ECHR stipulates that the accused has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the prosecution. This guarantee can be found word-by-word in the statutes of international criminal courts.[30] It ensures that a defendant has the opportunity not only to call on defence witnesses, but foremost to challenge and cross-examine any crucial witness against him.[31] However, the right to cross-examination is not absolute[32] and the courts are given a certain margin of discretion when it comes to deciding which witnesses and to what extent they can be examined by the defendant. This corresponds to the right to an expeditious trial and obliges the court to make the proceedings as efficient and effective as possible.[33]

Judgment of 27 April 2004, para. 56; *Kress v. France*, Appl. No. 39594/98, Judgment of 7 June 2001, para. 72.

26 V. Tochilovsky, *The Jurisprudence of the International Criminal Courts and the European Court of Human Rights*: *Procedure and Evidence* (2008), 277; Nowak, *supra* note 6, Art. 14, MN 29.

27 Appeals Chamber, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 149.

28 Appeals Chamber, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgment, 1 June 2001, para. 69.

29 Appeals Chamber, *Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

30 Article 21 (4) (e) ICTY Statute; Article 20 (4) (e) ICTR Statute; Article 17 (4) (e) SCSL Statute; Article 67 (1) (e) Rome Statute.

31 On the importance of the right to cross-examination in international criminal proceedings, see Zahar and Sluiter, *supra* note 10, 375-378.

32 Appeals Chamber, *Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chambers Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 12.

33 See B. Farrell, 'The Right to a Speedy Trial before International Criminal Tribunals', (2003) 19 *South African Journal on Human Rights* 98.

The ECtHR,[34] the ICTY[35] as well as the Special Court for Sierra Leone (SCSL)[36] have recognized that the witnesses are especially vulnerable to any examination by the alleged perpetrator or his attorney in cases of sexual violence and are therefore in need for special protective measures. The handicaps for the defendant must be weighed against these measures. As a result, whenever the accused is not given any opportunity to confront a witness whose testimony forms an important part of the conviction, his right to a fair trial has been violated.[37] This problem is of high relevance whenever the Prosecution relies on anonymous witnesses to prove its case. The ECtHR and the *ad hoc* tribunals have had the chance to rule on the permissibility of such evidence in a few cases, which will be discussed below.

2.1. The question of anonymous witnesses before the ECtHR

In the *Kostovski* case, the ECtHR rightly emphasized the problems that typically arise when witnesses are kept anonymous to the Defence:

> "If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious."[38]

In this case, the court found a violation of Article 6 ECHR because the conviction was based on a police report of statements by two anonymous witnesses that were taken in the absence of the accused and his counsel.[39] In the *Van Mechelen* case, the trial was found unfair for several reasons. The police officers refused to give their identities when testifying, were given random numbers and could only be questioned by the defendant through a sound link from another room. The court held that the Defence could not sufficiently test the witnesses' credibility because it was unable to

34 *S.N. v. Sweden*, Appl. No. 34209/96, Judgment of 2 July 2002, para. 47.

35 Trial Chamber II, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 47.

36 Trial Chamber I, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, para. 32.

37 *Krasniki v. The Czech Republic*, Appl. No. 51277/99, Judgment of 28 February 2006, para. 78; *Hulki Güneş v. Turkey*, Appl. No. 24890/95, Judgment of 19 June 2003, para. 96.

38 *Kostovski v. The Netherlands*, Appl. No. 11454/85, Judgment of 20 November 1989, para. 42.

39 *Ibid.*, para. 45.

observe the demeanour of the witnesses under questioning.[40] In addition, the court was not convinced that the protective measures were strictly necessary because the national court never examined the alleged threat to the physical integrity of the witnesses.[41] In contrast, in the case of *Doorson* the conviction was only partly based on anonymous testimony and the counsel of the defendant had the opportunity to question the anonymous witness on any matter except his identity.[42] Here, the ECtHR found no breach of the fair trial provision. In the more recent case of *Krasniki* the Strasbourg judges have upheld their previous jurisprudence. A District Court of the Czech Republic tried an applicant for drug offences and based its guilty verdict exclusively on the testimony of two anonymous witnesses. The presiding judge heard the testimony of one of the anonymous witnesses outside the courtroom and out of sight of the applicant and his counsel, who were only able to put questions to the witness through the presiding judge. The second witness did not show up in court. Instead her statements that were taken in the pre-trial proceedings by the police while the applicant's counsel was present were later read out in court. The ECtHR held that the seriousness and substantiation of the reasons for granting anonymity were not sufficient and could not justify the limitation of the rights of the applicant to such an extent.[43]

In sum, the ECtHR has therefore not *per se* ruled out the admissibility of anonymous witnesses. There is some inconsistency in the court's jurisprudence, however, when it comes to the specific preconditions for allowing such evidence. It is not clear, for example, if the mere impossibility of the defence to question an important witness in person is in itself sufficient to qualify as a violation of the due process guarantee. The court has unambiguously held that convictions based solely or to a decisive extent on anonymous witness testimony are breaches of Article 6 (3) (d) ECHR. In addition, anonymity shall only be granted if there is a real threat to the well-being of the witness. The *ad hoc* tribunals have relied on the jurisprudence of the ECtHR and further refined the preconditions for admitting anonymous testimonies as valid evidence. However, it should be noted that the ECtHR is a regional court. The precedential value of its jurisprudence for international criminal trials is thus limited.

2.2. The law and practice of the ICTY and ICTR

Unfortunately, an account of the jurisprudence of the *ad hoc* tribunals demonstrates that there is substantial uncertainty regarding the permissible scope of protecting victims and witnesses in the course of a criminal trial. Although the statutes and RPE provide some guidance in this regard (Article 22 Statute and Rule 69 for the ICTY and Article 21 Statute and Rule 75 for the ICTR), these rules are very broad and even-

40 *Van Mechelen and Others v. The Netherlands*, Appl. No. 55/1996/674/861-864, Judgment of 23 April 1997, para. 59.

41 *Ibid*., para. 61.

42 *Doorson v. The Netherlands*, Appl. No. 20524/92, Judgment of 26 March 1996, para. 73.

43 *Krasniki v. The Czech Republic*, Appl. No. 51277/99, Judgment of 28 February 2006, para. 82.

tually leave the appropriate measure to judicial discretion. The general rule is that any kind of protective measure is only granted in exceptional circumstances and on the basis of a case-by-case evaluation.[44]

Nonetheless, in international criminal justice, tribunals have tended to grant protective measures quite easily. This tendency has been rightly criticized.[45] Judges may adopt a range of different measures which are mentioned in their respective RPE. They may order that the identities of witnesses are not disclosed to the public or to the media; that their names are not included in any of the public records of the tribunal; that hearings are held in closed sessions, or that testimonies of witnesses are given by one-way closed circuit television or by use of face and voice alteration. Besides these special measures, judges have a general duty to ensure that the defence does not ask intimidating or harassing questions, thereby minimizing the psychological effects of cross-examination on the witness. Allowing for full anonymity in the trial phase is not explicitly foreseen in any of the RPE. Nonetheless, the tribunals have considered it a few times and also granted it.

2.2.1. The Tadić decision of 10 August 1995

In the case against *Tadić,*[46] Trial Chamber II of the ICTY had to decide for the first time whether to grant a motion by the Prosecution for complete non-disclosure of the identity of several witnesses to the accused or his counsel during the trial. The Chamber's decision was split. The majority ruled that the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. It found that the notion of a "fair trial" is based on a balancing of these interests. A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses.[47] It held that anonymity may be granted under exceptional circumstances, but only if it is the sole measure to protect the witness effectively. But the Chamber reserved the right to exclude such evidence later if it eventually turned out that the defendant's rights to cross-examination under Article 21 (4) of the ICTY Statute had been unfairly limited.[48] The Chamber decided that the knowledge of the identity of a witness is not in all circumstances essential for the principle of due process.[49] Nonetheless, the accused or his counsel should at least be given the opportunity to question the witness on issues unrelated to his or her iden-

44 *Prosecutor v. Rutaganda*, Case No. ICTR-96-1-T, T. Ch. I, Decision on Protective Measures for Defence Witnesses, 30 June 1998, para. 1.

45 See P. M. Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', (2002) 5 *Yale Human Rights & Development Law Journal* 217, at 222-224.

46 For a comprehensive account of the famous *Tadić* trial see M. Scharf, *Balkan Justice*: *The Story behind the first International War Crimes Trial since Nuremberg* (1997), 93-205.

47 Trial Chamber II, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 55.

48 *Ibid*., para. 84.

49 *Ibid*., para. 68.

tity.[50] The judges provided the following guidelines on the admission of anonymous testimony by witnesses: (i) there must be a real fear for the safety of the witness or her or his family; (ii) the testimony of the particular witness must be important to the Prosecutor's case; (iii) there should not be any *prima facie* evidence that the witness is untrustworthy; (iv) the ineffectiveness or non-existence of a witness protection programme has to be taken into account; and (v) any measures taken should be strictly necessary.[51] In the respective case, the judges allowed the Prosecutor to withhold the identity of four witnesses from the Defence and the accused. These guidelines have been applied by other chambers in subsequent cases at the ICTY.[52]

2.2.2. The dissenting opinion of Judge Stephen

Judge Stephen (Australia) attached a strong dissent to this decision. In his opinion, proceedings are not being conducted with full respect for the rights of the accused as stipulated by Article 20 (1) of the ICTY Statute if witnesses are being granted full anonymity.[53] These far-reaching protective measures infringe on the minimum guarantees afforded to the accused to confront witnesses and render the trial unfair. The Defence will only be able to conduct an effective cross-examination if it knows the identity of the witness. Judge Stephen further argued that there is nothing in the Statute or the RPE of the ICTY that allows for withholding the identity of the witness during the trial.[54] Instead Rule 69 (A) provides that "in exceptional circumstances, the prosecutor may apply to a trial chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk *until*[55] such person is brought under the protection of the tribunal."

In a later decision of Trial Chamber I in the *Blaskić* case, the judges seemed to reflect some of these considerations. They stated that victims and witnesses merit protection not only from the public and media but also from the accused during the preliminary proceedings and until a reasonable time before the commencement of the trial, if necessary. But from then on, the right of the accused to a fair trial must take precedence which requires that the veil of anonymity be lifted.[56]

50 *Ibid*., para. 71.

51 *Ibid*., paras. 62-66.

52 Trial Chamber II, *Prosecutor v. Delalić et al*. Case No. IT-96-21-T, Decision on the Motion by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", 28 April 1997, para. 60; Trial Chamber I, *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996, para. 41.

53 Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses of 10 August 1995, at 4.

54 *Ibid*., at 4.

55 Emphasis added.

56 Trial Chamber I, *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996, para. 24.

2.2.3. ICTR cases

The ICTR adopted the guidelines of the ICTY and has granted far-reaching protective measures for witnesses in several cases.[57] But until now, it did not go as far as to allow for full anonymity of a witness towards the defendant. However, Trial Chamber III made a quite remarkable statement in the *Bagosora et al.* case. It noted:

> "There is nothing within the statute that indicates that an accused right to a fair trial is somehow hampered or compromised in service of witness protection. The concepts of protective measures for witnesses, including delayed disclosure of identity, did not streak like a meteor across the existing statutory and regulatory landscape of the accused right to a fair trial and effective cross-examination."[58]

The judges allowed the prosecutor to disclose the identities of witnesses only after the commencement of the trial on a rolling basis. The ICTR thereby clearly ignored its own RPE as Rule 69 (C) creates an unambiguous duty of the Prosecution to disclose the identities prior to the commencement of the trial. This practice has been rightly criticized.[59]

2.3. Striking the right balance

While some scholars share the majority opinion of the *Tadić* decision,[60] Judge Stephen's dissent has found very strong support by others.[61] Without going into the

57 See, for example, Trial Chamber I, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses, 26 September 1996, pp. 1-2

58 Trial Chamber III, *Prosecutor v. Bagosora et al.*, Case No. ICTR-48-91-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001, para. 16.

59 J. Pozen, 'The Non-Disclosure of Witnesses' Identities in ICTR Trials', (2005-2006) 38 *New York University Journal of International Law and Politics* 281, at 298.

60 A.-M. de Brouwer, *Supranational Criminal Proceedings of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005), 252-253; C. Chinkin, 'Due Process and Witness Anonymity' (1997) 91 *American Journal of International Law* 75, at 78; M. Momeni, 'Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victim and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal of the Former Yugoslavia', (1997-1998) 41 *Howard Law Journal* 155, at 178; O. Swaak-Goldman, 'The ICTY and the Right to a Fair Trial: A Critic of the Critics', (1997) 10 *Leiden Journal of International Law* 215, at 221.

61 S. Zappalà, 'The Rights of the Accused', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* Vol. II (2002), 1319 at 1333; M. Leigh, 'The Yugoslav Tribunal: Use of unnamed Witnesses against Accused', (1996) 90 *American Journal of International Law* 235, at 238; M. Leigh, 'Witness Anonymity is inconsistent with Due Process', (1997) 91 *American Journal of International Law* 80, at 83; N. A. Affolder, '*Tadić*, the Anonymous Witness and the Sources of International Procedural Law', (1997-1998) 19 *Michigan Journal of International Law* 445, at 494; K.L.

details of all the arguments, the problem comes down to the question of how to reconcile the obligation to protect victims and witnesses with the duty to ensure full respect for the due process guarantees of the defendant. Alternative proposals have been considered which deviate to varying degrees from the grant of full anonymity during the trial to the witness in question. One proposed solution is to withhold the identity of the witness at risk only from the accused but not from his counsel. This, however, poses two problems. Such a measure is obviously ineffective in cases where the court has allowed the accused to defend himself in person.[62] In addition, where the accused is represented by counsel, such a measure would violate the attorney-client privilege set out, for example, in Articles 14-18 of the Code of Professional Conduct for Counsels before the ICC (CPCC).[63] Article 16 (1) CPCC clearly emphasizes that defence counsel shall put the client's interests before his own interests or those of any other person, organization or state.[64] In addition, Article 15 (1) CPCC obliges the client's counsel to provide him with all explanations reasonably needed to make informed decisions regarding his or her representation. For these reasons, each counsel should refuse to continue to represent a client if ordered by the court not to reveal the identity of a protected witness to the defendant. Accordingly, this is not a valid solution. It has been suggested that an independent ombudsman may be used to overcome this particular problem. This person would be tasked with the interrogation of the protected witness under the supervision of the judges.[65] The provisions of current international criminal courts, however, do not foresee such a possibility.

Others have recommended to strengthen the inquisitorial aspects of international criminal procedure and to leave it to the discretion of the judges to examine the witnesses and assess their reliability. Following this logic, the Defence would not be allowed to question the witness directly but rather through the mediation of the bench.[66] This solution denies the defendant his right of cross-examination, which is hardly compatible with the regulations and current practice of all of the international

Fabian, 'Proof and Consequences: An Analysis of the *Tadić* and *Akayesu* Trials' (1999-2000) 49 *DePaul Law Review* 981, at 1007; A. Sherman, 'Sympathy for the Devil: Examining A Defendant's right to Confront Before the International War Crimes Tribunal', (1996) 10 *Emory International Law Review* 833, at 848; F. Mumba, 'Ensuring a Fair Trial whilst protecting victims and witnesses – Balancing of Interests?, in R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001), 359, at 369; S. Stapleton, 'Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impossibility of Derogation', (1999) 31 *New York University Journal of International Law and Politics* 535, at 570.

62 For the scope of the right to self-representation see N.H.B. Jørgensen, 'The Right of the Accused to Self-Representation before International Criminal Tribunals', (2004) 98 *American Journal of International Law* 711.

63 ICC-ASP/4/Res.1 of 2 December 2005.

64 According to Article 4 CPCC these rules trump any other code of ethics that may apply to the counsel when practising before the ICC. The other international criminal tribunals have similar rules of conduct.

65 Zappalà, *supra* note 24, 132.

66 de Brouwer, s*upra* note 60, 254; Safferling, *supra* note 13, 282-288.

criminal courts. It has been proposed to inform the accused of identifying criteria of the witness, such as a nickname, in order to address the cross-examination problem. This would allow the accused to identify the witness without revealing all of the personal details, such as the witnesses' full name and address.[67] This is a good solution, but it will only be accessible in very few scenarios.

As seen, so far no lucid and coherent solution has been found by the *ad hoc* tribunals, scholars or practitioners to solve the anonymity problem. Weighing the protection of witnesses against the fair trial guarantee of the defendant remains a difficult endeavour. In the course of the *Tadić* trial, one witness testified in full anonymity. The deputy prosecutor himself later acknowledged that he felt very uncomfortable with the notion of going forward with witnesses whose identities were not disclosed to the accused.[68]

3. The treatment of anonymity before the ICC

How is the situation in the context of the ICC? Being well aware of the ICTY jurisprudence on this issue, the drafters of the Rome Statute have refrained from inserting any provision into the Statute or the RPE that allows the use of anonymous witnesses. Delegations did not manage to reach a compromise during the negotiations of the Working Group on the RPE. The practice of the ICTY has demonstrated that the lack of any such explicit power is not a valid argument to rule out such an option. The judges at the ICC have a number of systematic and teleological arguments at their disposal to argue in favour or against the permissibility of anonymous witnesses.

3.1. Drafting history of protective measures

During the negotiations of the Working Group on the RPE, the Italian delegation presented a proposal which granted the Court the power to appoint a guardian to the witnesses' identity in exceptional cases. According to the proposal, the guardian was mandated to examine the reliability of the witness and report his findings later at trial.[69] The Netherlands supported this suggestion and argued that a fair trial does not necessarily include an absolute right to know the identity of a witness.[70] However, this opinion lacked majority support. Too many delegations, especially from common law countries, rejected the possibility of anonymous witness testimony. The representatives of Australia argued that the defendant needs to be aware of the identity of his accusers. Otherwise he would not be in a position to conduct an ef-

67 J.R.W.D. Jones, 'Protection of Victims and Witnesses', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. II (2002), 1355 at 1366.

68 See Scharf, *supra* note 46, 108.

69 UN Doc. PCNICC/1999/WGRPE/DP.20 (1999).

70 UN Doc. PCNICC/1999/WGRPE/DP.35 (1999).

fective cross-examination.[71] Italy and the Netherlands introduced a second revised proposal[72] that reflected the jurisprudence of the ECtHR in the *Kostovski* case. The proposal allowed the use of anonymous testimony under strict conditions. Interestingly, most NGOs lobbied against a provision permitting full anonymity.[73] By contrast, the Women's Caucus for Gender Justice advocated for the criteria set forth in the *Tadić* judgment.[74] In the end, delegations agreed not to agree. Accordingly, the RPE make no explicit mention of the possibility of granting anonymity. Instead, an earlier proposal by Australia was reformulated, which eventually became Rule 88 (1). This rule added the words 'such as, but not limited to' before the word 'measures' to the Australian proposal.[75] The Rule now reads as follows:

> "Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2."

State parties thereby left it to the discretion of the Court to decide on the permissibility of anonymous witness testimony.

3.2. The legal framework of the Rome Statute

The regulations on the protection and participation of victims in proceedings set forth in Article 68 of the Rome Statute and Rules 85 to 99 of the RPE[76] should permit anonymity before the ICC only in exceptional cases. Article 68 (1) of the Rome Statute provides:

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71 See H. Brady, 'Protection and Special Measures for Victims and Witnesses', in R. Lee (ed.), The *International Criminal Court*: *Elements of Crimes and Rules of Procedure and Evidence* (2001), 434 at 450.

72 UN Doc. PCNICC/2000/WGRPE(6)/DP.2 (2000).

73 Brady, *supra* note 71, at 453.

74 *Ibid*., at 452.

75 See C. Kress, 'Witnesses in Proceedings before the International Criminal Court: An Analysis from a Perspective of Comparative Criminal Procedure', in H. Fischer, C. Kress and S. R. Lüder (eds.), *International and National Prosecution of Crimes under International Law*: *Current Developments* (2001), 309, at 377.

76 See in general on the role of victims, G. Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis', (2007) 7 *International Criminal Law Review* 531; S. Bock, 'Das Opfer vor dem Internationalen Strafgerichtshof', (2007) 119 *Zeitschrift für die gesamte Strafrechtswissenschaft* 664; C. Jorda and J. de Hemptienne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*: *A Commentary,* Vol. II (2002), 1387.

> "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 children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes."

Based on Article 43 (6) of the Rome Statute, the Registrar has created a Victims and Witnesses Unit (VWU) within the Registry. The VWU provides appropriate assistance for witnesses and victims who testify before the ICC and undertakes to provide them with protective measures and security arrangements. The VWU has personnel with expertise in trauma and helps witnesses find medical and psychological care. Article 68 (4) of the Rome Statute specifies that the VWU can advise the Prosecutor and the Court on appropriate protective measures and security arrangements. Rule 87 (3) and Rule 88 (1) RPE foresee specific measures of protection, which are very similar to those mentioned in the *ad hoc* tribunals RPE, but the list is not exhaustive.[77]

These regulations appear to leave the judges at the ICC some leeway to adopt the position of the majority in the *Tadić* decision.[78] And indeed, though not referring to the ICTY, Trial Chamber I of the ICC ruled in favour of the permissibility of anonymous witness testimonies in the *Lubanga* case.

3.3. The Trial Chamber I decision of 18 January 2008

In this decision, the majority of Trial Chamber I argued that preserving the anonymity of witnesses was compatible with the guarantee to a fair trial, as long as sufficient counterbalancing measures in favour of the Defence are adopted by the Court. The Chamber held:

> "Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety. However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, par-

77 For a comprehensive account of possible protective measures, see de Brouwer, *supra* note 60, 235-248.

78 Supported by de Brouwer, *supra* note 60, 252-253. H. Friman, 'Inspiration from the International Criminal Tribunals when developing Law on Evidence for the International Criminal Court', (2003) 3 *The Law and Practice of International Courts and Tribunals* 373, at 395 does not see any room for such a practice before the ICC. Of the same view are D. Donat-Cattin, 'Article 68', in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999), MN 19 and J. Nicholls, 'Evidence: Hearsay and Anonymous Witnesses, in R. Haveman, O. Kavran and J. Nicholls (eds.), *Supranational Criminal Law*: *A System Sui Generis* (2003), 239 at 298-299.

> ticularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice."[79]

The Chamber then cited the *Doorson* judgment of the ECtHR as authority on this point. This reflects the argument of the Public Counsel for Victims in the proceedings which qualified Rules 81 and 87 of the RPE as valid basis for granting anonymity.[80] By contrast, neither the Defence[81] nor the Prosecution[82] suggested that victims should remain anonymous towards the defendant during the proceedings leading up to and during the trial.

In a decision issued shortly thereafter by the same chamber, the judges further elaborated on the possibility of special measures for the presentation of evidence of traumatised and vulnerable witnesses (especially former child soldiers) during the trial.[83] The Chamber ruled on the introduction of evidence via audio or video-link technology from a remote location and the scope of examination by a party not calling a witness. The Chamber did not mention the permissibility of anonymous witness testimony.

3.4. Criticisms

In his dissenting opinion, Judge Blattmann (Bolivia) of Trial Chamber I rightly criticized the definition of victims adopted by the majority as being too broad. He argued that this definition entails extremely far-reaching protection and could render the trial against the defendant unfair.[84] Unfortunately, Judge Blattmann did not use the opportunity to comment on the permissibility of anonymous witnesses. But there is some related case law on the issue by the Pre-Trial Chamber.

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79 Trial Chamber I, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Victims Participation, 18 January 2008, paras. 130-131.

80 *Ibid*., para. 78.

81 *Ibid*., para. 58.

82 *Ibid*., para. 70.

83 Trial Chamber I, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on various Issues related to Witnesses' Testimonies during Trial, 29 January 2008, paras. 31-43.

84 Separate and Dissenting Opinon of Judge Blattmann on Decision on Victims Participation, 18 January 2008, paras. 16-27.

Earlier in the *Lubanga* case, Pre-Trial Chamber I ruled on the modalities of participation of anonymous victims at the investigation stage. The Chamber stressed the need to ensure that victims participate in a manner that is fully consistent with the rights of the Defence.[85] Due to the unstable security situation in the Democratic Republic of the Congo, the Chamber allowed the victims to remain anonymous but held at the same time that their anonymity will limit the scope of their ability to participate in the proceedings. The Chamber ruled that victims will only have access to the public files of the case and will not be able to question witnesses, if they decided not to reveal their identity to the Defence. The Chamber stated that otherwise "the fundamental principle prohibiting anonymous accusations would be violated".[86]

It is submitted that a decision permitting anonymous evidence is flawed for several reasons. The regulations of the Rome Statute lack any explicit provision on anonymous testimony. One would assume that such a far-reaching protective measure requires a clear legal basis in order to be permissible. The text of the Rome Statute, by contrast, includes formulations that indicate the opposite. Article 68 (5) of the Rome Statute stipulates that

> "[w]here 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 purpose of any proceedings conducted *prior to the commencement*[87] of the trial, withhold such evidence or information and instead submit a summary thereof."

Accordingly, any restrictions by the prosecutor to withhold classified information from the defendant can only be justified until the trial commences.[88]

These systematic arguments have been challenged. It might be argued that witness testimony cannot be categorized as a piece of information in the sense of this provision. Moreover, Article 68 (5) of the Rome Statute merely regulates the pre-trial powers of the Prosecution. It has thus been argued that it does not limit the powers of the judges who could very well decide to withhold information given to them by the prosecution from the defendant.[89]

However, the more persuasive arguments point against the permission of full anonymity. As demonstrated above, the ICC has far-reaching obligations to protect victims and witnesses. The Court is mandated to provide for a sophisticated and long term protection programme for especially endangered witnesses. This should include measures, such as the allocation of new identities, re-locations and any other

85 Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, pp. 6-7.

86 *Ibid*., p. 7.

87 Emphasis added.

88 Brady, *supra* note 71, at 453; S.A. Fernandez de Gurmendi and H. Friman, 'The Rules of Procedure and Evidence of the International Criminal Court', (2000) 3 *Yearbook of International Humanitarian Law* 289, at 323.

89 See Kress, *supra* note 75, at 378-379.

measures deemed necessary by the VWU in order to prevent any risk of reprisal after a trial by the defendant or his supporters. When it comes to balancing the rights of the accused against those of the witness, such options are less restrictive measures in relation to full anonymity during the trial. They have the added advantage of preserving the due process rights of the accused. One of the main arguments used by the ICTY to justify anonymous witness testimony was the lack of funding for any such witness protection programme.[90] While this alone can hardly been seen as a convincing excuse for allowing for such drastic measures, the ICC cannot avail itself of this argument due to its self-imposed duties in regard to witness protection.

One should also keep in mind that due process rights are minimum rights.[91] The fact that due process rights are derogable in times of state emergencies[92] is of no relevance[93] when it comes to international criminal courts. Such courts are not states and as such, not in a position to declare a state of public danger. The mere fact that a comparable crisis situation, a state of war in most cases, might have prevailed at the time of the occurrence of the acts for which perpetrators are being tried for by the court does not *per se* justify any derogation. The Rome Statute emphasizes that the measures based on Article 68 shall never be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial. In addition, Article 21 (3) of the Rome Statute expressly obliges the court to respect all internationally recognized human rights. The statute does not foresee the possibility of suspending fair trial rights.

It should also be noted in this context that there cannot be an excusable or negligible breach of the due process guarantee. A trial can only be fair or unfair. Arguing in favour of a minor diminution of the defendants rights due to an overwhelming need to bring such perpetrators to justice[94] turns the presumption of innocence[95] upside down.

In light of ECtHR jurisprudence, there is further considerable agreement that a conviction shall not be based solely or predominantly on evidence given by a witness whose identity is not revealed to the defence.[96] If the Prosecution can come up with enough evidence to secure a conviction based on standard witnesses that were subject to an ample cross-examination by the defence, why is there any need for anony-

90 Trial Chamber II, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 42.

91 Zappalà, *supra* note 61, at 1349; van Dijk and Viering, *supra* note 8, at 631.

92 See, for example, Article 15 ECHR, Article 4 ICCPR or Article 27 ACHR.

93 This has been one of the arguments of the majority in the *Tadić* decision and its supporters. Trial Chamber II, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 61.

94 Momeni, *supra* note 60, at 178.

95 Article 66 (1) Rome Statute.

96 See Kress, *supra* note 75, at 372 citing a resolution of the International Association of Penal Law. See also House of Lords, *R. v. Davis*, Judgment of 18 June 2008, [2008] UKHL 36.

mous witness testimony in the first place? The fear that the Prosecution may have difficulties to prove its case due to a lack of witnesses who are willing to reveal their identities to the accused can never be a valid argument to allow for such evidence.

For these reasons, one can only hope that the Chambers at the ICC will reject future requests for witness testimony in full anonymity. Anonymous witnesses render a trial unfair because their permissibility deprives the defendant of the chance to an effective cross-examination. Although it is understandable that Trial Chamber I did not want to close all doors in its ruling, there is hardly any imaginary scenario in which the due process guarantee would not enter dire straits due to the lack of justification and valid advantage shown by the prosecution.

4. Possible consequences of due process breaches

The ICTR has unmistakably stated that it is a fundamental principle of human rights law that any violation of human rights entails the provision of an effective remedy.[97] This principle is recognized in many national legal systems and can also be found in human rights treaties, e.g., Article 14 (6) ICCPR.[98] While the fundamental procedural rights of a defendant are meticulously laid down in the Rome Statute, the legal framework of the ICC is largely silent on the regime of effective remedies applicable when these rights are breached in the course of the proceedings.[99]

The Statute lacks any provision on the nullity of specific illegal acts that are attributable to organs of the ICC. Learning from the ICTY and ICTR experience,[100] the ICC should consider a number of remedies depending on the extent and severity of the breach. In extreme cases, the defendant should be released and all charges dismissed.[101] The setting aside of jurisdiction has been considered in the *Nikolić* case where the defendant had been seriously physically mistreated.[102] It has also been acknowledged by Pre-Trial Chamber I in the *Lubanga* case as potential remedy in cases of torture and serious mistreatment.[103] Keeping in mind the serious nature of

97 Trial Chamber III, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, para. 16.

98 See S. Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals', (2002) 96 *American Journal of International Law* 628, at 636-640.

99 A fact also criticized by Zappalà, *supra* note 61, at 1354.

100 See G. Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations', (2007) 20 *Leiden Journal of International Law* 613, at 621-634.

101 This has been granted by the ICTR's Appeals Chamber in a case of excessive pre-trial detention. See Appeals Chamber, *Barayagwiza v. Prosecutor*, Case No. ICTR-99-52-T, Decision, 3 November 1999, paras. 102-112.

102 Appeals Chamber, Prosecutor v. *Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, paras. 28-30.

103 See Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a)

the offences that are being adjudicated before international criminal courts, such ("generous") remedies should be accessible in cases of the most profound human rights violations on the side of the defendant.[104] In case of less egregious breaches, the Court should, at least, consider the reduction of the defendant's sentence after conviction.[105] If a violation of the fair trial guarantee is sufficient to amount to a level that calls for such actions cannot be answered in the abstract but need to be assessed on a case-by-case basis.

No specific remedies have been incorporated into the ICC Statute. This may be explained by the fact that it is extremely difficult to create an exhaustive and comprehensive list of possible remedies.[106] The lack of such a catalogue does not mean, however, that the Court's hands are tied when trying to redress the wrongs of its system. For example, the ICC could very well consider due process violations in the context of Article 76 (1) of the Rome Statute as a mitigating factor when determining a sentence. One scenario where the accused can hope for financial compensation is in cases where he has been acquitted after being detained and the court finds a manifest miscarriage of justice.[107] However, the threshold for receiving such compensation is extremely high.[108] The current state of remedies to redress due process violations before the ICC is rather unsatisfactory because the award of such compensation is left to the sole discretion of the chambers. The codification of a right of the defendant to some form of compensation in specific circumstances would have been much more appropriate. With respect to possible infringements of due process guarantees, the defendant can at present only hope that the chamber will scrutinize the evidence carefully *proprio motu* and set aside single testimonies for reasons of unfairness. This is a right which Trial Chamber I of the ICC explicitly reserved itself in the *Lubanga* case.[109]

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of the Statute, 3 October 2006, p. 10 ("Considering however that whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused and that, to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal,").

104 G. Sluiter, 'International Criminal Proceedings and the Protection of Human Rights', (2003) 37 *New England Law Review* 935, at 946-947.

105 See Appeals Chamber, *Prosecutor v. Kajelijeli*, Case No. ICTR-99-44A-A, Judgment, 23 May 2005, para. 255.

106 See Acquaviva, *supra* note 100, at 635.

107 Article 85 (3) Rome Statute.

108 Critical also S. Zappalà, 'Compensation to an Arrested or Convicted Person', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* Vol. II (2002), 1577 at 1583.

109 Trial Chamber I, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Victims Participation, 18 January 2008, para. 131.

5. Conclusion

Thus far, no chamber at the ICC has allowed witnesses to testify whose identity is withheld from the defendant. But Trial Chamber I obviously regards this practice as a valid option in exceptional cases. For the above mentioned reasons, this would seriously jeopardize the due process guarantees of any defendant before the ICC and hurt the credibility of the Court. It makes it also more difficult for states from a common law legal culture to accede to the Rome Statute, since the right to cross-examination is often a constitutional guarantee in these jurisdictions. Keeping in mind that state co-operation and political backing – not only by its member states – is crucial for the long-term success of the Court,[110] this development is more than questionable. Allowing the use of anonymous testimonies will probably cause greater harm than good to the overall objectives of international criminal justice.

110 On the political interdependence of the court, see D. McGoldrick, 'Political and Legal Responses to the ICC', in D. McGoldrick, P. Rowe and E. Donelly (eds.), *The Permanent International Criminal Court*: *Legal And Policy Issues* (2004), 389-449.

Chapter 33 Article 68 (3) and personal interests of victims in the emerging practice of the ICC

*Sergey Vasiliev**

1. Introduction

Providing victims with procedural rights at the International Criminal Court (ICC) has been characterized as an "extremely innovative" and unprecedented step in international criminal law,[1] insofar as it endows them with an independent standing within international criminal process.[2] This development can by right be considered as one of the most breathtaking legal experiments undertaken by the drafters of the ICC Statute.

The magnitude of the venture is all the more conspicuous given the generous scope of the rights granted. While falling short of the rank of parties to the proceedings *stricto sensu*, the status of victims before the ICC goes far beyond witness function and ancillary rights to protection familiar from the procedural systems of ICTY, ICTR, and SCSL. On the one hand, it encompasses the right to obtain reparations directly from

* LL.M (2005, Maastricht University); PhD candidate, Amsterdam Centre for International Law, University of Amsterdam. This publication is part of the VIDI project 'International Criminal Procedure: In Search for General Rules and Principles' funded by the Dutch Organization for Scientific Research (NWO). The paper takes into account jurisprudential developments up to 1 April 2008. Later case law is subject to limited consideration.

1 A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Law* 144, at 167-168; C. Jorda & J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. II (2002) 1387; E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?', in D. McGoldrick, P. Rowe and E. Donnely (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 315.

2 T. van Boven, 'The Position of the Victim in the Statute of the International Criminal Court', in H.A.M. von Hebel, J.G. Lammers, J. Schukking (eds.), *Reflections on the International Criminal Court – Essays in Honour of Adriaan Bos* (1999) 77: "the Statute goes well beyond treating the victim as an aid in criminal proceedings and … gives the victim standing in her or his own right".

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 ISBN 978 90 04 16655 4. pp. 635-690.

the convict or, in the alternative, from the specially created Trust Fund.[3] On the other hand, victims enjoy the right to participate in the proceedings and therewith a possibility, however limited and conditional, to influence the procedural decision-making. These multiple and novel roles have fundamentally altered the legal position of victims in international criminal proceedings, to the extent that their traditional "aid in the criminal proceedings" role as witnesses may come under attack, in view of the conflict of interests.[4] It is thus understandable why, whilst greeted by the international legal community as a progressive development embodying triumph of long-ignored interests of crime victims, the ICC's innovative and highly ambitious victim involvement scheme has engendered caution and misgivings as to its expedience and viability.[5] In broader terms, one may not easily dismiss the prognosis that the advent of victim will render the familiar landscape of international criminal trials irrecognizable.

Although encountered – and in a more far-reaching format – in the domestic legal systems rooted in a civil law tradition,[6] the combination of reparatory and participatory rights for victims renders the ICC model unparalleled among the institutions

3 Article 75 and 79 of the ICC Statute. In the ICTY/R and SCSL procedural regimes, restitution (forfeiture) of the property acquired by criminal conduct is provided for as a measure supplemental to the penalty of imprisonment (Article 24 (3) of the ICTY Statute and Rule 105 of the ICTY RPE; Article 23 (3) of the ICTR Statute and Rule 105 of the ICTR RPE; Rule 104 of the SCSL RPE; cf. with Article 77 (2) of the ICC Statute) and compensation through national proceedings (Rule 106 of the ICTY RPE and ICTR RPE; Rule 105 of the SCSL RPE).

4 Jorda & de Hemptinne, *supra* note 1, at 1409: 'In order fully to safeguard the rights of the accused, it will be necessary to ensure that a victim may not simultaneously be a witness and a party in one and the same case'; S. Zappalà, *Human Rights in International Criminal Proceedings* (2003) 222: 'the grant of well-defined procedural status for victims … may lessen their credibility as witnesses'. Note, however, that the dual status of participating victims and victim-witnesses has not been excluded as such by the Trial Chamber, subject to the requirement of fairness: Trial Chamber I, *Prosecutor* v. *Lubanga,* Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 132-134.

5 Among these concerns were: the uncertain implications for the right of the accused to a fair and expeditious trial in a largely adversarial setting; the risk that, in view of the nature of crimes within its jurisdiction, the Court can be overwhelmed by the number of victims willing to participate or secure reparations; and, as a result, the failure of the victims' own expectations: Zappalà, *supra* note 4, at 221-222; Jorda & de Hemptinne, *supra* note 1, at 1387-1388.

6 In civil law countries, victim participation reaches beyond the right to be present and heard at relevant stages of proceedings as a civil party and may take form of private prosecution (victim launching prosecution), subsidiary prosecution (attaching to the case initiated by the public prosecution) or secondary prosecution (taking over after the public prosecutor drops charges). J. Sarkin, 'Reparations for Gross Human Rights Violations as an Outcome of Criminal Versus Civil Court Proceedings', in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (2005) 179: "the right of victims before the ICC to intervene is not as wide as in civil law countries, as they can only play a part if they have been "joined to an ongoing public prosecution"' (footnotes omitted). See also G. Bitti & H. Friman, 'Participation of

of international criminal judiciary, both historical and existent.[7] The common law adversarial construct largely adopted by the ICC predecessors does not foresee civil litigation within a criminal procedure;[8] nor has it, until relatively recently, provided for the possibility for victims to influence criminal process, reserving to them the sole role of witnesses.[9] Therefore, the ICC victim involvement scheme is generally considered as reflecting the influence of civil law countries.[10]

Whereas awarding reparations remains a matter of the future ICC practice,[11] the implementation of the victim participation scheme embodied in the Rome Statute has in the meantime become subject of extensive litigation and consumed considerable judicial time and resources. This is best demonstrated by the quantity of publicly

Victims in the Proceedings', in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 457, note 67.

7 Note, however, that the newer forms of internationalized criminal justice – the Special Panels for Serious Crimes (SPSC) in East Timor, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon – seem to be even more civil law oriented than the ICC as they provide victims with comparable or incidentally broader rights. Cf. in particular Sections 12, 25 and 50 of the UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure, as amended by UNTAET Regulation 2001/25 of 14 September (establishing, *inter alia*, the victims' right to participate at review and conditional release hearings and, if specifically allowed by the Panels, in any other proceedings, as well as to introduce compensation claims); Rule 23 of the Internal Rules of the ECCC ('civil party action'); and Article 17 of the Statute of the Special Tribunal for Lebanon, UNSC Resolution 1757 (2007), 30 May 2007 (a provision on victim participation identical to Article 68(3) of the ICC Statute).

8 Zappalà, *supra* note 4, at 219.

9 In a number of common law jurisdictions victim participation adopts the forms of victim impact statements (Australia, Canada, United States, New Zealand) and right to private prosecution (e.g. Australia, England and Wales, and New Zealand). See *infra* section 4.2.

10 Prof. Cassese has described victims' role before the ICC as 'indicative of the meritorious acceptance of a fundamental feature of civil law systems within a procedure basically grounded in the adversarial system typical of common law countries'. See Cassese, *supra* note 1, at 170. See also A. Zahar and G. Sluiter, *International Criminal Law* (2008) 71.

Such input would be less tangible without support and active lobbying by NGOs and victim rights advocates: see D. Donat-Cattin, 'The Role of Victim in ICC Proceedings', in F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (1999), at 268; Zappalà, *supra* note 4, at 225; van Boven, *supra* note 2, at 83; M. Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court', (2007) 26 *Saint Louis University Public Law Review* 249, at 253.

11 See further M. Henzelin, V. Jeiskanen & G. Mettraux, 'Reparations to Victims Before the International Criminal Court: Lessons from the International Mass Claims Processes', (2006) 17 *Criminal Law Forum* 317-344; L.M. Keller, 'Seeking Justice at the International Criminal Court: Victims' Reparations', (2007) 29 *Thomas Jefferson Law Review* 189; D.L. Shelton, 'Reparations for Victims of International Crimes', in D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2001) 137-147; F. McKay, 'Are Reparations Appropriately Addressed in the ICC Statute?', in ibid., 163-176.

available official court documents dealing with victim participation.[12] The recent five-year anniversary of the Court and two years since the delivery by Pre-Trial Chamber I of the landmark decision granting victims a general participatory right in the proceedings in the Situation in the Democratic Republic of the Congo (DRC)[13] present apt occasions for the critical assessment of the directions and first steps taken by the Court in this domain.

The ICC legislation establishes a highly complex system of victim participation in the proceedings consisting of multiple legal regimes,[14] and this paper does not pretend to examine all of them. In light of the fact that the regime prescribed in Article 68 (3) of the ICC Statute has gained particular practical relevance in the last two years, it seems to deserve more urgent and detailed consideration. This Article prescribes that

> "[w]here 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".

The presence of several unknowns in this equation renders the degree of judicial discretion so high that this provision is a case where the interpretation of law is of equal if not greater importance than the law itself. Thus, it comes as no surprise that the jurisprudence that has emerged in connection with this enigmatic rule is far from settled and reveals serious controversy on nearly every essential issue relevant to the determination of the prerequisites to and the scope of victim participation.

This is particularly true of the requirement contained in its first clause – namely, that the 'personal interests of the victims' must be affected. On the basis of the case law delivered in the first years, one can identify at least two major problems. Firstly,

12 In the period from January 2006 to November 2007, the Chambers issued over 45 decisions dealing exclusively or partially with the victim participation issues and more than 70 documents were submitted by the OTP, the Defence and victims' representatives (excluding submissions on substantive matters): see 'Victim Participation Before the International Criminal Court', Report by the War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, American University Washington College of Law, November 2007 ('WCRO Victims Report'), at 5.

13 Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr. (hereafter '*DRC* victim participation decision').

14 One can pinpoint the following participatory regimes characterized by relatively distinct scope of applicability, rules on notification, procedural status of actors, and underlying purposes: (i) participation under Part 2 of the Statute (Articles 15 (3) and 19 (3)), see Rule 92(1); (ii) general participatory regime under Article 68(3); (iii) Article 75 and 82(4) – participation in connection with the requests for reparations and derivative appeals by legal representatives; (iv) Rule 93 – the power of the Court to seek the views of victims and their legal representatives on any issue; and (v) participation under miscellaneous rules conferring on the victims the right to be heard, e.g. Rules 72 (2), 119(3) and 143.

the jurisprudence evinces divergent methodologies applied by various Chambers for the assessment of whether or not the "personal interests of the victims" are affected. Secondly, the concept of "personal interests" is interpreted differently by the Pre-Trial Chambers and Appeals Chamber, whereas the legal findings of the latter on this point evidence a split of opinions.[15]

Some commentators have observed that an overly broad discretion in shaping the victim participation scheme conferred on the Court by the drafters "endangers the consistency that formalized participation should achieve".[16] The materialized lack of coherence in the indicated areas confirms these misgivings as it deprives the victim participation regime under Article 68 (3) of a degree of procedural certainty indispensable to both satisfaction by the victims of their legitimate interests and the provision of fair trial to the accused.

The following analysis attempts to clarify the content and scope of the personal interests of victims in the context of the general participatory regime of Article 68 (3) of the ICC Statute, with reference to the emerging practice of the Court. Firstly, it provides an overview of the features and scope of this regime as it currently operates, and deconstructs its legal test into constitutive elements. Secondly, it focuses on the "personal interests" criterion of Article 68 (3) and assesses its treatment by the ICC, with a view to establishing what interests of victims are recognised by the Chambers. Thirdly, the discussion on the possible interpretations of the scope of "personal interests" is conducted in light of the nature of the ICC mandate and in light of the models of victim participation found in national jurisdictions.

2. Article 68 (3) participatory regime

2.1. General features

Article 68 (3) of the ICC Statute is characterized in the literature as embodying "the most general authority for victim participation"[17] and a *lex generalis* provision on victim participation before the ICC.[18] It sets out a participatory regime that entitles victims, where their personal interests are affected, to express their 'views and concerns' at the stages of proceedings determined appropriate by the Court and in the manner that does not create prejudice to the rights of the accused and a fair and impartial

15 See Separate opinion of Judge Sang-Hyun Song, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Appeals Chamber, *Prosecutor* v. *Lubanga,* 13 June 2007, ICC-01/04-01/06 OA8 ('*Lubanga* appeal decision on the joint application of victims').

16 Haslam, *supra* note 1, at 232.

17 C. Stahn, H. Olásolo and K. Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *Journal of International Criminal Justice* 219, at 235.

18 M. Heikkilä, *International Criminal Tribunals and Victims of Crime*: *A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status* (2004) 148.

trial. Rules 89 to 92 further detail this framework, by introducing a "structural principle" that the application needs to be made to and granted by the Chamber in order to participate.[19] In particular, Rule 89 (1) requires victims to make a written application, and Rule 89 (2) allows the Chamber to reject it *proprio motu* or on the request of either party where the person does not meet the definition of victim or otherwise does not fulfil the criteria under Article 68 (3).

The participatory regime at hand distinguishes itself from the other – specific – regimes prescribed under Part 2 of the Statute; Rule 93; and Articles 75 (3) and 82 (4), by the major following features:

(i) an unqualified scope of applicability, given that no exhaustive list of specific procedural steps falling within its scope is provided. The above-mentioned participatory regimes save for the one of Rule 93, are of *ad hoc* and goal-oriented character and are limited to very specific proceedings;[20]
(ii) making participation a right conditional upon fulfillment by the victims of the prerequisites set forth in Article 68 (3), which is unique to the participatory regime at hand; and
(iii) the specific object of such participation – expression of 'views and concerns', as opposed to the 'observations', 'representations' or 'requests for reparations' that constitute the object of participatory rights under other regimes.[21]

The subsequent paragraphs will consider the identified features in turn.

2.2. Scope of application of Article 68 (3)

The determination of the applicability of the general participatory regime is problematic. Both the possibility of its application beyond the instances explicitly provided (e.g. Rule 92 (2)-(3) of the ICC RPE) and its correlation to the special participatory regimes such as under Part 2 (Article 15 (3) and 19 (3)) of the Statute remain unclear.[22]

19 B. Timm, 'The Legal Position of Victims in the Rules of Procedure and Evidence', in H. Fischer, C. Kress and S. R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (2001), 289-308, at 295.

20 E.g. Article 15 (3) concerns participation in the proceedings pursuant to the Prosecutor's request for authorization of investigation; Article 19 (3) provides a participatory right in the proceedings in connection with the challenged to jurisdiction and admissibility; and Article 75 (3) and 82 (4) concern reparation proceedings and the appeals arising therefrom.

21 Cf. with Article 15 (3), 19 (3), 75 (1) and (3), and 82 (4) of the Statute.

22 Stahn et al., *supra* note 17, arguing (at 226) that '[t]he specific regulation of victims' involvement in Part 2 of the Statute appears to indicate that Rule 89-91 will only apply in a subsidiary fashion in these proceedings' and (at 236) that, under one possible interpretation, "Article 68 (3) might be viewed as a general mandate clause, which needs to be implemented through other specific provisions in the Statute and Rules and does not therefore serve as an independent basis … to allow for broader victims' involvement". Cf. with Heikkilä, *supra* note 18, at 144, suggesting that the specific provisions on victim participation "prevail" as *lex specialis* over *lex generalis* of the Article 68 (3) test.

On the one hand, the Article pertains to Part VI of the Statute entitled "The Trial", and some early commentaries indicate that participation under Article 68 (3) would normally take place at trial or upon the confirmation of charges by the PTC.[23] On the other hand, Rules 89-92 are contained in Chapter 4 "Provisions relating to various stages of the proceedings", and another scholarly view advocates that this test and, consequently, the general conditional right to participate foreseen thereby can be realized at all stages of the ICC proceedings, from the pre-trial to appeals and review phase, without qualification as to whether or not it can be exercised at the entire length of pre-trial proceedings.[24]

The latter position has been adopted by the Chambers in the early case law, as far as the investigation of situation phase is concerned.[25] However, on this very point, the applicability of Article 68 (3) remains contentious, primarily due to the persistent objection mounted by the OTP. Before turning to that, the instances of victim participation subject to Article 68 (3) expressly provided for in the ICC legal framework will be briefly considered. The explicit indications in the Rules to the instances where victims can participate under Article 68 (3) point to the capacity of respective proceedings to affect their 'personal interests' and thus may be helpful for the purpose of identifying the nature of such interests.

2.2.1. Explicit instances

2.2.1.1. Review of the Prosecutor's decision not to investigate or prosecute (Rule 92(2))

Rule 92 (2) establishes the obligation of the Court to notify victims of the possibility to apply under Rule 89 for participation in the proceedings on review of the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to Article 53 (1) and (2). Although not totally free from controversy,[26] the participation of victims in these proceedings appears the earliest instance explicitly provided by the ICC legal framework where the participatory rights can be exercised *pursuant to* Article 68 (3) of the Statute. The applicability of the Article to these proceedings has thus far remained uncontested by the parties and, to the contrary, the decision

23 Timm, *supra* note 19, at 295; Haslam, *supra* note 1, at 322: 'During the trial, victim participation is governed by Article 68(3)'; W.A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed. (2004), 173: "Victims are entitled to intervene at the trial stage, when their "personal interests" are affected". Cf. with D. Donat-Cattin, 'Article 68', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), 869-888, at 880, adopting a view that victims may intervene earlier, "from the first hearing of confirmation of the charges".

24 Donat-Cattin, *supra* note 10, at 269; Heikkilä, *supra* note 18, at 144.

25 See under 2.2.2.1. *infra*.

26 The possibility of review by the PTC of the Prosecutor's decision not to proceed with the investigation *proprio motu* is not specially foreseen in the ICC legal framework, and the applicability of Article 53 to such decisions is controversial: see Stahn *et al.*, *supra* note 17, at 229. However, Article 53 (3) (b) does not exclude such review at least in cases where the decision has been taken solely based on the consideration of the 'interests of justice' (Article 53 (1) (c) of the Statute).

not to investigate or prosecute has been alluded to by the Prosecutor as a distinctive trigger-off for the 'proceedings' under the terms of Article 68 (3) and for the exercise of the participatory rights by victims under this article.[27] In view of the purposes of the review proceedings, it seems reasonable to suggest that the rationale for victim participation at this procedural step is to ensure that the situation proceedings are not terminated illegitimately and without their concerns having been taken into consideration.[28]

In the DRC Situation, the legal representative of the six victims earlier admitted to participation in that situation (VPRS 1 to 6) attempted to entice the Court to invoke its review powers under Article 53 (3) (b) in connection with the Prosecutor's decision to temporarily suspend the investigation in relation to other potential charges against Mr. Lubanga Dyilo and not to amend charges until the close of the (pre-)confirmation proceedings, without excluding such amendment at a later stage.[29] The legal representative requested to consider this as an implicit decision not to prosecute pursuant to Article 53 (2) (c) and to review it under the head of Article 53 (3) (b). However, PTC I held that the decision to suspend investigation did not amount to the decision not to investigate or prosecute under Article 53 (1) (c) and (2) (c) and dismissed the request as having no legal basis and inappropriate.[30]

2.2.1.2. Confirmation hearing (Rule 92 (3))

Article 61 on confirmation hearings contains no explicit provision allowing for victim participation in the respective proceedings. However, similarly to the instance of victim participation addressed above, the possibility for the victims to participate at the confirmation of charges hearing subject to the requirements of Rule 89 and Article 68 (3) is explicitly provided in Rule 92 (3) on notifications to victims and their legal representatives.[31] On this account, the applicability of Article 68 (3) to the confirmation of charges proceedings appears uncontroversial and has thus far remained unchallenged by the parties.

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27 OTP, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, paras. 14-17.

28 Ibid., para. 21: "a decision by the Prosecutor not to proceed in a situation, either with an investigation or prosecution, would preclude future participation by victims and could therefore affect their interests".

29 OTP, *Prosecutor* v. *Lubanga*, Prosecutor's Information on Further Investigation, 28 June 2006, ICC-01/04-01/06-170, paras. 7-10.

30 Pre-Trial Chamber I, Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on further Investigation", 26 September 2007, ICC-01/04-399, at 5.

31 Rule 93 (3): "In order to allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification will be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question".

When making arrangements for the participation of the four victims earlier admitted to the *Lubanga* case (a/0001/06 to a/0003/06 and a/0105/06),[32] PTC I pronounced on a rationale underlying victim participation at the confirmation hearings. It connected victim participation to the objective of the respective proceeding, namely, the determination of whether evidence provides substantial grounds to believe that the accused committed the crimes imputed to him, and held on that basis that "the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered".[33]

In the subsequent submissions, the OTP underlined that the participation of victims in the confirmation hearing was the "milestone in meaningful victim participation as anticipated in the Statute".[34] Some commentators were somewhat more critical as to the actual value of such participation. Partially because the Chamber had granted victims full anonymity at the hearing,[35] the contents of their legal representatives' interventions were solely concerned with the legal issues rather than devoted to setting forth a personal perspective ('views and concerns') of the victims on the events encased by the charges.[36]

2.2.2. Implicit instances

2.2.2.1. Participation of victims in the investigation of situation

Victims clearly have a role to play at the pre-case stages of the ICC proceedings – even prior to the commencement of investigation of situation – where this is explicitly provided under the Statute and Rules. For example, Article 15 (3) entitles victims to make representations before the PTC in accordance with the RPE where, upon reaching the conclusion that there is a reasonable basis to proceed with an investigation,

32 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga,* Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06, 28 July 2006, ICC-01/04-01/06-228; Pre-Trial Chamber I, *Prosecutor* v. *Lubanga,* Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06, 20 October 2006, ICC-01/04-01/06-601.

33 Pre-Trial Chamber I, *Prosecutor* v. *Lubanga,* Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462-tEN, at 5.

34 OTP, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, 24 June 2007, ICC-01/04-346, para. 24.

35 Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *supra* note 33, at 6-8. For a discussion on this aspect of victims' participation at the confirmation hearing, considering it as 'the most controversial due process issue': see Jouet, *supra* note 10, at 263 et seq.

36 See G. de Beco, 'The Confirmation of Charges before the International Criminal Court: Evaluation and First Application', (2007) 7 *International Criminal Law Review* 469–481, at 479-480. On the meaning of 'views and concerns', see *infra* section 2.4.

the Prosecutor submits to the Chamber a request for authorization of an investigation. Their participation is then governed by the autonomous participatory regime of Article 15 (3) and Rule 50, which is specific to the procedure for authorization of the commencement of investigation. Another example is the possibility for the victims (and their legal representatives) to express their views when specifically sought by the Chamber pursuant to Rule 93, on any issue arising at that stage of proceedings including, but not limited to those indicated in Rules 107 (review of the Prosecutor's decision not to investigate or not to prosecute taken in reaction to a State or Security Council referral) and 109 (review of the Prosecutor's decision not to proceed with the investigation or prosecution solely 'in the interests of justice').

However, the applicability of Article 68 (3) to the proceedings taking place prior to and during the investigation of a situation before a summons or arrest warrant has been issued with respect to an identified individual is uncertain in the ICC legal framework, which could be construed both ways. This uncertainty has led to the major controversy between the Court organs, in the form of persistent objection by the OTP to the approach taken by the Chambers.

In its first decision on victim participation, remarkable *ipso facto* as the first ruling on the issue ever delivered by an international criminal jurisdiction,[37] PTC I rejected the Prosecutor's submission that Article 68 (3) does not apply to that stage, because 'proceedings' referred to in Article 68 (3) do not properly start until the completion of investigation, subject to provision of Article 53 (3).[38] Based on the three-pronged – terminological, contextual and teleological – interpretation of the word "proceedings",[39] it held that Article 68 (3) applies during the investigation of situation and that victims possess "a general right of access to the Court at that stage".[40] The teleological interpretation of Article 68 (3) seemed to have occupied a significant place in PTC I's reasoning. Thus, it concluded that the application of Article 68 (3) to the stage of investigation of situation is "consistent with the object and purpose of the victims participation regime" and "the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law".[41] The only general character of this statement shows that the Chamber failed to consider the pertinent Prosecutor's argument that, while allowing victim participation in the

37 The decision has generated extensive body of commentaries, see, among many, J. de Hemptinne and F. Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', (2006) 4 *Journal of International Criminal Justice* 342-350 and D. Lounici et D. Scalia, 'Première decision de la cour pénale internationale relative aux victimes: état des lieux et interrogations', (2005) 76 (3-4) *Revue Internationale de Droit Penal* 375-408.

38 OTP, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, paras. 5, 11 et seq.

39 *DRC* victim participation decision, *supra* note 13, paras. 28-54.

40 Ibid., para. 46.

41 Ibid.

criminal proceedings in realization of their right to access to justice, international (human rights) law does not require such participation.[42]

The request by the Prosecutor for leave to appeal the decision of 17 January 2006 under Article 82 (1) (d) was dismissed as having no bearing on the 'fair conduct of proceedings'.[43] The subsequent request for the extraordinary review of that decision filed directly with the Appeals Chamber was disqualified too, on the ground that the Court's statutory framework provided no such remedy.[44] This effectively precluded the approach taken by PTC I and subsequently followed by PTC II from becoming subject to appellate review, until quite recently.

The conclusions reached by PTC I in the context of the DRC Situation that Article 68 (3) applies during the investigation stage was further leaned on by the same Chamber, differently composed for the purposes of the proceedings in the Situation in Darfur,[45] and by Pre-Trial Chamber II in the context of the Situation in the Northern Uganda.[46] In rejecting the Prosecution's arguments similar to those advanced in the context of the DRC Situation and its prayers to depart from that jurisprudence,[47] these Chambers relied on PTC I's Decision of 17 January 2006 not only as an important precedent, which it no doubt is, but also as the established case law setting forth

42 OTP, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, paras. 37-50.

43 Pre-Trial Chamber I, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006, 31 March 2006, ICC-01/04-135-tEN, para. 61. For a criticism of an overly restrictive interpretation by the Pre-Trial Chambers of the "effect on fairness" requirement under Article 82 (1) (d) generally and in relation to the latter decision, see War Crimes Research Office, *Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, International Criminal Court Legal Analysis and Education Project, American University Washington College of Law, January 2008 ('WCRO Interlocutory Appeals Report'), at 6-7, 38-41. See also the contribution by H. Friman in Ch. 28 of this volume.

44 Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 42.

45 Pre-Trial Chamber I, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 14 December 2007, ICC-02/05-111-Corr (hereinafter 'Corrigendum to *Darfur* victim participation decision'), para. 1; Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials of the Prosecutor, 3 December 2007, ICC-02/05-110, paras. 2-4.

46 Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 5-10.

47 OTP, Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 28 February 2007, ICC-02/04-85, paras. 10-11, 20-27; OTP, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06, 8 June 2007, ICC-02/05-81, paras. 17-18.

"core principles and requirements for victim participation at the situation stage". The latter has, however, been questioned by the Prosecutor, and rightly so, in light of the fact that the effective review of initial PTC I's decision on the crucial issue of the scope of application of Article 68 (3) by the appellate instance has not been undertaken thus far.[48]

There are, however, a number of questions as to the reasonableness and manageability of the Pre-Trial Chambers' approach. First, by extending the scope of Article 68 (3) to the pre-case proceedings and granting victims a "general participatory right" at the investigation phase, the Chamber endowed potentially thousands of applicants with a possibility of entering the Court proceedings. The necessity to consider these applications undoubtedly imposes a heavy burden on the limited Court resources. Both the rapidly growing number of victim applications for participation in the investigation of situations and the resulting backlog brought about by this approach indicate that the Court has already faced serious practical difficulties in implementing the liberal policy it embarked on in January 2006.[49]

Second, although the Decision of 17 January 2006 was lauded and celebrated by some as the first triumph of victims' rights in international criminal law,[50] it is questionable if the approach it embodies in relation to the applicability of Article 68 (3) to the investigation stage benefits the applicants in the long run. The Chamber would of course have to make a difficult decision if it were to turn down the applications, given that "in the criminal justice debate, concern for the interests of victims of crime constitutes an almost unassailable moral position",[51] which appears especially true for international crimes. The decision spared the Chamber this discomfort, yet reserving to it full control over the "timing and modalities" of the victim participation.[52] Besides, according applicants 'victim status' in relation to the situation with "a general right

48 See, e.g. Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06, 30 November 2006, ICC-01/04-315, para. 18: 'the jurisprudence on the participation of victims in the situation remains unsettled. … to date there was no secondary review on the merits of this issue at the appellate level.'

49 As noted by WCRO, by January 2008, more than 150 victims have applied for participation in the DRC investigation alone, with the waiting period towards the initial decision thereon exceeding 15 months: WCRO Interlocutory Appeals Report, *supra* note 42, at 4 and 41-42. In this author's assessment, the correspondent periods amounted to nearly 14 months (from 19 June 2006 to 10 August 2007) with respect to 49 applications in the context of the Uganda Situation and to nearly 18 months (27 June 2006 to 6 December 2007) in the context of the Situation in Darfur.

50 De Hemptinne & Rindi, *supra* note 37, at 345, referring to the statements by the FIDH, which assisted VPRS 1 to 6 in filing the applications.

51 D. Miers, 'The Responsibilities and the Rights of Victims of Crime', (1992) 55 *Modern Law Review* 482, at 469.

52 *DRC* victim participation decision, *supra* note 13, paras. 64 and 73: 'This general assessment, pertaining to the scope of the application filed with the Court which relates to the whole of the proceedings before it, does not rule out the possibility of a more specific assessment of victims' personal interests'.

of access to the situation proceedings" entails acknowledgement of their suffering, which can be expected to have some positive consoling effects. Nevertheless, it is debatable if it is the better solution. It can generate unreasonably high expectations on behalf of the victims – in the absence of real participatory rights that would unconditionally attach to such a procedural status,[53] as well as in the absence of guarantee that they will continue to qualify as victims for the purposes of the participation and reparations in any future case brought against a concrete individual, due to the limited focus of the prosecutions.[54] Combined with the overlong waiting periods, these aspects of the Pre-Trial Chambers' approach are fraught with the risk of frustrating victims' expectations and can lead to 'secondary victimization' – the phenomenon that the participation scheme was set up to prevent in the ICC context.[55] Therefore, the likely serious consequences of the currently prevailing interpretation of the scope of Article 68 (3) as encompassing the investigation phase for the overall success may not be taken lightly.[56]

These considerations confirm the desirability and urgency of the appellate review on the fundamental issue of whether Article 68 (3) can be interpreted as conferring on victim general right to participate in the proceedings. In this connection, the granting by PTC I, in the context of both the DRC and Darfur situations, of OPCD's leaves to appeal the issue of whether the "procedural status of victims" can be accorded in the pre-trial proceedings and, if so, whether it is subject to the requirements of Rule 89 is

53 When setting out the possible specific procedural steps where victims can potentially participate during the investigation phase, PTC I underscored that the exercise of the concrete participatory rights by individuals with a victim status would be conditional upon meeting the 'personal interests' requirement: *DRC* victim participation decision, *supra* note 13, paras. 73-75. Noting that these rights are 'theoretical' and 'largely hypothetical', see WCRO Victims Report, *supra* note 12, at 5 and, on the risk of imbuing unrealistic expectations, at 44 et seq.

54 See Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06, 30 November 2006, ICC-01/04-315, para. 20.

55 Pointing to this as a peril inherent in the victim participation scheme under the ICC Statute, see Zappalà, *supra* note 4, at 222; G.K. Sluiter, 'Naar een slachtoffergericht internationaal strafproces?', in M. M. Dolman, P. D. Duyx and H. van der Wilt (eds.), *Geleerde lessen. Liber amicorum Simon Stolwijk* (2007), 187-202, at 201.

56 WCRO recommended that the Pre-Trial Chambers reconsider the question of applicability of Article 68 (3) to the investigation of a situation stage: WCRO Victims Report, *supra* note 12, at 6, 48-49. The present author subscribes to this recommendation.

undoubtedly a very welcome development.[57] This also contrasts positively with Pre-Trial Chamber I's earlier restrictive approach towards interlocutory appeals.[58]

2.2.2.2. Interlocutory appeals

Save for the appeals against orders on reparations under Article 82 (4), Articles 81-82 of the ICC Statute reserve the right to bring (interlocutory) appeals to the parties. While the ICC legal framework does not provide explicitly for victim participation in the appellate proceedings under Article 68 (3), the applicability of the provision to that phase as a matter of principle has caused no controversy, in contrast with the investigation. The Appeals Chamber confirmed, on numerous occasions, the potential right of victims to participate in the proceedings before it, subject to the requirements of the legal test envisaged in Article 68(3) (except for the "procedural status of victim" if previously acknowledged by the other Chambers[59]), and granted victims participatory rights.[60] Whenever participation of victims in the interlocutory appeals stage was refused, this was done on the ground that the requirements under Article 68 (3) of the ICC Statute were not satisfied,[61] rather than for the reason that Article 68 (3) could not serve as a legal basis for their intervention at the appellate level.

2.3. Legal test of Article 68 (3)

2.3.1. General character

Article 68 (3) provides that the Court *shall* permit victims' views and concerns to be presented and considered at the appropriate stages, where their personal interests are affected and in the manner consistent with the right to a fair trial. The *travaux préparatoires* indicate that the choice of language 'shall' instead of alternative 'may' is a deliberate one.[62] This implies that whenever all prerequisites are met, participation

57 Pre-Trial Chamber I, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 23 January 2008, ICC-01/04-438; Pre-Trial Chamber I, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 23 January 2008, ICC-02/05-118.

58 See *supra* note 43.

59 Appeals Chamber, *Prosecutor* v. *Lubanga,* Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en líberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824 ('*Lubanga* appeal judgment on provisional release'), paras. 45 and 48. See also ICC-01/04-01/06-1335; ICC-02/05-138; and ICC-01/04-503.

60 See, e.g., Appeals Chamber, *Prosecutor* v. *Lubanga*, 12 December 2006, ICC-01/04-01/06-769 (OA 7), para. 3.

61 *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 29.

62 See Article 43 of 1997 ICC PrepCom Draft: Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August, A/AC.249/1997/L.8/Rev.1, 14 August 1997;

in the form of expression of 'views and concerns' becomes a right granting which is an obligation upon a Chamber.[63] Thus, whilst the judicial decision under Article 68 (3) is overall not discretionary,[64] the Court possesses substantial discretion to determine whether the particular elements of the test have been established.[65]

The legal test of Article 68 (3) and the application requirement under Rule 89 (2) have been indicated as the unique features of the participatory regime in question, insofar as establishing by a victim of the requirements of "personal interests" and "appropriateness" is not necessary under other regimes of victim participation (e.g. as per Part 2 or Rule 93). On the one hand, this can be interpreted as a disconnection of Article 68 (3) from the other participatory regimes, in the sense that the "impact on personal interests" and "appropriateness" are fully extraneous to those regimes. On the other hand, this may also imply that the fulfillment of these requirements for the purposes of Part 2 or reparations proceedings is to be presumed thus rendering the determination by the Court on this point superfluous.

The logical structure of the legal test for victim participation under Article 68(3) compounds three cumulative requirements: (i) the applicant must be a victim, i.e. satisfy the formal definition of victim; (ii) the "personal interests of the victim" should be affected at the stage of proceeding with respect to which the participation is sought (this can be referred to as the "personal interests clause"); and (iii) that stage of proceedings should be determined by the Court as appropriate for the expression of "views and concerns". In addition, the requirement (iv) that the manner for the expression of these should not be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" can also function as a prerequisite for participation, with the effect – at least theoretically – of blocking victim participation where the Court conceives of no practicable mode for victims to participate without violating the fairness requirement.

Out of these four prerequisites, only the first one – the definition of victim – is based on *prima facie* objective criteria formulated in relatively clear yet imperfect

WCRO Victims Report, *supra* note 12, at 19; Haslam, 'Victim Participation at the ICC', *supra* note 1, at 323.

63 *DRC* victim participation decision, supra note 13, para. 71. In a similar vein, see Separate and Dissenting Opinion of Judge Blattmann, *Prosecutor* v. *Lubanga*, ICC-01704-01/06-1119, T. Ch., ICC, 18 January 2008, para. 13; Separate Opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint applications of victims, *supra* note 15, para. 14.

64 This allows contrasting the Article 68 (3) participatory regime to the one foreseen by Rule 93, which is of discretionary character: 'The Court *may* seek the views of the victims or their legal representatives…'

65 Haslam, *supra* note 1, at 323; Donat-Cattin, *supra* note 23, at 880. The discretionary character of the elements of the Article 68(3) test has been acknowledged by various Chambers: see e.g. Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 8.

terms of Rule 85[66] and further enunciated in the Court's jurisprudence.[67] (It is noteworthy that, despite the non-discretionary character of this element, the litigation before the ICC has already revealed numerous controversies surrounding the elements of the victim status, including the meaning of "harm", "causal link", the required proof of identity, the standard of proof to establish victimhood, etc.). By contrast with the requisite (i) above, the elements of the legal test from (ii) to (iv) apparently require a discretionary determination by the bench, thus confirming the above thesis that the Chambers eventually possess a broad power to control the timing, extent and modalities of the victim participation under Article 68 (3).

The risk of inconsistent treatment inherent in the far-reaching judicial discretion is exacerbated by the fact that the principles guiding the exercise of such discretion by the Chamber remain largely *in limbo*.[68] Thus, some decisions in *Lubanga* rejecting the case victims' participation at the status conferences fail to cite the legal grounds and to indicate explicitly which requirement(s) of Article 68 (3) the applicants did not satisfy.[69] This is troublesome in view of the fact that the Court's discretion is at

66 Rule 85 of the ICC RPE defines victims as (a) "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"; and (b) as including "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".

This language may seem unfortunate on three grounds: (i) it is unclear if organizations can possess "*personal* interests" as required by Article 68 (3) of the ICC Statute; (ii) the indication of the required cause for the harm (crime within the Court's jurisdiction) is omitted in relation to organizations, which may lead to absurd results should the rule be interpreted textually; (iii) under the present definition that refers to "crime" and not alleged crime, the victim status can, in accordance with the presumption of innocence, be granted only upon the guilt verdict, when the commission of the crime has been established. See Jorda & de Hemptinne, *supra* note 1, at 1403. Note also G. Fletcher, 'Victims and Victims – The Theological Foundations of Criminal Law', Working Paper, 1 December 2005, Cardozo School of Law (on file with the author), at 4: "when we use the language of victimhood, we run the risk of violating the defendant's presumption of innocence. After all, how do we know who the "victim" is until the defendant's guilt has been determined?"

67 Based on Rule 85(a), PTC I established four following criteria for the recognition of the victim status: see *DRC* victim participation decision, *supra* note 13, para. 79; see also, among others, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06, 31 July 2006, ICC-01/04-177-tENG, at 6.

68 Haslam, *supra* note 1, at 323.

69 See Pre-Trial Chamber I, *Prosecutor* v. *Lubanga,* Decision on the application for participation of victims a/0001/06 to a/0003/06 in the status conference of 5 September 2006, 4 September 2006, ICC-01/04-01/06-380-tEN, at 3; Pre-Trial Chamber I, *Prosecutor* v. *Lubanga* Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 24 August 2006, ICC-01/04-01/06-335-tENG, 17 August 2006, at 3, merely "noting" and "considering" Article 68.

the minimum subject to the obligation to provide a reasoned opinion, which is not removed, as a matter of principle, by the 'technical nature' of the stage of a proceeding. This reaffirms the need for the Chambers to establish – jointly and with reference to the practice in the context of other situations and cases – the principles governing application of Article 68 (3), with a view to efficient and predictable participatory regime.[70]

2.3.2. Drafters' intent and the UN Declaration

The unclear purport of Article 68 (3) and the obscure character of its test have been widely noted by commentators.[71] The question arises as to what role in particular is reserved by the drafters to the victims participating in the proceedings pursuant to that Article and whether they are to be conceived of as civil parties, as participants with some prosecutorial functions, as a combination or none of these.[72]

The drafting history of Article 68 (3) that might assist judges in applying it does not provide insights as to the numerous questions arising in connection with the purpose of this provision. The absence of a discussion of the elements of the legal test at hand at the sessions of the Preparatory Committee indicates that the drafters to all appearance did not intend anything specific in terms of exact rationales for the victim participation under Article 68 (3). Consequently, the Chambers are charged with a challenging task of devising such rationales anew rather than unraveling a certain pre-existing design intended by the negotiators.

It is obvious that the drafters borrowed the language of Article 68 (3) almost word by word from paragraph 6 (b) of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[73] The resemblance between the two texts has been widely noted,[74] in contrast to the slight differences, which remain sub-

70 Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 5

71 See, e.g. Timm, *supra* note 19, at 295; Zahar & Sluiter, *supra* note 10, at 75; Jouet, *supra* note 10, at 267; WCRO, Victims Report, *supra* note 12, at 55, claming that the most criteria of the legal test overlap.

72 Discussing these issues, see *infra* section 4.2.

73 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. 40/34, 29 November 1985, UN Doc. A/RES/40/34 ('UN Declaration'), para. 6: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by … (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system…"

74 Donat-Cattin, *supra* note 10, at 268; Jorda & de Hemptinne, *supra* note 1, at 1404; WCRO Victims Report, *supra* note 12, at 19; Sluiter, 'Naar een slachtoffergericht internationaal strafproces?', *supra* note 55, at 192. See also Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint applications of victims, *supra* note 15, para. 10.

ject to speculation.[75] In the absence of evidence concerning the purport of Article 68 (3), the preparatory works of the UN Declaration in the part relevant to paragraph 6 (b) will be helpful for the purpose of clarifying if not the intent of the ICC drafters but at least the ordinary meaning and implications of the original language underlying the Article 68 (3) test.

The drafters' decision to transpose the text of paragraph 6 (b) of the UN Declaration into Article 68 (3) is understandable. While lacking legally binding effect, the former provision served as a symbolic authority for the decision to include a general provision on victim participation,[76] reflecting the agreement among delegations that the participatory rights of victims at the ICC should be at least adequate in light of the UN Declaration. Furthermore, the provision at hand was the only international norm available that directly addresses the participation of victims in criminal proceedings.

Nevertheless, the solution to copy-paste the text of paragraph 6 (b) into Article 68 (3) can hardly be considered as fortunate. The semantics of the declaratory instrument on victims' rights are ill-suited, in view of their immanent imprecision, to serve as a model for a norm prescribing a legal test for victim participation in the criminal proceedings of a concrete national or international jurisdiction.[77] Moreover, the available evidence on the drafting history of the UN Declaration reflects the fact that the text of paragraph 6 (b) was subject to considerable discussion in relation to the extent and particular modalities of victim participation in the criminal proceedings.[78] It can thus be said that its language is a camouflage of disagreement between the drafters rather than an outcome of a coherent and coordinated choice from among the models for victim participation promoted by various delegations, which in itself serves as another argument against borrowing it uncritically. Furthermore, as ultimately drafted,

75 Although cosmetic, these differences are capable of effectively reconfiguring the legal test prescribed in para. 6 (b). For example, placing the "personal interests clause" in the beginning of the first sentence in Article 68 (3) disconnects the former from the phrase "appropriate stages of the proceedings", with which it is associated in para. 6 (b) of the Declaration. In combination with making the "propriety" requirement conditional upon determination by the Court, this adjustment engenders the "appropriate stages of proceedings" as an independent requirement.

76 M. Joutsen, *The Role of the Victim of Crime in European Criminal Justice Systems: A Crossnational Study of the Role of the Victim* (1987), at 68 (on a merely symbolic character of the UN Declaration), Cf. with Donat-Cattin, *supra* note 10, at 268, speaking of the Declaration as the "legal foundation" of the victims' right to participate in proceedings.

77 Sluiter, *supra* note 55, at 192, note 21, and 196: "unclear purports of Article 68, para. 3, are result of a literal borrowing from international aspiration norms" (translated by the author).

78 G. M. Kerrigan, 'Historical Development of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', in M.Ch. Bassiouni (ed.), *International Protection of Victims*, Nouvelles etudes pénales, No 7 (1988), 91-104, at 100; Proposed General Assembly Resolution on Measures for Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Commentary to § 6 (b), in ibid., at 52; and Joutsen, *supra* note 76, at 179.

the cited provision of the UN declaration was not intended to operate in a procedural and institutional vacuum: it merely calls upon national legislators to allow for victim participation in the manner 'consistent with the national criminal proceedings', thus reserving the elaboration of the modalities to the respective national governments. This seems to have been overseen by the drafters of the ICC Statute who, instead of detailing the provision in the fashion consistent, in their view, with the nature and structure of ICC proceedings, confined themselves to transforming the test, save this very contextual requirement, into Article 68 (3). From this perspective, the regulation of victim participation before the Special Panels for East Timor is more adequate, in that it provides a limited number of proceedings where the participation of victim is a matter of right, whilst also vesting the Panels with the discretion to grant request for participation during any other proceeding.[79]

2.4. Object of participation: "Views and concerns"

A remarkable feature of the Article 68 (3) regime is the object and immediate goal of the victims' participation – namely, the expression of their "views and concerns". The use of the language "views and concerns", as opposed, for example, to the "representations" and "observations" featuring in Articles 15 (3) and 19 (3) of the ICC Statute, can reasonably be construed as pointing to the different substantive contents of victims' interventions under Article 68 (3). According to Judge Pikis, the expression of views and concerns is intrinsically linked to the promotion of the victims' "personal interests" and appears a "highly qualified participation".[80]

The ICC legal framework fails to provide clarity as to which issues would fall within the subject of victims' interventions under Article 68 (3). This is unsurprising, given the lack of certainty or agreement as to their contents in relation to paragraph 6 (b) of the UN Declaration from which the text "views and concerns" was inherited by the ICC Statute. Some commentaries on the former document refer to the vague character of these terms and provide that "views" could for example include "views on the losses from or effects of the crime, opinions on what happened" and, as a matter of debate, "views on sentence".[81] The scope of the legitimate "concerns" beyond the issues specified in subparagraph 6 (d) of the UN Declaration, such as "the minimiza-

79 UNTAET Regulation 2000/30, *supra* note 7, Section 12(3): "Any victim has the right to be heard at a review hearing before the Investigating Judge, and at any hearing on an application for conditional release"; Section 12 (5): "Any victim has the right to be heard at a review hearing before the Investigating Judge, and at any hearing on an application for conditional release".

80 Separate opinion of Georghios M. Pikis, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, paras. 1 and 15: 'the expression of victims' views and concerns is correlated to the personal interests of the victims'.

81 Commentary to § 6 (b), Proposed General Assembly Resolution on Measures for Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, in Bassiouni (ed.), *International Protection of Victims*, *supra* note 78, at 53.

tion of inconvenience", "privacy" and "safety", has also not been clear, especially in relation to the restitution which is seen as a penal measure.[82]

The major question arising in connection with the uncertain contents of the "views and concerns" is whether victims can participate in the proceedings by adducing evidence to establish guilt of the accused, as seemingly argued by some commentators.[83] The dominant interpretation of the original expression "views and concerns" in paragraph 6 (b) of the UN Declaration as set out above provides no basis for granting victims such power. Furthermore, while the earlier drafts of the ICC Statute evince that providing them with a right to present incriminating evidence through their legal representatives was initially considered,[84] the ICC legal framework ultimately sets out no such right. The jurisprudence on this issue delivered so far is equivocal. On the one hand, Judge Pikis opined that the "views and concerns" may not relate to "the proof of the case or the advancement of the defence", given that the onus of proving guilt is on the Prosecutor.[85] In the context of the *Lubanga Trial,* both parties requested and were granted leave to appeal on the issue of whether it is possible for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence. The Appeals Chamber remained divided.[86]

The subject of victims' interventions has given rise to litigation in the context of Uganda situation, where Single Judge, as claimed by the Prosecutor, adopted the decision that created the possibility of excessive and undefined participation, in particular, open to the interpretation that "requesting special investigative measures" is an available modality of victims' participation in the investigation phase.[87] While this would be in line with the previous finding of PTC I,[88] the Prosecutor considered this uncertainty inconsistent with a due interpretation of the scope of "views and

82 Ibid.

83 Donat-Cattin, *supra* note 23, 880. On 11 July 2008, the Appeals Chamber held that victims may lead evidence and challenge its admissibility at trial. See ICC-01/04-01/06-1432, paras. 93-105..

84 See, e.g., Report of the Inter-Sessional Meeting in Zutphen, UN Doc. A/AC.249/1998/L.13, 4 February 1998, at 117; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998. However, this detail was later removed from draft Article 68: see UN Doc. A/CONF.183/C.1/WGPM/L.58, 6 July 1998/Rev. 1, at 2.

85 Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 16.

86 For the majority, see *supra* note 83. Judge Pikis and Judge Kirsch appended dissenting opinions defending a more adversarial concept of trial.

87 OTP, Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 20 August 2007, ICC-02/04-103, paras. 6-9.

88 *DRC* victim participation decision, *supra* note 13, para. 75.

concerns" under Article 68(3) and requested a leave to appeal this issue, unavailingly though.[89]

3. The "personal interests" clause and its application by the Chambers

3.1. Functions and elements of the clause

In the context of the legal test of Article 68 (3), the requirement that the "personal interests of the victims" be affected by the proceedings in which participation is sought is essential to the determination of whether or not the application should be granted. Thus, what was referred to above as the "personal interests" clause fulfils the dual role of triggering and imposing confines on the victim participation.[90] The question of whether or not the requirement advanced thereby is met in a certain procedural situation has been a recurrent aspect of the jurisprudence of the Court from the outset. For example, in the very first decision on victims in the context of the DRC situation PTC I held that the "personal interests" of the victims are "affected in general at the investigation stage",[91] while the Appeals Chamber found that such interests were not affected by the admissibility part of the interlocutory appellate proceeding arising from the confirmation of charges.[92]

The assessment of whether or not the "personal interests" of the victims are affected is shaped by the way the Chambers interpret three constitutive elements of the "personal interests" clause: (i) the proceedings by which the "personal interests" should be affected and in relation to which the participation is sought; (ii) the methodology for the assessment of the impact of the proceedings on the "personal interests"; and, finally, (iii) the scope and contents of the "personal interests". Unavoidably, all of the three aspects of the "personal interests" clause have already become subject of extensive litigation before the ICC; the troubling trait of the emerging jurisprudence is that the inherent uncertainties of the Article 68 (3) test have led to varying interpretations by various Chambers.

3.2. Interpretation of "stages of proceedings"

In the absence of a clear indication of by what the "personal interests" should be affected to give rise to the victim participation under Article 68 (3), the textual interpretation of the subsequent text suggests that this is an implicit reference to the "proceedings" or "stages of proceedings" in the second part of the test. Consistent with the more obvious language of paragraph 6 (b) of the UN Declaration, where the "personal interests" clause immediately follows the text "appropriate stages of

89 Pre-Trial Chamber II, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, ICC-02/04-112.

90 See Haslam, *supra* note 1, at 329.

91 DRC victim participation decision, *supra* note 13, para. 63.

92 *Lubanga* appeal decision on the joint applications of victims, para. 29.

proceedings", this construction has been adopted by Judge Pikis in a separate opinion appended to *Lubanga* appeal decision on joint application of victims of 13 June 2007.[93] Thus, the phrase "stages of proceedings" is to be considered an integral part of the "personal interests" clause.

Depending on whether the "stage of proceeding" is interpreted broadly so as to encompass, for example, the entire investigation of situation phase, or narrowly so as to confine its ambit to a discernible and specific procedural step, the standard that the "personal interests of the victims" should be affected by such proceeding will be respectively more difficult or easier to satisfy. Construed generously, the "stages of proceedings" would imply an extended span of procedural phase embracing not only the proceedings underway at a given time, but also an unidentified number of hypothetical procedural activities or steps, which renders the respective assessments generic and speculative. To the contrary, a more restrictive construction would narrow the scope of the "stage of proceedings" to the procedural steps that are relatively limited in scope and are actual or imminent at the moment of the application for participation. The treatment by the Chambers of the term is briefly addressed below.

When arguing that the first victims' applications for participation in the context of the DRC Situation and elsewhere, the Prosecutor submitted that at the stage of investigation of situation "it is not possible to determine whether the Applicants' personal interests are affected by the Court's ongoing activities",[94] because this matter "can only be properly dealt with once there are formal proceedings related to specific crimes".[95] However, by granting victims participatory rights with regard to the entire length of investigation in its decision of 17 January 2006, PTC I adopted the broad interpretation of the (stages of) proceedings. Thereby it obviated, at that stage, the need to establish the impact on the personal interests of concrete and actual procedural steps as opposed to generally defined "investigation of situation", while retaining such possibility in relation to specific procedural steps.[96] In this author's view, imposing a requirement to establish "personal interests" for the second time in relation to the procedural step that is a part of a larger phase, with respect to which the assessment has already been rendered, is illogical and an unfair burden on the victims. Apparently, the narrow interpretation of the "stage of proceedings" from the outset, with the effect of denying participatory rights at the investigation of a situation, would

93 Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint applications of victims, supra 15, para 13: 'To the question "affected" by what, the self-evident answer is by the proceedings before the Court, in which participation is sought.'

94 Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, para. 23.

95 Ibid., para. 28. See likewise Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06, 30 November 2006, ICC-01/04-315, para. 17: "The personal interest of the Applicants in relation to the specific matters at issue in a proceeding can only be determined with certainty once a case has been commenced, and cannot be determined as such by the mere fact that crimes are being investigated".

96 *DRC* victim participation decision, *supra* note 13, paras. 64 and 73.

help avoid this problem. However, in later decisions, PTC I distinguished between the "stages of the proceedings" (such as the investigation of a situation and the pre-trial phase of a case) and "specific procedural activity or piece of evidence dealt with at a given stage of the proceedings", holding that it is namely in relation to the former that the assessment of the "personal interests" criterion is to be rendered.[97]

In contrast to PTC I, the Appeals Chamber employed a strict construction from the outset when deciding if the appropriateness of victim participation in interlocutory appeals should be considered anew despite PTC I's generic finding that this requirement is satisfied in relation to the pre-trial proceedings. The Appeals Chamber asserted that "an interlocutory appeal…, in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings" and hence "mandates a specific determination" of appropriateness.[98] In relation to the latter, it considered itself not bound by previous determinations by PTC I because for that Chamber, it would be impossible "to determine that [victims'] interests would be affected by that particular interlocutory appeal".[99] This may be interpreted as rejecting the conception that the assessment can be rendered in relation to the hypothetical "stages of proceedings". In a subsequent decision of 13 June 2007, the Chamber narrowed down the notion of "stage of proceeding" to a single issue by effectively isolating, at the length of interlocutory appeal proceedings, a stage dealing with the preliminary issue of the admissibility of appeal against confirmation of charges brought under Article 81 (1) (b), for the sole purpose of the assessment of the impact on the personal interests of the victims.[100]

The approach of the Appeals Chamber appears preferable to that of PTC I, since it reflects the idea of victim participation as a "procedure-specific concept".[101] It promotes a more accurate compliance with the 'impact on personal interests' requirement, thus imbuing it with a substantive legal effect. However, the generic assessments of a kind transpiring from the decisions of PTC I present, in this author's assessment, a deficient approach: it seems fallacious to presume that the "personal

97 Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, 6 February 2008, ICC-02/05-121, at 6; Pre-Trial Chamber I, Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, 6 February 2008, ICC-01/04-444, at 8-10.

98 *Lubanga* appeal judgment on provisional release, *supra* note 59, paras. 40 and 43. See *contra* Dissenting Opinion of Judge Sang Huyn-Song Regarding the Participation of Victims, appended to this decision, at paras. 4-7.

99 Ibid., para. 43.

100 *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 26. See also Separate opinion of Judge Pikis to that decision, at para. 17: "The "stage" relates to the point or interval of the proceedings at which views and concerns may be put forward".

101 Stahn *et al.*, *supra* note 17, at 224 and further: "The question of whether victims may participate in proceedings and in which form they may do so cannot be answered in general, but must be determined individually".

interests" of the victims would necessarily be affected at the entire length and by every single step of the proceedings in which they have been admitted in advance.

3.3. Impact on the personal interests

3.3.1. Assessment methodologies

The second element shaping the outcome of the determination under the "personal interests" clause bears upon the character and quality of the impact of a proceeding on the "personal interests" of the victim. Depending on what effects of the proceedings the Chambers conceive of as sufficient to reach the threshold of "affected" under Article 68 (3) and whether they adopt a strict or liberal methodology for the assessment of such effects, the range of cases where the participation of victims will be allowed and a number of victims considered eligible can be expected to vary significantly.

A strict approach to the element "affected" would require that victims establish that their "personal interests" are immediately and specifically at stake by virtue of the proceedings where the participation is being sought. On the contrary, a liberal methodology would satisfy itself of a lower threshold and suggest, for example, that a more general and indirect effect of the proceedings on the "personal interests" should be regarded sufficient for the purposes of the test of Article 68 (3). In a somewhat far-reaching version, it would even presume the existence of such impact for a certain type of proceedings[102] and, consequently, effectively forfeit the need to have this requirement specifically considered. As will be shown below, the jurisprudence of the Court, except for the Appeals Chamber, evinces the prevalence of the liberal approaches towards the impact requirement.

As a preliminary note, the liberal approach raises concerns from a legal perspective, insofar as it effectively leads to losing by the requirement of the impact on the personal interests of its autonomous procedural meaning. From the practical point of view, it operates in the fashion that can result in summarily granting participatory rights to a broad number of victims whose 'personal interest' in the proceedings at hand is at best indirect and general. Ultimately, this may open door potentially to every individual affected by the crimes committed in the context of a situation and result in the overburdening of the Court.

3.3.2. Application by the Chambers

3.3.2.1. Pre-Trial Chambers

The first applicants in the context of the DRC Situation argued that their "personal interests" are "indisputably at stake", solely based on the fact that they have suffered harm from a crime within the jurisdiction of the Court, thus by virtue of their vic-

102 Donat-Cattin, *supra* note 23, at 870: 'It appears self-evident that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct.'

tim status.[103] The Prosecutor submitted that the victims must specifically show that their personal interests are directly affected by the proceedings, in addition to their possessing a victim status, as merging the two requirements would deprive them of their autonomous meaning, create a normative tautology and thus be contrary to the principles of treaty interpretation.[104] On the face of it, Pre-Trial Chamber I agreed with the Prosecutor's interpretation, by stating that the "personal interests" criterion "… constitutes an additional criterion to be met by victims, over and above the victim status accorded to them",[105] thereby rejecting that the "personal interests" requirement can be met as a matter of presumption based on the victim status.

However, by holding further that "the personal interests of victims are affected *in general* at the investigation stage",[106] it *de facto* approached very lightly, and thus substantively negated, the autonomous character of this criterion.[107] Further on, it clarified that the personal interests of victims are affected at the investigation phase because the identification of the persons allegedly responsible is the "first step towards their indictment" and because there is a "close link" between investigation and "future orders for reparations".[108] The vague and unsupported character of such rea-

103 Memorandum in Support of Applications No. 01/04-1/dp to 01/04-6/dp, para. 13, cited in Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, para. 24.

104 Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, paras. 25-28. In its later submissions, the Prosecution consistently emphasized that "[t]he "personal interest" to be affected must be something more than the general interest of any victim in the progress and outcome of the investigation – otherwise the criterion would be rendered meaningless.": e.g. Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, 25 June 2007, para. 19; Prosecution's Reply under Rule 89(1) to the Applications for Participation, 8 June 2007, ICC-02/05-81, para. 20 etc.

105 *DRC* victim participation decision, *supra* note 13, para. 62.

106 Ibid., para. 63.

107 WCRO reaches the same conclusion, stating that the PTC's finding renders the "additional criterion essentially meaningless at the situation stage". See WCRO Victims Report, *supra* note 12, at 46. This is even more visible in later decisions of PTC I. See e.g. Pre-Trial Chamber I, Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and Ad Hoc Counsel for Defence, 7 July 2006, ICC-01/04-164-tENG, at 3: "pursuant to article 68(3) of the Statute, the Chamber considers that victims may present their views and concerns at the investigation stage … once the Chamber grants them victim status"; Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06, *supra* note 32, *passim*, failing to elaborate on why its considers the "personal interests" requirement met.

108 *DRC* victim participation decision, *supra* note 13, para. 72.

soning has been noted by commentators.[109] One may wonder if the link between these two procedurally distinct procedural activities is close enough, given that the identification of a suspect serves no guarantee that the reparations will ultimately be awarded.

It is clear that in making this connection, the Chamber has applied a liberal methodology for the assessment of the impact of proceedings on the personal interests. Although foreseeing the possibility of and need in the subsequent *in concreto* consideration,[110] PTC I conducted at that stage only cursory and generic assessment before arriving at a conclusion that the relatively distant and general – rather than direct and specific – impact on the interests is sufficient to meet the threshold of the "personal interests" clause. It may be argued that such an overly generous approach allows for a summary and presumptive assessment of whether the "personal interests" are affected and thereby discards a meaningful legal effect of the "personal interests" criterion.

This approach, despite the indicated deficiency, had precedential effects in relation to the subsequent treatment by Pre-Trial Chambers I and II of the impact requirement in connection with the investigation phase in the context of other situations. For example, Single Judge of the same Chamber relied on the early legal findings in the DRC Situation when she reaffirmed, in the context of the Situation in Darfur proceedings, the existence of the (unqualified) "procedural status of victim" at the investigation of situation and case pre-trial phase and dismissed the need to conduct assessment of the impact of proceedings on the personal interests as a criterion of eligibility for that status.[111] Aware of a stricter methodology that had been developed by then by the Appeals Chamber, Single Judge considered that it would only be applicable in relation to the specific proceedings.[112]

After having considered the relevant jurisprudence of PTC I, Single Judge Politi of Pre-Trial Chamber II responsible for the Situation in Uganda took the approach largely in line with the methodology for the assessment of the impact on personal interests employed by PTC I. Single Judge posited that "[t]here seems to be little doubt, at least in principle (and unless the Chamber decides otherwise in relation to a specific proceeding), that [the impact on personal interests] requirement is met whenever a victim … applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear" and "the fact that … victim's per-

109 De Hemptinne & Rindi, *supra* note 37, at 345, note 4; WCRO Victims Report, *supra* note 12, at 52.

110 See *supra* note 52.

111 Corrigendum to *Darfur* victim participation decision, *supra* note 45, paras. 13 and 14.

112 However, in a later decision, Single Judge stated that, "when determining the set of procedural rights attached to the procedural status of victim, [she] need not make a second assessment of the victims' personal interests". See Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, Situation in Darfur, 6 February 2008, ICC-02/05-121, at 9. The question arises as to when, in the view of Single Judge, the "impact on personal interests" is to be considered, if at all.

sonal interests are 'affected'" by criminal proceedings relating to the event or events in question seems incontrovertible.[113]

Corroborated by a reference to a single scholarly commentary,[114] this presumptive interpretation of the "personal interests" clause clearly negates the distinct character of the impact requirement in relation to the proceedings in the case, despite that in the very same paragraph the "personal interests" clause is extolled as a "paramount criterion for participation". It is submitted that this approach is at odds with the principle that provisions should be interpreted in the way that would not render them devoid of effect.[115]

3.3.2.2. Appeals Chamber

The Appeals Chamber adopted a more restrictive approach towards the assessment of the impact of the proceedings before it on the personal interests of the victims than that applied by the Pre-Trial Chambers. In a series of decisions, the Appeals Chamber undoubtedly set a new tone in the treatment of the "personal interests" clause by the Court and paved the way for a jurisprudential shift towards application of a stricter methodology.

In the judgment of 13 February 2007 resulting from an interlocutory appeal against a decision denying release to Mr. Lubanga Dyilo, the Appeals Chamber held that: (i) the right of victims to participate in the interlocutory appeals under Article 82(1)(b) is not automatic but conditional on granting of a leave to participate pursuant to Article 68(3); and (ii) the leave for appeal must show "whether and how their personal interests are affected by the particular appeal, as well as why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented".[116] The Appeals chamber dismissed presumption by victims that they would be allowed to participate in the interlocutory appeals by virtue of the fact that they had been admitted in the proceedings before the Pre-Trial Chamber which gave rise to the interlocutory appeals.[117]

In a decision of 13 June 2007, the Appeals Chamber further developed the grounds for the stance excluding the admissibility of an *in abstracto* assessment, particularly by holding that "any determination … of whether the personal interests of victims are affected in relation to a particular appeal will require *careful consideration on*

113 Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 9.

114 See above *supra* note 102.

115 *Corfu Channel Case (merits),* Judgement of 9 April 1947, ICJ Reports (1949) 24: "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect".

116 *Lubanga* appeal judgment on provisional release, *supra* note 59, paras. 1-2, 38.

117 A filing by victims (a/0001/06 to a/0003/06) made without prior application to the Appeals Chamber for leave was disregarded. See Appeals Chamber, *Prosecutor* v. *Lubanga,* ICC-01/04-01/06 (OA 7), 12 December 2006.

a case-by-case basis".[118] The victims whose applications for participation were dealt with, claimed that they had an 'obvious' interest in the outcome of the appeal, due to its bearing upon the possibility of obtaining reparations, and that they could participate in the interlocutory appeals proceedings as a consequence of their participation in the *Lubanga Case* and in the confirmation proceedings from which the appeal arose.[119] Both presumptions were dismissed by the Chamber, apparently as a result of the application of a strict methodology for the assessment of the impact on the personal interests. It held that the resolution of the preliminary issue whether the appeal against the decision confirming charges can be heard under Article 82 (1) (b) would "neither result in the termination of the prosecution nor preclude the Victims from later seeking compensation" and thus did not implicate personal interests of the victims.[120] This finding contrasts favorably with the generic and sweeping assessment of the impact of proceedings on the "personal interests" as conducted by Pre-Trial Chambers.

3.3.2.3. Current status

The further developments indicate that the Appeals Chamber's jurisprudence as set out above has had positive effects on the Pre-Trial Chambers' practice. The possibility for a shift in their policy has borne fruit in connection with the OPCD's and the OTP's appeals of PTC I's decisions of 14 December 2007 and 24 December 2007 recognizing the right to participate as victims in the proceedings at the investigation stage respectively in the Darfur Situation and the DRC Situation.

As noted by the applicants, in the relevant part of those decisions,[121] the responsible Single Judges omitted the requirement of the impact on personal interests from the factors to be considered in the assessment of whether or not the applicants can be granted a general right to participate during investigatory and pre-trial case stage. The

118 *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 28.

119 Ibid., paras. 10-11; Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber", filed on 1 February 2007, *Prosecutor* v. *Lubanga*, 2 February 2007, ICC-01/04-01/06-802-tEN, at 4-7.

120 Ibid., paras. 26-27. See *contra* the Dissenting Opinion of Judge Sang Huyn-Song Regarding the Participation of Victims, appended to this decision, at para. 19, arguing that the procedural issue of admissibility of appeal equally affects the "personal interests" of the victims, because for them, "it would make little difference whether the appeal is dismissed as inadmissible or as substantially unfounded". This reasoning appears to be a clear example of a liberal methodology, for it assesses the impact on personal interests not from the position of whether the proceeding in question is capable of worsening the victims' situation, but also whether it can remove in advance any procedural factors unfavorable to victims.

121 Pre-Trial Chamber I, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 14 December 2007, ICC-02/05-111-Corr, para. 13; Pre-Trial Chamber I, Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, 31 January 2008, ICC-01/04-423-Corr-tENG, para. 5 (at 15).

applicants opposed this approach as rendering the distinct requirement of the impact on personal interests "nugatory",[122] contrary to the Appeals Chamber's interpretation that the victim applicants must necessarily demonstrate their "personal interest" in relation to the particular interlocutory appeal. The requests for leave to appeal on this issue by both the OTP and the OPCD were granted by PTC I in both situations on 6 February 2008, notwithstanding that in the decisions granting leave Single Judges affirmed their previous view that the impact on personal interests should be assessed generically.[123] Thus the quandary of the implications of the "situation victim status" and the underlying question of whether a general right to participate can be granted without considering the impact requirement on the personal interests has finally been put before the Appeals Chamber, which is indeed a positive development.

3.4. Scope and contents of the personal interests of the victims

3.4.1. Functions of the procedural criterion

The textual analysis of Article 68 (3) allows identifying, on the face of it, the following functions that the "personal interests" criterion fulfils in the overall legal test envisaged by that Article: (i) as a part of the "personal interests" clause, triggering and limiting victims' participation;[124] (ii) directing the scope and subject of victims' interventions ("views and concerns"); and (iii) providing the immediate rationales for victims' participatory rights under Article 68 (3) of the ICC Statute. It thus can be inferred that the "personal interests" criterion is a key prerequisite to victims' expressing their "views and concerns" and potentially a powerful tool in the hands of the Court to craft the details of the participatory regime under that article.

The question logical to ask prior to the determination of the impact of proceedings on the personal interests is what one means by the "personal interests of the victims" for the purposes of the ICC proceedings. Depending on whether the personal interests of the victims are interpreted restrictively or broadly, the outcome of the Court's

122 DRC: OPCD, Request for leave to appeal the "Décision sur les demandes de participation à la procedure deposes dans le cadre de l'enquête en Republique démocratique du Congo par a/0004/06 à a/0009/06…", 7 January 2008, ICC-01/04-429, paras. 9 and 18(i); OTP, Prosecution's Application for Leave to Appeal the Single Judge's 24 December 2007 "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo", 7 January 2008, ICC-01/04-428, paras. 3-4 and 16-17. Darfur: OPCD, Request for Leave to Appeal the "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06…", 12 December 2007, ICC-02/05-113, paras. 14 and 21(i); OTP, Prosecution's Application for Leave to Appeal the Single Judge's 6 December 2007 Decision on Applications for Participation in the Proceedings, 12 December 2007, ICC-02/05-114, paras. 12-13.

123 Pre-Trial Chamber I, Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, 6 February 2008, ICC-01/04-444, at 10; Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, 6 February 2008, ICC-02/05-121, at 7.

124 See Haslam, *supra* note 1, at 329.

assessment of the impact of the proceedings would substantially vary with the effect of respectively limiting or expanding the potential number of eligible applicants.

It has been contended that "there is no evidence that the phrase [personal interests] was intended as a meaningful restriction on the categories of victims entitled to participate in the ICC proceedings".[125] While it can be explained by the deficiencies of the drafting process in relation to Article 68(3),[126] the indicated lack of evidence is not to be taken as forfeiting the criterion of its potentially profound effects on the operation of the legal test of Article 68 (3) along the lines indicated above. Moreover, it is submitted that it may not be taken as such, if the principle of effective interpretation is to be complied with.[127] It should have been expected that the bulk of litigation before the ICC will reflect the unrelenting struggle between parties and victims over the construction of the "personal interests" criterion to be adopted by the Court, and the emerging jurisprudence has cast first evidence to this.

3.4.2. Concept of (judicially recognisable) personal interests

Article 68(3) is the only provision throughout the Statute and Rules where the expression "the personal interests of the victims" occurs. Given that the meaning of the concept is not clarified in the ICC legislation, these are the matters for the interpretation by the Court.[128]

Textually, the concept compounds two elements: "interests" and "personal", the latter alluding to the dimension of the former. The first component – "interests" – can in abstract terms be defined as the reasonably expected benefits or satisfaction of needs that can give rise to the "rights", provided that the underlying cause and the course of action pursued are recognised legitimate.[129] The second component – "personal"

125 WCRO Victims Report, *supra* note 12, at 20, finding support in Donat-Cattin, *supra* note 23, at 879: "[i]t appears self-evident that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct".

126 See *supra* section 2.3.2.

127 See *contra* WCRO Victims Report, *supra* note 12, at 54: "the application of the … criterion to determine the timing and/or manner of victim participation is in no way mandated by the Rome Statute or the ICC Rules" and, further, "it has not proved to be helpful in practice". While the former argument disregards the principle of effective interpretation, the second point overlooks that whether the requirement is helpful depends ultimately on whether judges take on to meaningfully apply it.

128 Haslam, *supra* note 1, at 324. Articles 31-32 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 *UNTS* 331: the treaties should be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose, the preparatory work serving as a supplementary means of interpretation.

129 Attempts to give a definition to the "personal interests" by means of the notion of "rights" appears a circular exercise, in view of the fact that the former rather serves as a precursor to (or justification for) the latter. Cf. with Donat-Cattin, *supra* note 10, 270: "the term "interests" includes, but is not limited to, rights, such as the right to reparations under Art. 75".

– can refer equally to the individualized (as opposed to collective) character of the interests in question,[130] as to their private (as opposed to public) nature.

Regarding the perception of "personal interests" as individual interests, it has been advanced by the Prosecution in its submissions that the definition of "personal interest" should imply "something more than the general interest of any victim in the progression and outcome of the investigation",[131] because otherwise every person eligible for a victim can *ipso facto* be considered a holder of such interest. An authoritative statement of this vision featured in the Separate Opinion of Judge Pikis: "participating victims' views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings".[132] The individualized nature of the interests in question was further emphasised by the OPCD that, building on Judge Pikis' approach, pointed to the "particularity of each alleged victim's personal interests and the need for those interests be tied inimitably to the relevant proceedings".[133] The interpretation of "personal interests" as "private interests" distinct from the interests pertaining to the public dimension was successfully argued by both parties in the *Lubanga* case in connection with the appeal of the decision confirming charges, and it will be considered below.

In terms of the supplementary means of interpretation, it is pertinent to recall that the preparatory works of the ICC Statute do not enlighten as to the meaning of the "personal interests", for the "term does not appear to have given rise to any significant debate at any point in the drafting process".[134] As asserted earlier, in the absence of any substantive traces of the discussions underlying the drafting process of Article 68 (3) of the ICC Statute, the outcome of the debates surrounding adoption of subparagraph 6 (b) of the 1985 UN Declaration may have certain value for the purposes of discerning the implications of the original text.

An inquiry into the drafting history of the Declaration brings a noteworthy finding. The word "personal" before "interests" in the final version of subparagraph 6 (b) was added in Milan on the initiative of the Dutch delegation who wished the phrase to be construed as "limiting the recommended right to the presentation of concerns and views relating to privacy, protection from intimidation and civil damages (matters dealt with in sub-paragraph 6d and paragraph 8)", "in accordance with the statu-

130 In this vein, see Donat-Cattin, *supra* note 23, 879: "without prejudice to the collective interest of identifiable groups and of human-kind, this provision is specifically addressed to individual victims of a given crime".

131 See e.g. Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *supra* note 47, para. 29.

132 Separate Opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 28.

133 OPCD Response to the submissions of the Legal Representatives, 4 March 2008, ICC-01/04-484, para. 16.

134 WCRO Victims report, *supra* note 12, at 19.

tory practice in countries which, like the Netherlands, use the *partie civile* model".[135] This is further corroborated by the fact the initial Ottawa draft of the UN Declaration, urging states to "allow the victim to initiate and pursue criminal proceedings where appropriate and … provide for an active role for victims at all critical stages of judicial proceedings" was ultimately rejected.[136] Notably, this seems to rule out that the original text that served as a template for Article 68 (3) includes into the scope of the notion the interests of prosecutorial and punitive nature.[137]

While the textual interpretation of the "personal interests" criterion is only of limited help, its contextual analysis within the ICC legal framework may serve to shed light on the contents of that notion as far as clear cut examples are concerned.

Firstly, the expression "personal interests of victims" is used in the ICC legislation along with the "interests of victims".[138] This implies that these categories are not the same: while former can be interpreted as referring to the individual and private interests of victims, the latter denotes the interests of victims in a collective dimension. This entails that the subjects entrusted to advance these two categories of victims' interests do not coincide. While the protection of and respect for the victims' interests remains a general obligation of the Court organs and the Court as a whole, promoting *personal* interests by way of expressing "views and concerns" is specifically left to the victims and their legal representatives.

Secondly, various provisions of the Statute and Rules indicating specific needs of victims that must be addressed by the Court may not be interpreted in the way other than as recognising personal interests such as to have their dignity, privacy and physical integrity protected in the context of criminal procedure, as well as the interest in obtaining reparations.[139] The more tricky questions, such as, for instance, whether the victims are the legitimate bearers of the interest in having the accused convicted and sentenced cannot be convincingly argued based only on the textual and contextual interpretations of the "personal interests" concept. Casting no unequivocal and exhaustive answers, these analyses need to be corroborated by the interpretation of the concept in light of the "object and purpose" of the ICC Statute.

As a matter of teleological interpretation, there exists an intrinsic link between the vision of the purposes of victim participation and the recognition of particular interests as "personal", as aptly observed by the scholars.[140] Normally, the express state-

135 J.J.M. van Dijk, 'Victim Rights: A Right to Better Services or a Right to Active Participation?', in J. van Dijk, C. Haffmans, F. Rüter, J. Schutte and S. Stolwijk (eds.), *Criminal Law in Action: An Overview of Current Issues in Western Societies* (1986), 353-371, at 354.

136 Joutsen, *supra* note 76, at 179.

137 Confirming that the drafting of para. 6 (b) was informed of "distaste" of drafters towards a retributive role of victims and, in particular, in relation to sentencing (UK filed a reservation to this effect), see ibid., at 180 and note 2.

138 Articles 54 (1) (b), 68 (1) and (2); Rules 86, 90 (4).

139 Article 68 (1) and (2) of the Statute and Rules 87-88 of the ICC RPE; Article 75 of the ICC Statute.

140 Haslam, *supra* note 1, at 326: "Whether the Court will acknowledge a particular victim's interest in the proceedings will be determined by the view that it takes of the purposes of

ment of the scope and contents of the "personal interests" of the victims would help uncover both the goals of victim participation and the nature of the ICC's judicial mandate in that respect. The vague character of the ICC legal framework in general and Article 68 (3) in particular will rather make it work the way around. Given the lack of certainty in law, the Court will necessarily engage in a determination of the rationales of victim participation in criminal proceedings, and this will be discussed below.[141]

One predictable difficulty faced by the Court in its conceptualization of the "personal interests of the victims" is that of determining the contents of these interests *in abstracto*.[142] These can vary depending on many objective and subjective factors, such as the type of crime, the personality of the victim and his or her social, economic and cultural background.[143] The interests one may think of include such legitimate motives as the possibility of benefiting from the first psychological and medical help, apology and symbolical recognition of the wrongs done to them, prevention of further offences and protection of physical and psychical integrity, respectful treatment within criminal justice system and reparations of material and moral damages.[144] At the same time, victims may harbour vengeful sentiments, which society has looked at with disapproval and limiting which is the reason for bringing into existence prosecution as a public interest enterprise.[145] Thus, not all of the interests and needs of victims can be considered legitimate, and out of those that can, not all need be served in the framework of judicial – let alone criminal – procedure. Furthermore, in view of the largely "public interest" nature of criminal justice, the representation of only a few types of victims' interests will be entrusted to the victims themselves and not to the prosecutor or the court.

Thus, the primary task on the Court with respect to informing the participatory regime under Article 68 (3) of sufficient certainty is to delineate the circle of the personal interests that it recognises suitable to be legitimately pursued by the victims in the proceedings before it. While such discrimination between various interests is probably liable to the criticism of being rooted in a paternalistic claim,[146] the es-

participation"; Jouet, *supra* note 10, at 268: "[w]ithout knowing why victims have standing, it becomes equally uncertain *what* victims will do in court and *when* they will do so".

141 See *infra* section 4.

142 Zappalà, *supra* note 4, at 221.

143 T. K. Kuhner, 'The Status of Victims in the Enforcement of International Criminal Law', (2004) 6 Oregon *Review of International Law* 95, at 133: "victims' interests can be expected to vary between cultures. There may be no single correct answer regarding victims' interests, since victims are not a homogeneous group even within a single culture" (footnotes omitted).

144 For some examples, see Jouet, *supra* note 10, at 250.

145 S. Garkawe, 'The Role of Victim during Criminal Court Proceedings', (1994) 17(2) *UNSW Law Journal* 595, at 600; J.J.M. van Dijk, *supra* note 135, at 359.

146 Kuhner, *supra* note 143, at 133: "there is a considerable risk … of confusing what victims want with what victims should want; that is, there is a risk of researcher bias and a risk

tablishment of the exact scope and contents of the 'personal interests of the victims' appears unavoidable, if this requirement is to be treated at all as a meaningful procedural criterion.[147] Hence comes the concept of the "judicially recognisable personal interests" which reflects the notion that not all personal interests are capable of triggering victim participation but only those specifically recognized by the Court to this end.[148] In this author's view, the concept is valuable as it alludes to a certain pre-existing set of legal victims' interests of individual and private character that upon their judicial acknowledgement can be converted into the right of expressing "views and concerns", provided that other elements of the legal test under Article 68 (3) are duly satisfied. Indeed, this suggests the need in a preliminary judicial determination of what kinds of interests can qualify as "personal" to serve as the legitimate grounds for victim participation under Article 68(3).[149] Akin to this concept is the notion of "tangible and particularized interests" promoted by the OPCD.[150] The next paragraph will address the way how the Chambers of the Court have approached the issues of scope and contents of the "personal interests of the victims".

3.4.3. Interpretation by the Chambers

Although logically the definition of the "personal interests of the victims" is the matter to be addressed and resolved prior to answering the question of 'where the personal interests of the victims are affected', this issue has not been dealt with by the Court in a principled and systematic manner from the outset. The concept is in a state of flux and has been developed in a piecemeal fashion, in the form of a loose and from time to time expanding list of examples of the personal interests, rather than stemming from a profound analysis of the rationales of victims' participation under

of institutional bias"; see at 139: "once a claim begins to assert specifically what victims should want, as opposed to simply relaying empirical conclusions about what victims actually want, it becomes paternalistic. Although not in and of themselves a bad thing, paternalistic arguments are dangerous insofar as they mystify their subjects, imposing assumptions and (value-dependent) preferences under the guise of fact".

147 Cf. with WCRO's opinion, see *supra* note 125 and accompanying text.

148 The credit of introducing this term belongs to Emily Haslam who, to this author's knowledge, employed it first in the context of the discourse on victim participation before the ICC: see Haslam, *supra* note 1, at 326. From the outset, it became a regular turn of speech used by the OTP in its submissions urging the Court to limit victim participation across cases and situations: see, among many, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, para. 28.

149 The OTP seems to advance, on the basis of the 'judicially recognised personal interest' concept, the argument that this interest "must relate to the specific subject matters being discussed within the Court proceedings in which [victim] is applying to participate", thus linking it with a restrictive interpretation of "proceedings". See text accompanying *supra* note 38. See, e.g. Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 28 February 2007, ICC-02/04-85, para. 30.

150 See e.g. OPCD Response to the submissions of the Legal Representatives, 4 March 2008, ICC-01/04-484, para. 17.

Article 68 (3). Frequently, the Chambers made their conclusions as to whether personal interests are affected based on vaguely formulated notions of the Court's mandate, without having first addressed what interests qualify as "personal interests".[151] Against this background, the Appeals Chamber's jurisprudence aiming at the delimitation of the scope of the "personal interests" as "private interests" and identification of some unequivocal examples has been a notable development towards structuring the Court's perception of what "personal interests" under Article 68 (3) implies.

3.4.3.1. Pre-Trial Chambers

In its first decision on victims' participation of 17 January 2006, PTC I held that the personal interests of the victims "are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations for the harm suffered".[152] One may wonder whether all three indicated goals embody distinct personal interests of the victims, including those that traditionally pertain to the public domain, or whether the former two were only mentioned to satisfy the interest in obtaining reparations. The wording employed seems to suggest that all indicated interests are regarded by the Pre-Trial Chamber as autonomous "personal interests".

In a subsequent decision on the arrangements of victim participation at the confirmation hearing, PTC I appears to suggest that it is a "personal interest" of the victims: (i) "to help contribute to the prosecution of the crimes from which they allegedly have suffered", and (ii) "to, where relevant, subsequently be able to obtain reparations".[153] Thus, it is a consistently upheld position of PTC I to accept, in addition to the interest in reparations, the 'punitive' interest in having the accused prosecuted.

3.4.3.2. Appeals Chamber

In a decision of 13 June 2007, the Appeals Chamber denied participation to four victims earlier admitted in the *Lubanga* case (a/0001/06 to a/0003/06 and a/0105/06) in a proceeding considering whether the appeal brought against the decision confirming charges pursuant to Article 82 (1) (b) of the Statute is admissible, on the ground that the victims had not established their personal interest in relation to that particular proceeding.[154] The decision was accompanied by two separate opinions – the one concurring with the majority, by Judge Georghios Pikis, and another dissenting

151 Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 5-10: "That the personal interests of a victim are affected in respect of proceedings relating to the very crime in which that victim was allegedly involved seems *entirely in line with the nature of the Court as a judicial institution with a mission to end impunity for the most serious crimes*" (emphasis added).

152 *DRC* victim participation decision, *supra* note 13, para. 63.

153 Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *supra* note 33, at 5.

154 *Lubanga* appeal decision on the joint application of victims, *supra* note 15, paras. 24 and 29.

on reasons, by Judge Sang-Hyun Song who found that, while the "personal interests" standard was duly met, the participation of victims in the proceeding at hand would be inappropriate. The decision and attached individual opinions are important not only because they clarify the contents of the "judicially recognised personal interests", but also because they present the first instance when the scope and nature of the personal interests of the victims before the ICC are discussed specifically and in more detail.

In addition to the reduction of the potential for continuation of crimes or further violence earlier recognised by the Chamber,[155] the majority indicated that the "clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations".[156] In his opinion, Judge Pikis added to this list the interest in "the elicitation of evidence revealing the injury inflicted upon victims by the crime", and the "protection and support in the proceedings".[157]

Regarding the scope of the "personal interests of the victims", the majority of the Appeals Chamber seems to have been impressed by the argument advanced by the accused urging the strict interpretation of that notion,[158] as it emphasized the importance of assessing in each case as to "whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor".[159] Judge Pikis bolstered this conclusion by an argument that, according to the Statute, "[t]he burden of proof of the guilt of the accused lies squarely with the Prosecutor" and "[i]t is not the victims' domain either to reinforce the prosecution or dispute the defence".[160] The determination of the scope of personal interests by the majority and by Judge Pikis appears correct, for the following reasons.

155 *Lubanga* appeal judgment on provisional release, *supra* note 59, para. 54, recognising the victims' concerns expressed in: Observations of victims a/0001/06, a/0002/06 and a/0003/06 in respect of the application for release filed by the Defence', 9 October 2006, ICC-01/04-01/06-530-tEN, paras. 11-15.

156 *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 28.

157 Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 14 and 16. At para. 16, Judge Pikis also mentioned "a right of participating victims … to express their position in any hearing held for sentencing purposes" (Rule 143); however, it is difficult to say whether Judge meant that the interest to influence sentencing (e.g. in a form of victim impact statement) can be inferred from that Rule.

158 *Prosecutor* v. *Lubanga,* Corrigendum to the Response to the applications to participate in the appeal proceedings related to the Decision on the confirmation of charges, 16 May 2007, ICC-01/04-01/06-901-Corr-tEN, paras. 25-29.

159 *Lubanga* appeal decision on the joint applications of victims, *supra* note 15, para. 28.

160 Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint applications of victims, para. 16.

The idea of equating participation of victims to prosecutorial agency has no legal basis in the Court's legal framework or the other sources of applicable law.[161] In this case, the absence of explicit entitlements should be interpreted as excluding them,[162] because the Statute contains, as will be shown, other explicit provisions that would be compromised, should the existence of the inherent *droit de poursuite* of victims be presumed. The assumption of such a prosecutorial right would imply the possibility of adducing evidence proving guilt and thus inevitably lower the prosecution's burden of proof in the way inconsistent with Article 66 (2) of the Statute, to the prejudice the accused. Furthermore, the attribution of a private prosecutorial function would encroach upon the mandate of the Prosecutor as an independent and impartial organ vested with an exclusive power to investigate and prosecute under the Statute.

Nonetheless, one commentator has adopted a sweeping assumption that, before the ICC, "[v]ictims may … act as private prosecutors and be allowed to argue defendant's guilt in and of itself, especially since obtaining damages is contingent on a defendant being proven guilty".[163] In the view of the present author, this argument is based on a number of flaws. Firstly, the right to obtain damages exists *vis-à-vis* the person who *has been found guilty* and by no means with respect to an innocent person. If one were to argue that the *interest* in reparations encompasses the interest in prosecution (although these were strictly delimited by the Appeals Chamber's majority!), the *right* to pursue reparations does not as such entail the right to private prosecution.[164] The two legal actions are distinct, and deserve to be kept apart, inasmuch as the prosecutorial function is entrusted to and duly exercised by the public prosecutor. Even if victims are entitled to adduce evidence towards conviction of the accused, this does not convert them automatically into "private prosecutors"; the special example of countries following the hybrid model of victim participation may not embarrass this distinction, as the both roles are intrinsic in the single title of participation.[165]

The other reasons advanced by this commentator to argue in favour of the assumption that victims at the ICC possess implicit prosecutorial powers are of policy character and sit uncomfortably with the nature of the ICC as a judicial institution,[166]

161 Regarding the internationally recognised human rights standards (Article 21 (3) of the Statute), refer to *infra* notes 176-178 and accompanying text; on the general principles of law (Article 21 (1) (c) of the Statute), see under *infra* section 4.2.5.

162 The so-called *expressio unius est exclusio alterius* argument, see in Jouet, *supra* note 10, at 267. However, Jouet later abstains from employing it and contradictorily concludes that the power of "private prosecution" can nevertheless be presumed (see at 269), as will be argued further, on mistaken grounds.

163 Jouet, *supra* note 10, at 267 and 283.

164 On the distinction between interests and rights, see *supra* note 129 and accompanying text.

165 See *infra* notes 211-212 and accompanying text.

166 See Jouet, *supra* note 10, at 269: "broad participation would also be consistent with victims' need for a forum to speak and be heard". It is questionable whether the "need for a forum" can and should reasonably be expected to be satisfied by the ICC. The ICC is

or are incomprehensible from a legal viewpoint,[167] and will not be specifically addressed here. At this juncture, it is apt to turn to the arguments raised by Judge Song in his separate opinion.

Although agreeable to the dismissal of victims' applications in principle, Judge Song dissented from the majority and Judge Pikis' reasoning and argued that, while their participation in the admissibility of appeal proceeding would be inappropriate, this preliminary issue, just as the appeal itself, does affect their personal interests.[168] This conclusion is based on a different interpretation of the scope "judicially recognisable personal interests" which embraces, in addition to the interest in obtaining reparations, the interest of "seeing the Appellant being prosecuted" and "that justice is done".[169] Judge Song opines that victims of crime have "a particular interest that the person allegedly responsible for his or her suffering is brought to justice [which] goes beyond the general interest that any member of society may have in seeing offenders held accountable".[170]

Firstly, he argues that such interest can be established on the basis of a number of provisions in the ICC legal framework: (i) Article 65 (4) and Rule 69 providing that, when the parties agree on an alleged fact, a Chamber may still decide that "a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims" and either request the Prosecutor to present additional evidence or reject the admission of guilt; (ii) Rule 93 and 191, according to which a Chamber may seek the views of victims of the granting of an assurance to a witness or an expert "that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom".

As to the first argument, one may doubt as to whether the "personal interest" may be inferred from these norms. It is important to note that Rule 69 does not concern the promotion of the "*personal* interests of victims" by the victims themselves, as is the case in the context of participation under Article 68 (3), but deals with the Court's protection of the collective interests of victims *in abstracto* as a segment of the "inter-

neither a Truth and Reconciliation Commission nor a restorative process: for a more detailed discussion, see *infra* section 4.1.

167 Based on a far-fetched analogy with the continental European systems, Jouet (ibid., at 269) claims that "victims at the ICC can appeal a prosecutor's decision not to investigate or prosecute a case". By contrast with the right to make representations before the Chamber when notified, pursuant to Rule 92 (2), of the Prosecutor's decision not to proceed in case of a referral, the victims have the right to "appeal" such decision neither under the Statute nor under the cited by Jouet Rule 107.

168 Separate dissenting opinion of Judge Sang-Hyun Song, *Lubanga* appeal decision on the joint applications of victims, paras. 3-4, 17-19.

169 Ibid., paras. 10-12.

170 Ibid., para. 13.

ests of justice".[171] This line of reasoning seems to "conflate individual victim's interests with the interests of a wider collective victimhood".[172]

Similarly, it is questionable whether a judicially recognisable personal interest can be derived from Rule 93. This provision does not concern the promotion of "personal interests" as of right, but regulates the possibility for the Court to take into account the views of victims when deciding on any issue and where appropriate. It is submitted that the rationales underlying the participation of the victims under one legal regime cannot be easily transposed to the other.

Secondly, Judge Song refers, *inter alia*, to a number of decisions by human rights courts which can be interpreted as recognizing the "special interest" of victims that the alleged perpetrators ought to be brought to justice.[173] This finding should, in his view, be taken into account in the interpretation of the notion "personal interest" in accordance with Article 21 (3) of ICC Statute.[174] On the face of it, this argument is valid, given that such interests seem to be inherent in the right of victims to an effective investigation and prosecution as a part of the right to an effective remedy and access to justice recognised by the human rights (soft) law[175] and jurisprudence.[176] However, human rights law does not explicitly deal with the notion of the "*personal* interests of the victims" as a criterion for admitting them into criminal proceedings. Being largely silent on the specific requirements governing the role of victims within criminal process,[177] human rights law and jurisprudence do not appear to provide conclusive guidance as to the interpretation of "personal interests" under Article 21

171 As to the correlation between "interests of victims" and "interests of justice", elsewhere in the Statute and Rules "interests of victims" are treated as a category: (i) distinct from but congruous with "the interests of justice" (see Rule 73 (6) of the RPE); or (ii) at tension with 'the interests of justice' (Article 53 (1) (c) and (2) (c) of the ICC Statute).

172 Haslam, *supra* note 1, at 326.

173 *Blake* v. *Guatemala*, Judgement of 24 January 1998, IACHR (Ser. C) No. 36 (1998); *Kiliç* v. *Turkey*, Judgement of 28 March 2000, Application no. 22492/93.

174 Separate dissenting opinion of Judge Sang-Hyun Song, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 16.

175 Article 2 (3) of the ICCPR; Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN GA Resolution adopted on 21 March 2006, 60th session, UN Doc. A/RES/60/147, para. 4, 11(a), 12-14.

176 On the state duty of effective investigation: *Velásquez-Rodríguez* v. *Honduras*, Judgment of 29 July 1988, IACtHR (Ser. C) No. 4 (1988) 28 ILM 291, para. 174 *et seq*.; *Selmouni* v. *France*, Judgement of 29 July 1999, Application no. 25803/94, para. 79. For an overview, refer to M. Cherif Bassiouni, 'International Recognition of Victims' Rights', (2006) 6 *Human Rights Law Review* 203, at 226-230; R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', (2004) 26 *Human Rights Quarterly* 605, at 621 et seq., 645-646 (overviewing relevant communications by the Human Rights Committee).

177 Sluiter, *supra* note 55, at 191. Article 6(1) of the ECHR grants no right to a victim to institute a criminal prosecution him- or herself: *Helmers* v. *Sweden*, Judgement of 29 October 1991, Application no. 11826/85, 15 *EHRR* 285.

(3).[178] Moreover, even if it were otherwise, one must bear in mind the role and function of Article 21 (3). This provision elevates internationally recognised human rights to the status of a "general principle of interpretation" and it provides a framework for the application of the relevant sources of law by the Court.[179] But it does not serve as an open channel for the direct transposition of the practice of human rights courts into ICC law. This makes it necessary for the Court to recognise a particular kind of interest as a "personal interest" under the terms of Article 21 (3). As discussed at length above, by taking another avenue, the majority of the Appeals Chamber, including Judge Pikis have explicitly rejected the idea that the scope of this concept includes prosecutorial and punitive interests.

One may wonder what legal effect the findings of Appeals Chamber will have for proceedings before other Chambers. Although the reasoning of the Chamber is explicitly limited to "any determination *by the Appeals Chamber*",[180] it does not distinguish proceedings before it from any other proceedings possibly falling within Article 68 (3). This may imply that the Chamber intended to establish a general methodology concerning the application of this Article by the Court. While the doctrine of binding precedent is explicitly rejected in Article 21 (2) of the ICC Statute,[181] the binding force of *ratio decidendi* of the appellate instance for the purposes of adjudication by lower chambers is accepted in international criminal law.[182] This conclusion was supported by the ICTY. It may as well be valid for the ICC.[183] One might, however, question the binding legal force of the pronouncements by Appeals Chamber as to the contents

178 This is not to contradict the important proactive role of the human rights courts, in particular the ECHR, in extending the scope of application of respective instruments to victims of crime via the state obligation to effectively protect against the violations (mostly, under Article 2 and 3 of the ECHR): see further J. Doak, 'The Victim and the Criminal Justice Process: An Analysis of Recent Trends in Regional and International Tribunals', (2003) 23(1) *Legal Studies* 1, 11-16.

179 Pre-Trial Chamber I, *Prosecutor v. Lubanga,* Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 10; Pre-Trial Chamber I, *Prosecutor v. Lubanga,* Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, 19 May 2006, ICC-01/04-01/06-108, para. 7 (i).

180 *Lubanga* appeal decision on the joint application by victims, *supra* note 15, para. 28.

181 Article 21(2) of the ICC Statute: "The Court *may* apply principles and rules as applied in its previous decisions" (emphasis added). See also the contribution by V. Nerlich above in Ch. 17 of this volume.

182 ICTY, Appeals Chamber, Judgement, *Prosecutor* v. *Aleksovski*, Case No. IT-95-14/1-A, 24 March 2000, para. 113: "the Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its previous decisions is binding on Trial Chambers".

183 Ibid.: (i) "the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers"; (ii) "the fundamental mandate of the Tribunal cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law"; and (iii) the right of the accused

and scope of 'personal interests' insofar as these present an *obiter dictum* rather than reflect *ratio decidendi* of the decision to dismiss victims' applications.[184] It remains to be seen if the construction of the Appeals Chamber will be adopted by other Chambers of the Court, especially by PTC I whose views appear to conflict with the findings of the majority of the Appeals Chamber.

4. Choice of a model: ICC at the crossroads

4.1. Between retributive and restorative justice

As the above discussion shows, the determination of the kinds of personal interests of victims to be recognised for the purposes of participation under Article 68 (3) calls for fundamental choices to be made by the Court with respect to the rationales underlying victim participation. On a conceptual level, the choice will depend on what type of justice the ICC is mandated to deliver, and what role of victims may be inferred from the "object and purpose" of the Statute. The Court's determination is also likely to be influenced by its approach towards "ownership of the conflict", i.e. the question whether the crimes within the jurisdiction of the Court are to be perceived as primarily attacking "public" interests or as harming relationships between individuals.

It is widely recognised that the intention to repair the practical, legal and moral inadequacies of the *ad hoc* tribunals' approach towards treatment of victims within criminal procedure urged the drafters of the ICC Statute to endow them with the participatory rights, including the right to express their "views and concerns" under Article 68 (3).[185] Some authors conclude on that basis that the cause for the victim participation in the ICC proceedings is the aspiration to turn the Court into a mecha-

to have like cases treated alike; the aspiration for "a single, unified, coherent and rational corpus of law".

184 The applications were dismissed because no personal interests directly affected by the preliminary issue were stated by victims, rather than because the indicated interests in the appeal (continuation of proceedings and possibility of seeking reparations) were not judicially recognisable: *Lubanga* appeal decision on the joint application by victims, *supra* note 15, para. 26.

185 Commentators indicate in particular the following deficiencies of an *ad hoc* model: fallacious presumption that the interests of victims coincide with the interests of the Prosecution leading to neglect of the former set of interests (plea bargaining being an example); submission of their functions to the procedural tactics and trial strategy of the parties and the Court; routine instrumentalisation of victim testimony; lack of positive effects on reconciliation in the target countries, etc. See Jorda & de Hemptinne, *supra* note 1, at 1388; 1394-1397; Zappalà, *supra* note 4, at 221; Haslam, *supra* note 1, at 318-319 and 325; Å. Rydberg, 'Victims and the International Criminal Tribunal for the Former Yugoslavia', in H. Kaptein and M. Malsch (eds.), *Crime, Victims and Justice: Essays on Principles and Practice* (2004), 126-140, at 131; Donat-Cattin, *supra* note 23, at 871.

nism delivering "restorative justice", which would complement its traditional retributive goals.[186]

It is submitted that this claim is either erroneous or that it should, at least, not be interpreted as suggesting that proceedings before the Court qualify as a mechanism of "restorative justice" and the participation of victims in those proceedings as a "restorative justice" process.[187] The judicially recognisable personal interests of victims are inextricably connected to the functions of the ICC process and the paradigm of justice it embodies.[188] Adding to the judicial mandate of the Court the so-called "restorative" goals would signify a shift in that paradigm and, as a consequence, have a profound impact on the rationale of victim participation, its modalities and the scope of the judicially recognisable personal interests. Furthermore, as it will be shown below, the very possibility of adding restorative goals to the traditional retributive goals is questionable.

This author hopes that he is not doing injustice to the differences between various restorative justice theories by averring that they generally promote practices that are complementary (reductionist) or alternative (abolitionist) rather than integratable into retributive justice.[189] One of the fundamental features of the restorative paradigm is that retribution is absent from its value set.[190] As far as the role of victims is concerned, a conventional understanding of the term "restorative justice" as reflected on the 2006 UNODC Handbook envisages: (i) a central role for a victim, offender and, where appropriate, the community affected by crime in the resolution of matters arising from the crime, generally with the help of a facilitator; and (ii) an equal emphasis on the process and on the outcome.[191] Thus, in any restorative justice programme, the participation of victims is undertaken to a significant extent for the own sake of the process. This implies in particular that victims "must be allowed to tell

186 See, for instance, WCRO Victims Report, *supra* note 12, *passim* that uses "restorative justice" as a framework for the assessment of the ICC's current victim-related practice, and at 2: "The primary motivation behind the creation of a victim participation scheme within the ICC context was a desire to achieve restorative – as opposed to strictly retributive – justice"; Haslam, *supra* note 1, at 315: "The Rome Statute is taken to embrace a more expansive model of international criminal law that encompasses social welfare and restorative justice".

187 The explanation by the WCRO makes clear that they use the term "restorative justice" to refer to the position of victims *within* criminal justice system (WCRO Victims' Report, *supra* note 12, at 8). It will be shown below that such interpretation is not justified.

188 Haslam, *supra* note 1, at 326. See also A. Ashworth, 'Some Doubts about Restorative Justice', (1993) 4 *Criminal Law Forum* 277, at 282: "Any [victims'] rights have to be justified by reference to the rationale for the criminal process and the relevance of victims' wishes in respect of each stage of the process".

189 Heikkilä, *supra* note 18, at 39. For an overview of restorative theories, see ibid., at 36-39.

190 See generally K. Pranis, 'Restorative Values', in G. Johnstone and D. van Ness (eds.), *Handbook of Restorative Justice* (2007), 59-63.

191 UNODC, *Handbook on Restorative Justice Programmes* (2006), at 7. The Handbook indicates such restorative justice programmes as victim-offender mediation, community and family group conferencing, circle sentencing, etc.

their story" and "speak first in any forum in order to avoid an imbalanced focus on the offender's issues that may result in the victim withdrawing from the discussion or challenging the offender".[192] Yet, with respect to the ICC, it has been recognised that the limitations inherent in the nature of the judicial forum will necessarily limit the possibility for the victims to tell their story, as "the Court is unlikely to be interested in hearing a story for its own sake".[193]

Indeed, the possibility of obtaining reparations and more active role for victims in the settlement of their conflict with an offender are the elements typical of "restorative justice". However, these aspects are not exclusive to it but are shared also by the systems embodying the "victim-oriented justice", which is too characterized by a fairly favourable treatment of victims within criminal proceedings. This paradigm stands for the type of criminal justice meted out by those states that, in response to the tensions and inadequacies exposed by the Victim Rights movement,[194] have reformed their respective criminal justice systems not only by improving the standards of treatment and services provided to victims ("services model"), but also by accommodating their interests within criminal procedure ("procedural rights model").[195]

"Victim-oriented justice" should be distinguished from "restorative justice", on the ground that it aspires to integrate victims into the criminal process and to make the latter more victim-friendly without altering or replacing its core goals.[196] In contrast to "restorative justice", the victim-oriented perspective is deferential to the traditional retributive values of criminal justice.[197] Apparently, the retributive values are by no means alien to the ICC, whose primary goal envisaged in the Preamble of the Statute remains to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished" and "enhancing international coopera-

192 Ibid., at 60.

193 Haslam, *supra* note 1, at 326.

194 For a useful overview of the Victim Rights Movement, see Heikkilä, *supra* note 18, at 34-36.

195 On a distinction between the "services" model and "procedural rights" model, see J.J.M. van Dijk, *supra* note 135, at 352-353; Ashworth, *supra* note 188, at 281-282 (note, however, that Ashworth seems to use the term "restorative justice" in an unusually broad sense encompassing also the "victim-oriented justice").

196 For the distinction between "victim-oriented criminal law" and "restorative justice", see Y. Buruma, 'Doubts on the Upsurge of the Victim's Role', in Kaptein and Malsch (eds.), *Crime, Victims and Justice: Essays on Principles and Practice, supra* note 185, 1-15, at 2-4. In this sense, note also Cavadino and Dignan's distinction between, on the one hand, the 'retributive model victim-based measures' providing victims with participatory rights that affect the operation of criminal justice without adjusting its rationale and, on the other hand, 'restorative justice measures' that negate or question that rationale: J. Dignan and M. Cavadino, 'Toward a framework for conceptualizing and evaluating models of criminal justice from a victim's perspective', (1996) 4(3) *International Review of Victimology* 153-182 and Heikkilä, *supra* note 18, at 41.

197 One of the major US restorative theorists, Howard Zehr, postulated that formal criminal justice is based on retributive rather than restorative goals: H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990), 232-233.

tion" to those ends. Emphasis on the nature of crimes within ICC jurisdiction to be "of concern to the international community as a whole" alludes to the strong communal interest in such crimes relevant for establishing the public ownership over the conflict that they underpin.

It can be argued that the right to request reparations under Article 75 is to be seen as a 'restorative' add-on to the process essentially guided by retributive values, because it contributes directly to the fulfillment of restorative goals.[198] However, this element is an afterthought rather than a cornerstone of ICC procedure – the criminal proceedings take place irrespective of whether or not requests for reparations have been made. Of course, the participation of victims under Article 68 (3) would normally be linked to the subsequent requests for reparations under Article 75, in the sense that it will very likely be aimed at substantiating the grounds for such requests; however, it is not a precondition to making the requests as such, given the autonomous character of the two participatory regimes. While victim participation under Article 68 (3) is indeed hoped to contribute to the better attainment of restoration and reconciliation in the communities concerned more generally,[199] these should be conceived as its consequential purposes rather than immediate objectives.

Although not void of potentially healing and restorative effects, the participatory rights of victims do not automatically turn the ICC into a restorative justice institution,[200] nor do they themselves reach beyond measures advocated by the non-punitive model of victim-oriented justice.[201] As evidenced by the drafters' extensive reliance on the UN Victims Declaration and Van Boven Principles,[202] the victim empowerment at the ICC was inspired primarily by the Victim Rights movement rather than by any "restorative justice" ideology.[203]

While the Court moves away from a purely retributive justice model pursued at the ICTY and ICTR, it is more legitimate to conceptualize it in terms of victim-oriented justice with retributive values at the core. This entails a different prioritization

198 Bitti & Friman, *supra* note 6, at 457, aptly characterizing reparations as "the most important restorative element in the Statute".

199 Ibid.: "the Court's role should not purely be punitive but also restorative"; Stahn et al., *supra* note 17, at 221.

200 In a similar vein, see M. Findlay and R. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (2005), at 284-285.

201 "[A] branch [of victims' movement] which aims at improving the status of victims before criminal courts by granting them procedural rights… proposing changes to the existing criminal justice system, which would make the system more victim-friendly without simultaneously making the system less defendant-friendly": Heikkilä, *supra* note 18, at 35.

202 Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, 24 May 1996, UN Doc. E/CN.4/Sub.2/1996/17.

203 This is not to deny that the restorative justice thinking had an *indirect* influence via victim movement. Note that the WCRO view that "restorative justice" as the goal of the ICC was "heavily influenced" by the UN Declaration could be interpreted as suggesting – mistakenly – that the UN Declaration is a "restorative justice" document. See WCRO Victims Report, *supra* note 12, at 2.

of goals in terms of process and rationales for victims' participation than a restorative mechanism proper. Whereas in the restorative justice system a victim participates to participate, in the victim-oriented justice system a victim participates to influence the procedural decision-making in a self-beneficial way: by obtaining compensation, by ensuring own safety and preventing further commission of crime, or by praying the Court to mete out a harsher sentence to the offender. The rationales for victim participation along these lines are linked to the nature of the judicial mandate, which is as such lacking in the restorative justice paradigm. For these reasons, applying the "restorative" label to the ICC is inaccurate and engenders risk of overstating the ambit and purpose of the victim-serving function that the Court can reasonably be expected to fulfil.[204]

4.2. Models of victim participation

4.2.1. General Remarks

Should the above claim on the propriety of conceptualizing the ICC in terms of victim-oriented justice be upheld, it would be reasonable to consider in more detail, for the purpose of identifying the concrete rationales underlying victim participation under Article 68 (3), the models of victim-oriented justice discernible on the basis of a comparative inquiry into the national criminal procedures. On a more specific level, the Court's interpretation of such rationales will be shaped by the extent to which the Article 68 (3) participatory regime is perceived to embody a particular model (or combination of models) of victim participation familiar from the national context or, which is even more likely, as the combination of elements of various models making up a *sui generis* model.

This inquiry is not aimed at finding a perfect match to the ICC model among national jurisdictions. Compared to the interpretation of the vague provision of Article 68 (3) in light of the "object and purpose",[205] the technique of analogy appears to be a more constructive and safe method to those ends. While not attempting to squeeze the ICC participation scheme into the archetypes habitual to national criminal justice systems, it should provide one with a valuable insight into the advantages and tensions related to various models of victim participation in the criminal proceedings. Thus, drawing parallels with the national context may contribute to a better comprehension of the institute of victim participation at the ICC and to help the Court make an informed – as opposed to presumption-based – choice as to what model, if

204 Cf. with WCRO Victims Report, *supra* note 12, at 2, indicating the goal of "serving the interests of victims" on an equal footing with "punishing wrongdoers" and discussing the need to balance it with the retributive values of fairness and efficiency. Rightly dismissing the proposition that Article 68 (3) allows for "balancing" between the victims' rights and the rights of accused: Jouet, *supra note* 10, at 280.

205 See Jouet, *supra* note 10, at 269: "It is logical to assume that the "personal interests" and "views and concerns" of victims will relate not only to their needs for financial compensation but also to their need to see that culprits get reasonable retribution… Naturally, these assumptions would not be necessary if the victim standing rule was not so vague".

any, should serve as a fallback for interpreting the Article 68 (3) participatory regime. Indeed, some commentators have contended that "the ICC victim standing rule is rather similar to victim standing rules in continental European systems, somewhat analogous to the right of private prosecution in England and Ireland, and markedly different from American criminal procedure".[206] Thought-provoking claims such this one call for detailed consideration of the models that serve as a comparative material.

National criminal justice systems present a rich variety of diverse arrangements towards the empowerment of victims in the framework of criminal process, as opposed to their witness function. Methodologically, this makes a country-per-country approach in principle preferential to the classification along the common law *v.* civil law lines, which is fraught with misleading generalisations.[207] However, as a comprehensive overview of the national arrangements towards providing victims with a standing in criminal procedure is neither possible nor necessary in this context,[208] conducting discussion in terms of more abstract models appears appropriate.[209]

To this end, one can confront the ICC model with the following forms of victim participation in national criminal proceedings: (i) civil party; (ii) participation in the prosecution, in the form of private, secondary or auxiliary prosecutor; and (iii) limited participation as provider of impact statements. The rationales of victim participation and, hence, the judicially recognised personal interests of the victims depend on the route that the victim participation takes in a concrete instance. For example, whilst a private prosecutor may legitimately pursue prosecutorial interests as personal interests, a civil party's only recognisable personal interest is in obtaining civil damages from the accused within criminal process, which effectively confines its participation to the issues intrinsically concerned with their civil claim.[210] These rationales can also be multiple, in case of a combination by a victim of several procedural roles. Some civil law jurisdictions allows for such a hybrid model, when a civil

206 Jouet, *supra* note 10, at 257.

207 Zahar & Sluiter, *supra* note 10, at 71.

208 The objective of this inquiry is not to compare how the scope of participatory rights varies between different counties, but to set out the major forms of victim participation in general terms. For comprehensive country-per-country analyses of the position of victims of crime in Europe, see an impressive study by M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (2000).

209 Understandably, an imminent sacrifice to be expected in this connection is the insensitivity of discourse to the numerous – and not always negligible – differences between various countries that may fall within the same model. Using the words of Herbert Packer, the identified models "are not labeled Is and Ought… [They] merely afford a convenient way to talk about the operation of a process… [and] are distortions of reality": H.L. Packer, *The Limits of the Criminal Sanction* (1968), 153-154.

210 In a similar vein, see Jouet, *supra* note 10, at 268.

party also participates on the prosecution side by way of advancing own penal claims (for instance, Finland and Sweden,[211] France and Belgium[212]).

4.2.2. Civil party

The civil adhesion model is alien to common law legal systems but can be encountered in every civil law jurisdiction.[213] Victims are joined to the ongoing criminal procedure conducted by the public prosecution as parties introducing a civil claim with a view to obtaining reparations for damages caused by the crime (*partie civile* in France;[214] *actor civil* in Argentina;[215] *Privatbeteiligter* in Austria;[216] *burgerlijke partij* or *partie civile* in Belgium[217]). On a conceptual level, it conveys the message that the offender is held responsible for damage to both state and individual interests. In practical terms, this model is underpinned by a consideration that the resolution of civil claims in a related criminal procedure spares victims' efforts victims' efforts and resources that would otherwise be spent on the initiation and conduct of civil proceedings.[218]

The capacity of a civil party entitles, among others, to adduce evidence towards providing grounds for an award of damages and to put questions to the accused and witnesses, but only insofar as it is relevant to substantiating the claim of damages.[219] The limitations inherent in participation as a civil party are that the civil claim is subordinate to the nature and objectives of criminal proceedings: on the one hand, the Court may decide to refer the claim to the civil court if it is capable of diverting too much court resources from the penal litigation and, on the other hand, the termina-

211 Termed *asianomistaja* and *sakagäre* respectively: see Heikkilä, *supra* note 18, at 54-55.

212 Termed *plainte avec constitution de partie civile*: M. Chiavario, 'The Rights of the Defendant and the Victim', in M. Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2002) 543.

213 E.g. Argentina, Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Poland, Portugal, Russia, Sweden, Switzerland and Turkey: see Brienen & Hoegen, *supra* note 208, at 1069; A. Carrio and A.M. Garro, 'Argentina', in C. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (1999) 46.

214 Articles 85 and 87 of *Code de procédure penale*. See Brienen & Hoegen, *supra* note 208, at 318-319.

215 Article 87-96 of *Código Procesal Penal*; Article 29 of the *Código Penal*.

216 Ss. 47 of *Strafprozeßordnung* of 9 December 1975 (StPO).

217 Articles 63, 66, 67 of *Wetboek van Strafvordering*.

218 On the criticisms of the model, see M. Joutsen, 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems', (1987-1988) 34 *Wayne Law Review* 95, at 116-117: it requires knowledge of procedure by the victim; it may also delay and complicate criminal process, as criminal judges may lack experience in civil procedure. See also M. Maguire & J. Shapland, 'The "Victims Movement" in Europe', in A.J. Lurigio, W.G. Skogan and R.C. Davis (eds.), *Victims of Crime: Problems, Policies, and Programmes* (1990), at 216.

219 See van Dijk, *supra* note 135, at 354; J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', (2005) 32 *Journal of Law and Society* 294, at 311; R. Henham, *Punishment and Process in International Criminal Trials* (2005), at 68.

tion of a criminal case automatically leads to a collapse of the joined civil claim, with the remaining possibility to file an identical claim with a civil court.[220]

The right of victims at the ICC to submit requests for reparations under Article 75 combined with their participation under Article 68 (3) indeed makes an analogy with the *partie civile* model appropriate, although this language is missing from the ICC legal framework.[221] The participation of victims under Article 68 (3) is not a precondition to obtaining reparations (a short cut is to file a request under Article 75), nor is its objective – the expression by victims of views and concerns – substantively confined to the reparations-related issues. Thus, the Article 68 (3) participation pursues broader goals and may not be equaled to a *partie civile* system.

4.2.3. Participation in the prosecution

The model allowing for victim participation in the proceedings in a form of conducting or contributing to the prosecution of the offence is represented by three major forms, under which victim has the role of: (i) private prosecutor; (ii) secondary prosecutor; and (iii) auxiliary prosecutor. While these prosecutorial roles are subject to certain restrictions depending on the type of crime or public prosecutor's decisions, in a handful of states victims enjoy full prosecutorial rights,[222] frequently availing themselves of all three modes of participating in the prosecution (for example, the institute of *målsägande* as injured party in Sweden).[223]

The private prosecution model, which is described as "a remnant of the days when a criminal offence was essentially a matter to be settled between the individuals directly touched by the act",[224] can be encountered in a number of civil law states (*querellante particular* in Argentina,[225] *citation directe* in France,[226] *acción particular* in Spain[227]) and common law countries (notable examples are England and Wales, Cyprus, Australia and New Zealand).[228] The victim-prosecutor possesses full pros-

220 Brienen & Hoegen, *supra* note 208, at 1069. The *res judicata* effects of an acquittal for the purpose of civil proceedings varies from country to country: in Norway, for instance, the award of damages against a person acquitted in a prior criminal procedure is not precluded.

221 Cf. with the Internal Rule of ECCC that explicitly refer to the 'civil party action by victims' (Rule 23) and in general more coherently embody the pure *partie civile* model, which can be explained by the fact that Cambodian law in this respect is largely based on French law.

222 See Stahn *et al.*, *supra* note 17, at 220, referring to the example of Spain; see also Heikkilä, *supra* note 18, at 140.

223 Ss. 8, Chapter 20 of *Rättegångsbalk* (Code of Judicial Procedure, *RB*).

224 Brienen & Hoegen, *supra* note 208, at 1063.

225 Articles 82-86 of *Código Procesal Penal*.

226 See Brienen & Hoegen, *supra* note 208, at 321-322.

227 Ibid., at 857-858.

228 Citing relevant precedents from England and Wales, as well as Cyprus, see Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 11, note 25. Interestingly, in England and Wales, private pros-

ecutorial rights, such as bringing charges against the accused before the magistrate, conducting prosecution and taking decisions on its termination. The efficiency and significance of this model may be reduced due to the high costs incurred, especially when legal aid is not readily available, the lack of legal expertise on the part of victims and other inconveniences.[229] In particular, the victims' penal initiative is moderated by control mechanisms in the form of the obligation to compensate the costs of a trial where the suit is dismissed by public authorities or leads to an acquittal,[230] and the potential for civil (and possibly criminal) liability for *male fide* prosecution.[231]

In most countries, private prosecution is possible only in relation to a special category of crimes. Matti Joutsen sets forth four principal policy reasons for designating private prosecution (and complainant) offences: (i) if it is petty so that public order is not implicated; (ii) if the victim's attitude is critical in establishing the fact of crime (the complainant offences such as libel and defamation); (iii) if prosecution might harm social (family) relations between the victim and offender; (iv) even if the crime is serious, public prosecution may violate victim's right to privacy or other interests outweighing the public interest (e.g. crimes of sexual violence).[232]

There are sufficient reasons why the ICC victim participation cannot be analogized to a "private prosecution" model, which, as shown, "is largely limited to minor crimes in which there is no public interest in prosecution".[233] Firstly, it is apparent that crimes under ICC jurisdiction, by virtue of their extreme gravity and, as observed above, very strong public interest dimension reaching far beyond the boundaries of the communities directly affected, are not "private prosecution offences". Secondly, the victims possess no right to initiate the investigation and prosecution, which is the prerogative of the Prosecutor; their role under Article 15(1) could at best be described as "crime-reporting".[234] Awarding victims with the *droit de poursuite* at the ICC would lead to an unbearable prejudice to the accused that would potentially have to face thousands of private accusers, and undoubtedly render the ICC dysfunctional due to the overburdening of the system. Thirdly, the ICC Statute does not establish

ecution, including the right to request the court to issue a summons may be exercised, by any member of the public (although this vehicle is very rarely used): Brienen & Hoegen, *supra* note 208, at 258-259.

229 Joutsen, *supra* note 218, at 102 and 113; Garkawe, *supra* note 145, at 598.

230 As examples of many jurisdictions show, the obligation to pay the costs of a trial where the private action does not succeed is a characteristic element of the institute of private prosecutions. e.g., s. 390-1 StPO (Austria); ss.162 and 194 of the *Wetboek van Strafvordering* (Belgium); s. 8, ch. 20 of *RB* (Sweden). See Brienen & Hoegen, *supra* note 208, at 78 and 137.

231 See Chiavario, *supra* note 212, at 545.

232 See Joutsen, *supra* note 218, at 98-99 (footnotes omitted); see further id, *supra* note 76, at 152-156.

233 Ibid., at 112. See also Brienen & Hoegen, *supra* note 208, at 1063.

234 The importance of the independent position of the Prosecutor is indicated as a major reason why *droit de poursuite* for victims is undesirable in international criminal procedure: Sluiter, *supra* note 55, at 194.

the traditional control mechanisms to prevent abuse, such as the legal responsibility for a false claim or liability to pay costs of the trial in case of acquittal, nor can these be inferred from the ICC legal framework.

The participation of victims in the *secondary or subsidiary prosecution* model that is found in some civil law countries (e.g. *Subsidiarankläger* in Austria,[235] subsidiary action of aggrieved party in Norway[236]) is triggered by the decision of public prosecutor not to proceed with the case.[237] The victims (who usually have joined as civil claimants) can initiate or take over the investigation and prosecution and enjoy powers comparable to those of the public prosecutor,[238] with some qualifications (e.g. on the right to appeal). In case of such participation, they are liable to pay the costs of the trial in case of acquittal.[239] Given that analogous right to replace the Prosecutor where he or she decides not to investigate or prosecute is clearly not envisaged under the ICC legal framework, this model appears to be irrelevant for the purposes of drawing parallels with the ICC.

Finally, some national legal systems provide for the possibility of victims to participate on the side of prosecution as *auxiliary* or *accessory prosecutors* (e.g. the institute of *Nebenkläger* in Germany[240] and Austria[241]). While the bulk of prosecution is done by the public prosecutor, this role entitles victims to attend the trial, even if he or she is to be heard as a witness, to adduce additional evidence, to provide input on the examination of witnesses by putting question to them and by contesting the admissibility of questions and to be heard in court with respect to the charge.[242] Joutsen underlined that this model is significant because, firstly, it provides victims with a possibility of expressing their "views and concerns" and, secondly, relieves victims of the prosecutorial burden, which is imposed on the public prosecutor.[243] The third feature to be added is that auxiliary prosecutors run no financial risks in connection with the possible acquittal. Should victims before the ICC be allowed to lead and challenge admissibility of evidence and enjoy other quasi-prosecutorial rights, the ICC victim participation scheme may be considered to embody to a large extent the *auxiliary prosecution* model. This will be addressed in the synthesis below.

4.2.4. Allocution

In most common law jurisdictions, the re-conceptualization of crime as a harm to public rather than individual interests and the taking over of prosecutorial business by public agencies since the early nineteenth century led to a noticeable decline of

235 S. 48 StPO (Austria). See Brienen & Hoegen, *supra* note 208, at 74.

236 § 406 of the Criminal Procedure Act of 22 May 1981 No. 25.

237 Heikkilä, *supra* note 18, at 52.

238 See further Joutsen, *supra* note 218, at 114.

239 See the example of Austria, Brienen & Hoegen, *supra* note 208, at 79.

240 Ss. 395-402 of *Strafprozeßordnung*; see Brienen & Hoegen, *supra* note 208, at 363-364.

241 Ss. 117-4 of *Strafgesetzbuch.*

242 Joutsen, *supra* note 218, at 114; Brienen & Hoegen, *supra* note 208, at 364.

243 Joutsen, *supra* note 218, at 114.

the position of victim from fully-fledged private accuser to witness.[244] Victims were gradually ousted from criminal proceedings, as their independent role was considered to impinge on the principle of adversarial and due process.[245]

As a result of reforms inspired by the Victim Rights Movement over recent decades and as a matter of increasing privatisation of criminal justice, the victims of crime have been vested with limited elements of procedural standing in a number of common law jurisdictions. Thus, in the United States, Australia, New Zealand, Ireland, and Canada, the victims' position within criminal process was expanded with the right to allocution, that is to make written victim impact statements (VIS) with respect to physical and emotional harm and other effects of the offence including the property damage and loss for the purposes of sentencing and the faculty to be heard on the issues of parole and plea bargaining.[246]

In light of the fact that the allocution model attributes to victims no effective powers to influence the prosecutorial and adjudicative process,[247] it presents a relatively limited advancement of victims' procedural rights as compared to other models of victim participation. Even so, the respective reforms were considered problematic from a due process perspective in the jurisdictions concerned and met with serious academic and professional resistance.[248] Victim impact statements have often been perceived as institutionalized private revenge in the criminal process and a factor

244 W.F. McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', (1976) *American Criminal Law Review* 649, 649-650; H. Fenwick, 'Procedural "Rights" of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?', (1997) 60(3) *Modern Law Review* 317, at 318. See further P. Sankoff & L. Wansbrough, 'Is There Really a Crowd? Thoughts about Victim Impact Statements and New Zealand's Revamped Sentencing Regime', paper submitted for the 20th International Conference of the ISRCL, Brisbane, Australia, July 2006, http://www.isrcl.org, at 6-9.

245 This phenomenon has been famously described as the state's 'stealing' the conflict from the individuals: N. Christie, 'Conflicts as Property', (1977) 23 *British Journal of Criminology* 289.

246 See Brienen & Hoegen, *supra* note 208, at 481 (on Ireland); Sankoff & Wansbrough, *supra* note 244, at 11-13 (on New Zealand). For relevant case law and legislation, see separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint applications of victims, notes 28-30 and accompanying text.

247 C. Bradley, 'United States', in id. (ed.), *Criminal Procedure*, *supra* note 213, at 422; D. Beloof, 'The Third Model of Criminal Process: The Victim Participation Model', (1999) *Utah Law Review* 289, at 296.

248 For an overview of the judicial practice in New Zealand, see Sankoff & Wansrough, *supra* note 244, at 14-19, noting that the courts have gradually subjected admissibility of VIS to numerous limitations regarding contents.

potentially leading to disparity in, or harshening of, sentences.[249] On these grounds, it has generated jurisprudential controversies, notably in the United States.[250]

One may argue that the allocution model approximates to the Article 68(3) participatory regime insofar as it concerns the expression of views and opinions on the effects of crime at sentencing hearings or the possibility of consulting victims when guilty a plea is entered.[251] However, the range of matters on which victims may be heard under Article 68 (3) is broader than a narrow circle of matters traditionally concerned with the "victim impact statements".

4.2.5. Synthesis

Based on a brief overview of the victim participation in the national criminal proceedings, Judge Pikis opined that the Article 68 (3) participatory regime "has no immediate parallel or association with the participation of victims in criminal proceedings in either common law system of justice… or the Romano-Germanic system of justice".[252] While the above survey is in line with this conclusion, it corroborates the earlier observations on the proximity of the ICC participatory model to the latter major legal tradition.[253]

In terms of more abstract models, one may be certain that the participatory rights under Article 68 (3) exceed rights typically exercised by civil parties and victims with a faculty of making an impact statement taken independently; which means, above all, that participating victims are not civil parties or actors participating under allocution model in the proper sense. However, if the two were merged, the resultant

249 For a representative view, see Ashworth, *supra* note 188, at 298: 'when the victim goes on to express a view about the appropriate sentence… this traverses the line between the proper and improper. The sentence should be determined by the court according to general principles: the views of the individual victim – whether forgiving, vengeful, whimsical, or well informed – should be as irrelevant as the personal preferences of the judge.' Note, however, that some empirical researches (among which the one conducted in South Australia) refutes the thesis that the VIS reforms have had any significant effects on the actual sentencing outcomes: see further E. Erez & L. Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals', (1999) 39(2) *British Journal of Criminology* 216, at 223 and 235.

250 The conformity of allowing for victim impact statements in the capital cases with the Eighth Amendment of the US Constitution was dealt with in a series of the US Supreme Court decisions, leading to different outcomes: see *Booth* v. *Maryland*, 482 US 496, 502-507 (1987) (recognising unconstitutionality of VIS) and, *contra*, *Payne* v. *Tennessee*, 501 US 808, 821-827 (1991).

251 Although the right of victims participating before the ICC to express their 'views and concerns' with respect to sentence is not explicit, such possibility can be inferred from the wording Rule 143; moreover, victims' or their legal representatives' views may be sought by the Court under Rule 93 in connection with the Trial Chamber's decision under Article 65(4) and Rule 69 concerning the agreements on facts.

252 Separate opinion of Judge Georghios M. Pikis, *Lubanga* appeal decision on the joint application of victims, *supra* note 15, para. 11.

253 See *supra* notes 6 and 10 and accompanying text.

hybrid might well be a prototype for the ICC. The participatory models envisioning victims as private and subsidiary prosecutors are clearly inconsistent with the ICC legal framework and ought not to be considered by the ICC as a platform to shape its own participatory scheme.[254] The question of the auxiliary prosecution model as embodied, for instance, in the institute of *Nebenkläger* is more complicated, and this model should not be automatically discarded. Despite the strong indications transpiring from the Appeals Chamber's jurisprudence towards the exclusion of "prosecutorial" interests from the ambit of "personal interests of the victims",[255] the question of whether or not victims hold quasi-prosecutorial rights, such as the right to lead evidence at trial, have been answered in the positive by the Trial Chamber and the Appeals Chamber majority. Since the Court – in spite of the split of opinion among appellate judges – appears to perceive the victims participating under Article 68 (3) as so entitled , the model in question can prove to be of great assistance as a comparative material and theoretical fallback. From the practical viewpoint, it will help fine-tune the co-existence of public and accessory prosecutorial functions and inform the Court of the way the inherent tensions between the two are dealt at the national level.[256]

A final observation is due concerning the possible legal value of the results of comparative inquiries into the national arrangements towards enhanced procedural standing of victims in the framework of criminal process. There is an essential common law *v.* civil law divide complicated by the diversity of the national measures within and across the major legal traditions. Thus, should the Court wish to establish the "general principles of law" on that point as a subsidiary source of law under Article 21 (1) (c), it is likely to face a serious methodological difficulty in the process of law-determination and when providing reasoning as to why a particular model (for example, the *Nebenkläger*) has been considered to be representative in view of numerous diverging and opposing approaches.

5. Conclusion

The foregoing analysis of the regime of Article 68 (3) of the ICC Statute and underlying legal test is aimed at clarifying the contents and scope of the recognisable personal interests of victims with reference to the relevant practice of Court since its coming into existence. The following concluding remarks summarize and evaluate the main elements of the discussion.

254 Contrast with the view of Jouet, see text accompanying *supra* note 206.

255 See *supra* section 3.4.3.

256 For instance, under the terms of the *Nebenkläger* model, the victim may exercise active procedural rights "on the basis of his declaration of solidarity with the prosecution" and with the authorization of the Court, which decides "after having heard the [public] prosecutor". See Brienen & Hoegen, *supra* note 208, at 346. Thus, the model will not work in the ICC context unless similar arrangements safeguarding the prerogatives and independence of the ICC Prosecutor are made.

It has been said, with regard to the *Lubanga* case, that victim participation is "a victory for victims' rights" that has nonetheless "proved to be a tortuous path marred by controversial due process issues".[257] This assessment reflects the generally problematic nature of the participatory regime under Article 68 (3). A principled approach towards the interpretation and application of the elements of the legal test envisaged in that provision is a prerequisite to the ICC victim participation system's acquiring a degree of procedural certainty indispensable both to the provision of fair and expeditious trial to the accused and the effective realization by victims of their conditional right to express "views and concerns".

Due to its link to the criterion of "personal interests", the participatory regime under Article 68 (3) is clearly distinguishable from the other participatory regime under the ICC Statute and Rules, in view of its special object, this being the elicitation of victims' views and concerns, indefinite scope of applicability, and subjection of participation to a sophisticated legal test. This regime is further overshadowed by considerable uncertainty as to the very purpose of victim participation. The questions of what is implied by "views and concerns" and, more noticeably, at which stages of proceedings victims can exercise their participatory rights have been extensively litigated and are not yet settled by the emerging jurisprudence. At present, the ICC Appeals Chamber is seized of a number of interlocutory appeals regarding this matter. Pre-Trial Chamber I granted appeals in the context of both DRC and Darfur situations on the single issue of whether the attribution to victims of general participatory rights at the investigation of situation and pre-trial stage of a case is subject to fulfillment of all elements of Article 68 (3). The Appeals Chamber was also called upon to decide whether victims should enjoy the right to introduce and challenge evidence at trial and has rendered a judgment on this issue. The resolution of these matters by the appellate instance is expected to contribute substantively to the elucidation of the nature of the victim participation scheme embodied in Article 68 (3) and, hence, to place the discourse on the modalities of their interventions into a solid and predictable framework of timing and preconditions for participation.

In this author's view, the third feature of the Article 68 (3) regime – i.e. its legal test – is a core reason of the current problems encountered in the context of victim participation. Since it is directly imported from paragraph 6 (b) of the UN Declaration and unaccompanied by any clarification as to its purport and meaning, the cryptic language of this provision may be a perfect mantra of the Victim Rights Movement but it is apparently ill-suited to serve as a legal formula establishing prerequisites to granting victims participatory rights. While it may take the Court some years of cut-and-try before it arrives at solid principles for the balanced and cogent application of this obscure norm, it is argued that the problem with Article 68 (3) could more effectively and promptly be resolved at the coming review conference of 2009. As the same has indeed occurred to some commentators and observers of the Court's activities, there seem to be multiple avenues for a possible amendment.[258]

257 Jouet, *supra* note 10, at 259 and 262.

258 See ibid., at 281, proposing to shape the amendment in the way excluding any exercise of judicial discretion unfair to the accused. In the view of the present author, such amend-

The view that Article 68 (3) is a deficient and poorly drafted provision that is very problematic to deal with in practice is readily bolstered by the unsatisfying results of the intense and inconclusive litigation. The controversy extends over all of its elements, including the definition of victim, the notion of "appropriateness", and the "impact on personal interests" criterion. In relation to the latter, the methodologies for the assessment of that impact exploited by the Pre-Trial Chambers and Appeals Chamber present striking differences. In particular, one observes a tendency towards generic and summary assessments of the said "impact" and the broad interpretation of the "stage of proceedings" by the former *versus* a more restrictive and procedure-specific evaluation of whether the interests of victims are affected by a definite and actual "stage of the proceedings". This divergence is not to the benefit of the former approach, insofar as it deprives the "personal interests" criterion of any distinct legal effect.

Although the differences between the position of the Pre-Trial Chamber and the jurisprudence of the appellate instance are flaring and disconcerting, it may take some time before ICC practice will find a common denominator, either via an adjustment of the *modus operandi* of the Pre-Trial Chamber to that of Appeals Chamber or via an Appeals Chamber ruling which addresses the contentious points and sets out a single approach to be employed by all Chambers. In the meanwhile, the Court will continue to be divided within two or even more 'schools of thought', which compromises the certainty of procedural law and the uniform treatment of identical issues across different Chambers.

Further narrowing down the focus of inquiry, this essay examined the contents and scope of the concept of "personal interests" that constitutes the key criterion of the first clause in Article 68 (3). The implications of the inclusion of this criterion into the legal text remain unclear, in the absence of any substantive discussions on this issue during the drafting process and negotiations. Potentially valuable as a proviso to limit the number of victims eligible for participation and to direct the scale of participation on a macro-level, the concept appears to have been developed in a piecemeal fashion and not based on a profound legal and theoretical analysis. Conversely, legal scholarship has identified the need to establish a set of "judicially recognised personal

ment is not strictly necessary, as the ICC practice has shown no particular problems with the application of Article 68 (3)'s fairness criterion. Furthermore, the proposed terminology ("private accuser") appears confusing, as it may be taken as referring to the "private prosecution" model of victim participation, which, as argued in the present chapter, is inappropriate for the ICC. As an alternative proposal, the present author would suggest setting out explicitly and in (more) detail: (i) which proceedings are appropriate for the victim participation, comparable to the approach embodied in the procedural law of the SPSC (cf. with Sections 12.3 and 12.5 of UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure, *supra* note 7); (ii) guiding principles on the permissible subject-matters of the victims' interventions, which would allow defining whether such activities as adducing incriminatory evidence falls within the ambit of "views and concerns"; and (iii) the scope and contents of the "personal interests of the victims", particularly in relation to the Prosecutor's function.

interests of the victims", which would reflect the fundamental rationales of victim participation and the nature of the Court's judicial mandate.

The interests recognised by Pre-Trial Chamber I and Trial Chamber I in *Lubanga* featured the following: obtaining reparations, protection, contributing to the clarification of facts, as well as contributing to the identification and punishment of the offender. The Appeals Chamber took a methodologically different approach and, apart from establishing two clear examples of "personal interests" – protection and reparations – held that the interests of the victims may not intersect with the prosecutorial function. Corroborated and refined by Judge Pikis in his separate concurring opinion, the majority stance was challenged by Judge Song who considered that the "personal interests of the victims" also encompass the interest "to see that justice is done". While the immediate implications of the findings of the majority and those of the dissent are yet to be seen, the former view appears legally more coherent and balanced within the general framework of the ICC procedural system. It is also to be preferred from a practical perspective, since it generally embodies a more wary approach towards shaping the victims' role within criminal proceedings.

Finally, for the purposes of interpreting the contents and scope of the "personal interests of the victims" in light of the "object and purpose" of the ICC Statute, the ICC mandate should be discussed in terms of "victim-oriented justice" rather than "restorative justice", and the claim asserting the "restorative" nature of the ICC process needs to be demystified *ab initio* as misleading. Confronting the ICC victim participation scheme to the main models of victim participation in the national criminal proceedings evinces that the ICC model is hardly a match to any of them. However, it can be described as a hybrid of a civil party model and an allocution model or, in the alternative, an auxiliary prosecution model. The parallel with the latter model seems to prove right insofar as the initial Appeals Chamber's strict and, in this author's view, correct interpretation of the "personal interests" has been departed from by that Chamber itself.

The ICC currently finds itself at the crossroads in relation to the victims' procedural role under Article 68 (3), and any choices and steps made in this respect should be based on a balanced and informed decision making rather than on sweeping assumptions and purely technical solutions like the one adopted in the first victim participation decision of 17 January 2006. With Article 68 (3) in general and the criterion of "personal interests" in particular, there is much more at stake than a mere procedural issue: namely, the overall credibility of the ICC as an institution and success of its mandate. Referring to the risk of frustrating victims' hopes already intrinsic in the Court's ambitious victim involvement scheme, Stover noted eloquently that, "if the ICC is not thoughtful, prudent, and practical about how it manages these expectations, it could end up digging its own grave with the spade of good intentions".[259] This is particularly true of the ICC victim participatory system that should be implemented in the way ensuring that the most 'breathtaking' experiment in the history of international criminal procedure does not bring its institutional laboratory to the point of asphyxia.

259 E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2007) 150.

Chapter 34 Role and practice of the Office of Public Counsel for Victims

Paolina Massidda and Sarah Pellet***

1. Introduction

The crimes punishable by international criminal law generate a very important number of casualties. More than 5 million Jewish people were exterminated during the World War II, which resulted in the killing of 6.7 million people. In Rwanda, the 1994 genocide led to 800,000 deaths within 100 days. In July 1995, between 7,000 and 8,000 Bosnian Muslim males were systematically killed in Srebrenica.

However, for a very long time, victims of the most serious crimes of concern to the international community as a whole were considered as mere witnesses. In the aftermath of the Second World War, the International Military Tribunals of Nuremberg and Tokyo never considered the lot of victims, exept through the repression of the crimes which gave rise to the harms they suffered from.

Some international humanitarian agreements, such as the four Geneva Conventions of 12 August 1949 and their additional Protocols of 8 June 1977 provide for the effective punishment of persons who commit or order the commission of grave breaches of these instruments. However, they do not provide for any kind of compensation rights for victims. Moreover, international agreements typically fail to provide any right of victims to trigger judicial proceedings against the authors of war crimes, to intervene in criminal proceedings or to obtain reparation.

Human rights conventions and the evolution of the human rights in general progressively fostered the idea that victims may play a role in proceedings related to the harm they suffered from and that they are entitled to compensation of their prejudice. Accordingly, the International Covenant on Civil and Political Right of 19 December 1966, the European Human Rights Convention of 4 November 1950, and other regional conventions provide for the right to access justice and to claim reparation for victims whose fundamental rights have been violated. These rights can also be found

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in specialised conventions, such as the United Nations Convention against Torture for which a Voluntary Fund has been created.

The international recognition of the rights of victims reached a new dimension with the adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations on 29 November 1985. This declaration provides a general survey of the rights of victims: right to access justice, right to fair treatment, right to restitution, to compensation and to medical, psychological and social assistance.

However, when the International Criminal Tribunals for ex-Yugoslavia and Rwanda were created, victims have been largely left aside. They were not vested with *locus standi* before the *ad hoc* Tribunals nor were they able to claim reparation (this possibility was only available in the national sphere). The only existing measures related to protection, in particular protection of victims appearing as witnesses before the Tribunals.

It is only with the adoption of the Rome Statute that the victims were placed at the heart of the international criminal justice. Henceforth, the rights and interests of the victims have been fully recognised at the international level.

2. Creation and functions of the Office of Public Counsel for Victims

The Statute enables victims to make representations, to submit observations and to have their views and concerns presented at all phases of the proceedings and considered "where [their] personal interests […] are affected", in accordance with Article 68(3) of the Rome Statute. In addition, Article 75 of the Rome Statute provides victims with the possibility to seek reparation for the harm suffered as a result of these crimes.

2.1. Creation of the Office of Public Counsel for Victims

Pursuant to rule 90, sub-rule 1, of the Rules of Procedure and Evidence "a victim shall be free to choose a legal representative". But giving the potentially very high number of victims who might wish to participate in proceedings before the Court and in order to assist victims to exercise the rights conferred to them by the Rome Statute, Regulation 81 of the Regulations of the Court directs the Registrar to "establish and develop an Office of Public Counsel for victims".

Regulation 81 of the Regulations of the Court, read jointly with Regulation 80 of the Regulation of the Court, provides for the establishment of the Office of Public Counsel for Victims (the "Office" or the "OPCV") to assist victims,[1] either directly by providing legal assistance and legal representation in the proceedings or indirectly, by providing assistance to their legal representatives.

1 The term "victims" is used as covering both applicants and victims who have already been granted the right to participate in the proceedings before the Court.

During the Preparatory Works for the Regulations of the Court, the creation of a "Public counsel's office", following the model of the Public Defender Office established at the Special Court of Sierra Leone, was debated.[2]

The original proposal provided for the creation of one office to fulfil tasks in support of both suspects/accused and victims. This office was supposed to exercise a broad mandate which included the protection of the rights of the Defence, the rights of persons entitled to legal assistance under the Rome Statute and the Rules of Procedure and Evidence and assistance to the Registrar in relation to his/her responsibilities concerning the rights of the defence (Rule 20 of the Rules of Procedure and Evidence) and regarding victims (Rule 16 of the Rules of Procedure and Evidence).

However, as the discussions progressed, the Judges considered that the creation of two distinct offices was needed in order to avoid any conflict of interest. Furthermore, since the Rome Statute and the Rules of Procedure and Evidence do not entail a binding obligation upon the Registrar to provide legal assistance paid by the Court to victims – contrary to what is provided for the suspects and accused – the Judges expressed the view that the staffing of the Office of Public Counsel for Victims should be different from the one of the Office of Public Counsel for the Defence. This separation allowed the Office of Public Counsel for Victims to represent group(s) of victims in the proceedings before the Court.

Once the agreement on the creation of both Offices of Public Counsel was reached, the same provisions were drafted for the Office of Public Counsel for the Defence and for the Office of Public Counsel for Victims. The mandate of the Offices of Public Counsel was clarified, while incorporating a certain flexibility to cover scenarios not foreseeable at the time of the adoption of the Regulations of the Court. Accordingly, the Office of Public Counsel for Victims was established on 19 September 2005.

2.2. Functions of the Office of Public Counsel for Victims

Pursuant to Regulation 81 (4) of the Regulations of the Court, the Office "shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate, legal research and advice; and appearing before a Chamber in respect of specific issues".[3]

2 The *travaux préparatoires* relating to the Regulations of the Court are not available to the public.

3 Regulation 81 of the Regulations of the Court reads as follows:

> "1. The Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in sub-regulation 4.
>
> 2. The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently."
>
> 3. The Office of Public Counsel for victims may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.
>
> 4. The Office of Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate:

Moreover, pursuant to Regulation 80 of the Regulations of the Court, members of the Office can be appointed as legal representatives of victims.[4] When appointed legal representative, their mandate does not differ from the one of legal representatives on the list of Counsel. Therefore, in fulfilling their responsibilities, members of the Office shall enjoy the same rights and prerogatives as external legal representatives and they shall be bound by the same obligations, including by the Code of Professional Conduct for Counsel before the ICC.[5]

In accordance with Regulation 81 of the Regulations of the Court the Office shall function as an independent office. Members of the Office shall not receive instructions from anybody in relation to the fulfillment of their mandate. Therefore, the Office falls within the Registry solely for administrative purposes. The independence is a prerequisite for carrying out its mandate of assisting and representing legal representatives of victims and representing victims. It also allows the Office to work without being subjected to pressure of any kind and preserves the privileged relationship between victims and their legal representatives.

The mandate of the Office will evolve with the jurisprudence of the Court concerning victims. However, it is already possible to outline the extent of some tasks.

When victims have not yet been allowed by a Chamber to participate in the proceedings, the Office, as a general principle, undertakes to protect their interests through attempting to raise the general awareness on victims' issues. Moreover, the Office is able to offer its legal expertise to potential victims or to potential legal representatives of victims when evaluating the possibility to ask for participation.

With regard to victims already allowed to participate in the proceedings by a relevant Chamber, several scenarios are to be envisaged.

(i) The first one is a case where victims are already represented. In these circumstances, the Office can, for example, be asked to provide the legal representatives upon request with: factual background documents on the situations before the Court and research papers and advice on selected aspects of international criminal law, in particular, the law governing victims' participation and reparation and any substantive and procedural matter pertaining to the proceedings before the Court. The legal representative may also ask the members of the Office to act as *ad hoc* counsel for specific hearings or to appear on their behalf before a Chamber in respect of specific issues.

(a) Legal research and advice; and

(b) Appearing before a Chamber in respect of specific issues."

4 Regulation 80 reads as follows:

"1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.

2. The Chamber may appoint counsel from the Office of Public Counsel for victims."

5 See the Code of Professional Conduct for Counsel, Resolution ICC-ASP/4/Res.1, adopted at the 3rd plenary meeting of the Assembly of States parties on 2 December 2005 by consensus and entered into force on 1st January 2006.

The signature of *ad hoc* agreements has proved to be the most suitable way for the Office to carry out its functions in this respect. These agreements enable the Office to assign its staff to the situation or case, to evaluate the possible existence of conflicts of interests, on the one hand, and the resources available, on the other. They are negotiated on a case by case basis, the needs of legal representatives varying according to several factors, including the number of victims they represent, the location of their main practice, the number of persons constituting the legal team, etc.

The Office also provides assistance pending the signature of an agreement with the legal representatives, particularly when the latter seek to be provided with a preliminary legal assessment of the applications for participation, or at the very early stage of the filing of applications.

(ii) The second scenario concerns victims for whom the Office has been directly appointed as legal representative. In these circumstances, the Office acts as counsel, taking into account the interests of victims and the imperatives attached to the proceedings.

(iii) A further role for the Office may arise when a victim has chosen a counsel who does not fulfil the mandatory criteria of 10 years of experience necessary to appear before the Court, or any other criteria to be met by counsel.[6] In this case, a member of the Office might potentially act as counsel and perform his or her duties with the assistance of the person chosen by the victim.

In performing its functions within the framework of these scenarios, the Office takes into account concerns relating to the security and safety of victims, and always endeavours to respect the will of victims, as well as the language spoken by them and the specificities related to gender and children issues.[7]

A major challenge for the Office is to evaluate how members of the Office can effectively represent victims who will be unable to stay in the Netherlands for the entire length of proceedings. This very important issue is currently been examined with utmost care by the Office, taking into account that implementation of possible solutions could require the assistance of other sections/divisions within the Court.

2.3. Interactions of the Office of Public Counsel for Victims with other sections of the Court dealing with victims

Within the remit of the Registry, the Office is not the only section dealing with victims. The Victims Participation and Reparation Section (the "VPRS")[8] and the Vic-

6 See Rule 22 of the Rules of Procedure and Evidence and regulation 67 of the Regulations of the Court.

7 See Article 68 (1) of the Rome Statute.

8 See Regulations 86 and 88 of the Regulations of the Court and Regulations 97 to 111 of the Regulations of the Registry.

tims and Witnesses Unit (the "VWU")[9] are also in charge of specific aspects concerning victims.

The VPRS is a specialised section within the Registry dealing with victims' participation and reparations. This section is vested with the responsibility to assist victims and groups of victims in order to enable them to fully exercise their rights under the Rome Statute and to obtain legal assistance and representation, including, where appropriate, from the Office. The VPRS can be seen as the first point of contact of victims with the Court, since the Section is in charge of assisting victims in filling in their applications for participation and/or reparations and mandated to provide them with all information necessary to be able to exercise their rights under the Rome Statute.

The VWU makes it possible for victims and witnesses to testify and/or participate in the proceedings and limits possible adverse effects due to their status by providing protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony. The VWU also takes appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and other persons at risk. It advises participants in the proceedings and other organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance, in accordance with Article 68 of the Rome Statute. Accordingly, the Office is interacting with the VWU, as all the other participants in the proceedings, and within the framework of the provisions of the Rome Statute regarding the protection of victims.

Last but not least, there is another common misunderstanding relating to the functions of the Office. The list of counsel,[10] which also contains names of potential legal representatives of victims, is not administered by the Office, but falls within the responsibility of the Division of Victims and Counsel which contains two sections: VPRS – which is also in charge of providing administrative assistance to legal representatives' teams – and the Defence Support Section, which fulfill the same administrative functions in respect of defence teams.

3. Interpretation of the role and mandate of the Office of Public Counsel for Victims in accordance with the practice of the Court

Although the practice of the Court needs to be further developed, it is possible to identify some of the tasks the Office may fulfil in accordance with Regulation 81(4) of the Regulations of the Court by virtue of the existing jurisprudence. This jurisprudence currently focuses on three main areas: the legal representation of the applicants' victims by the Office, the appearance of the Office before a relevant Chamber in respect of specific issues and the legal representation of victims.

9 See Article 43 (6) of the Rome Statute, Rules 16 to 19 of the Rules of procedure and Evidence and regulations 79 to 96 of the Regulations of the Registry.

10 See Regulations 67 and 69 to 72 of the Regulations of the Court and Regulations 122 and 128 of the Regulations of the Registry.

3.1. Legal representation of the victim applicants

In interpreting Regulation 81 of the Regulations of the Court, the Single Judge of Pre-Trial Chamber II, in its Decision dated 1st February 2007, entrusted the Office with the task to provide support and assistance to 49 victims applying to participate in the situation in Uganda and in the case of *The Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen* when "necessary and appropriate at this stage of the proceedings", that is to say the stage which precedes a decision by the Chamber on their status.[11] The Single Judge reiterated his reasoning in his decision dated 10 August 2007.[12]

In the same decision the Single Judge recognised that "the mandate vested in the OPCV by the Regulations [of the Court] also encompasses forms and methods of assistance to victims which fall short of legal representation" and, therefore, he deemed it appropriate for victims to benefit from any form of support and assistance which may be offered by the Office.[13]

The decision of the Single Judge did not set out in detail the extent of the mandate of the Office; nor did it specify the meaning of the wording "provide support and assistance", thus leaving a margin of appreciation for the Office in evaluating when its intervention may be necessary and/or appropriate at the stage of the procedure which precedes a decision on the status of the victims.

The Single Judge even went further in its decision dated 10 August 2007. When assessing the role victims may play at the investigation stage and after having explained that they may play a role within the framework of Article 53 of the Rome Statute, he considered that "[t]he above list of victims' rights and prerogatives in the context of a situation could remain little more than a theoretical exercise, if not coupled with mechanisms to make victims aware of their existence and of the actual possibility of exercising them". He noted: "The evaluation of such a possibility is of a strictly legal nature and falls therefore squarely within the mandate of a victim's legal representative. However, in the present scenario, in which a number of applicant victims are not yet assisted by a legal representative, the Single Judge is of the view that it is the task of the OPCV, as the office entrusted with providing applicant victims with any

11 See Pre-Trial Chamber II, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, ICC-02/04-01/05-134, para. 13 and the operative part of the decision.

12 See Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, at 62.

13 See Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *supra* note 11, para. 13.

support and assistance which may be appropriate at this stage."[14] He requested the Office to "inform victims having communicated with the Court of their rights and prerogatives" in relation to Article 53 of the Rome Statute.[15]

Pre-Trial Chamber I followed the same reasoning in cases where "an applicant has no legal representation or in the absence of any document signed by that person". It ordered the Registrar in such cases "to automatically appoint the OPCV as his or her legal representative to provide support and assistance to the applicant until such time as the applicant has been granted the status and a legal representative is chosen by him or her or appointed by the Court".[16]

Trial Chamber I also had the opportunity to interpret Regulation 81(4) of the Regulation of the Court. Indeed, according to the Chamber "the Office's core role … is to provide support and assistance to the legal representatives of victims and to victims who have applied to participate".[17] Agreeing with the general approach adopted by Pre-Trial Chamber I in its decision of 17 August 2007,[18] Trial Chamber I ruled that "[a]s regards those victim applicants currently represented by the Office of Public Counsel for Victims, the Office shall continue to represent them until the Chamber issues a decision on their application to participate".[19]

However, what is actually covered by the provision of support and assistance to victim applicants remains unclear. Both Pre-Trial Chambers I and II, while entrusting the Office with the duty to provide support and assistance to victim applicants, failed to allow the Office to undertake any steps in this regard with the aim of protecting the interests of the victim applicants in the crucial phase which precedes a decision by the relevant Chamber on their status. Yet, important legal issues pertaining to the application for participation and/or to the protection and well-being of the person concerned may arise during this phase.

It has to be noted that requests for participation are normally compiled by victim applicants with the help of intermediaries (local or international non governmental organisations) who are not necessarily aware of all legal implications entailed by answers given in the application for participation.

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14 See Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *supra* note 12, para. 164.

15 Ibid., at 62.

16 See Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17 August 2007, ICC-01/04-374, at 24.

17 See Trial Chamber I, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, 6 March 2008, ICC-01/04-01/06-1211, paras. 31-32, at 13-14.

18 See Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *supra* note 16, para. 34, at 14-15.

19 Ibid., para. 34, at 15 and para. 41, at 17.

Moreover, the Court has a general obligation to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims" pursuant to Article 68 of the Rome Statute. The Single Judge of Pre-Trial Chamber II argued in his decision dated 10 August 2007

> "that the 'personal interests' of victims may be affected by the adoption of, or the failure to adopt, measures bearing upon their security and privacy appears hardly debatable. Accordingly, it would be consistent with Article 68, paragraph 3, and therefore appropriate for victims (specifically those victims who may be affected by the measures in question) to be authorised to present their 'views and concerns' for these purposes even prior to and *irrespective of their being granted victim status in a given case*. Participation within this context may take the form of authorisation to provide their point of view whenever the Pre-Trial Chamber considers the adoption of protective measures on its own and considers it appropriate that victims potentially affected by such measures should submit their views. Since failure to adopt protective measures may affect the victims' fundamental interest in the protection of their security, the Single Judge held the view that victims in the context of a situation should be allowed to submit requests aimed at obtaining the adoption of such measures by the Pre-Trial Chamber".[20]

The issue is particularly relevant when applicants hold the dual status of victims and witnesses. Access to certain information contained in the record of the situation or the record of the case is thus important to fully preserve the victim applicants' rights.

Although access to information relating directly to victim applicants seems necessary for the Office – and in general for legal representatives – to be able to fulfil its mandate with regard to victim applicants and in line with the general right of victims to be informed of the procedure,[21] the Single Judge of Pre-Trial Chamber I rejected a request by the Office to access the observations filed by the Prosecution and the Defence in accordance with Rule 89 (1) of the Rules of Procedure and Evidence and the index of the record of the situation.[22] This rejection was justified as follows:

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20 See Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/127/06, *supra* note 12, at, para. 98, at 37-38 (footnote omitted). Emphasis added.

21 See UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly., 29 November 1985. A/RES/40/34, available at <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b00f2275b> [accessed 2 April 2008]. See also, in relation to the right of counsel to access information and record related to their clients, the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at <www.unhchr.ch/html/menu3/b/h_comp44.htm> [accessed 2 April 2008].

22 See Request of the OPCV to access documents in the situation record related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06, 18 October 2007, ICC-01/04-407.

> "it may be helpful to the applicants to know the types of challenges directed at the applications … the helpfulness of this information must also be balanced with the obligation of the Single Judge to provide, where necessary, for the protection and privacy of the victims and witnesses pursuant to Article 57 (3) (c) of the Statute and with the general principle prescribed in rule 86 of the Rules that the Chamber in making any order shall take into account the needs of all victims and witnesses in accordance with Article 68".[23]

The Single Judge further explained that "the interest of the applicants in receiving the rule 89 (1) observations should also be balanced with the further obligation of the Single Judge to ensure the expeditiousness and effectiveness of the proceedings".[24]

In a previous decision dated 11 September 2007, the Single Judge granted a similar request of the Office of Public Counsel for the Defence.[25] In its former practice, the Chamber systematically notified the observations of the Prosecutor and the Defence pursuant to Rule 89 (1) of the Rules of Procedure and Evidence to the legal representatives concerned. It seems therefore that there is an inconsistency in the practice of Pre-Trial Chamber concerning the notification of the said documents. The Single Judge noted the inconsistency, but merely took "this opportunity to correct the notification process".[26] The observations under Rule 89 (1) of the Rules of Procedure and Evidence pertain to the application for participation and clearly have an impact on the personal interests of victims. It seems difficult to justify the absence of notification of that documents to the legal representatives of the persons concerned.

Overall, this decision is *de facto* limiting the possibility granted to victim applicants to present their views and concerns where their personal interests are affected, in conformity with Article 68 (3) of the Rome Statute.

Article 68 (3) of the Rome Statute does not differentiate between applicants and victims authorised to participate in proceedings before the Court, and thus covers both categories of persons when their personal interests are affected. This interpretation is supported by the broad definition of the term "victim" contained in rule 85 of the Rules of Procedure and Evidence. In fact, this definition does not contain any restriction to participation and only associates the term "victim" with the commission of a crime within the jurisdiction of the Court.

Despite the absence of restriction, the Single Judge of Pre-Trial Chamber I put forward a different point of view, recalling the Chamber's Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and *Ad Hoc* Counsel for the Defence issued on 7 July 2006.[27] In this

23 See Pre-Trial Chamber I, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, para. 14, at 8.

24 Ibid., para. 15, at 8-9. See, Pre-Trial Chamber I, Decision on the request by the OPCD for access to previous filings, 11 September 2007, ICC-01/04-389.

25 Ibid., at 8.

26 See Decision on the Requests of the OPCV, *supra* note 23, para. 4, at 5.

27 See Pre-Trial Chamber I, Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and *Ad Hoc* Counsel for the Defence, 7 July 2006, ICC-01/04-164-tENG.

decision, Pre-Trial Chamber I considered that prior to a decision granting the status of victim, it will not consider requests from applicants.[28]

However, when facing a similar request by the Office, Trial Chamber I granted the said request and ordered the Registry to disclose the relevant part of the observations made by the Prosecution under Rule 89 (1) of the Rules of Procedure and Evidence related to certain victim applicants represented by the Office.[29] The Single Judge of Pre-Trial Chamber II also differed from the point of view of his counterpart of Pre-Trial Chamber I when considering that "for the purpose of the tasks entrusted to the OPCV in the Decision, it appears indeed necessary for the OPCV to have access to the unredacted version of the Warrants, in particular with a view to it being apprised of the specific scope and the factual features of the charges brought against the persons whose arrest is sought by the Court".[30]

In addition to these conflicts of jurisprudence among different chambers with regards to access of documents necessary for the Office to fulfil its mandate, some uncertainties continue to exist in relation to the functions effectively covered by this mandate.

Once members of the Office are appointed legal representatives, they shall enjoy the same rights and prerogatives of external legal representatives. However, the practice of the Court seems to limit the functions the Office can fulfil when acting as legal representative. In its decision dated 17 August 2007, Pre-Trial Chamber I appointed the Office as "legal representative to provide support and assistance to the applicant until such time as the applicant has been granted victim status and a legal representative is chosen by him or her or appointed by the Court"[31] thereby referring directly to Regulation 80 of the Regulations of the Court.[32]

Pre-Trial Chamber I therefore ordered the Office to represent victims in conformity with Regulation 80 of the Regulations of the Court.[33] But in a decision dated 10 December 2007,[34] the very same Chamber prevented the Office from accessing certain documents registered in the record of the situation in Democratic Republic of the Congo and relating to victim applicants represented by the Principal Counsel of the Office. This practice appears to restrict the powers of the Office as legal representative although the Statute, Rules or Regulations do not provide any legal authority to distinguish the role of the Office (acting as legal representative) from that of external legal representatives.

28 Ibid., at 3.

29 See Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, *supra* note 17, para. 38 and 39, at 16 and 18.

30 See Pre-Trial Chamber II, Decision on 'Request to access documents and material', and to hold a hearing in camera and *ex parte*, 7 February 2007, ICC-02/04-01/05-152, at 3.

31 See Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17 August 2007, ICC-01/04-374, at 24.

32 Ibid., para. 41 et 46, at 20 et 21.

33 Ibid.

34 See Decision on the Requests of the OPCV, *supra* note 23.

Furthermore, the Single Judge of Pre-Trial Chamber II ruled that the mandate entrusted to the Office covers the following tasks:

– providing victim applicants with any legal advice related to their applications, as well as with any advice to supplement, if need be, their request;
– providing the applicants with explanation concerning the procedure before a decision on their application is taken by the relevant Chamber;
– and, more generally explaining their general rights as potential victims in a proceeding before the Court.[35]

However, the Single Judge decided that none of the provisions of the Court entrust the Office with the responsibility to assess any potential risks for the applicants or with any specific functions relating to security and safety concerns that such applicants may have by virtue of their communication with the Court and their request to participate in a case before the Court,[36] although issues of protection are very present at the stage of the proceedings which precedes a decision on the status of victims.

It also seems that Pre-Trial Chamber I and Trial Chamber I construed the mandate of the Office in a more limited way than the Single Judge of Pre-Trial Chamber II. Both Chambers asserted that "the OPCV's role was limited to providing support and assistance in the few instances in which the 'Registry automatically request[s] additional information for [any] incomplete Applications'".[37] Yet, one cannot but observe that this role has been expressly devoted to the VPRS pursuant to Regulation 86 (4) of the Regulations of the Court, or to the Registrar at least. Since the Office falls within the remit of the Registry solely for administrative purposes in accordance with Regulation 81(2) of the Regulations of the Court, this function cannot be deemed to be carried by it and the assertions of both Chambers in this regard cannot but generate a confusion concerning the mandates of the Office on the one hand, and the mandate of the VPRS on the other hand, and may jeopardise the independence of the Office.

3.2. The appearance before a relevant Chamber in respect of specific issues

In relation to the possibility for the Office to appear before the Chamber in respect of specific issues, Regulation 81(4) of the Regulations of the Court does not specify if such possibility is triggered by a request of a Chamber in this sense or by the Office itself in requesting leave to appear in respect of specific issues.[38]

35 See Pre-Trial Chamber II, Decision on the OPCV's 'Request to access documents and material', 16 March 2007, ICC-02/04-01/05-222, at 4.

36 Ibid., at 5.

37 See Decision on the Requests of the OPCV, *supra* note 23, para. 10, p. 7 and Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *supra* note 31, para. 43, at 19-20 (footnotes omitted). See also Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, *supra* note 17, para. 34, at 14.

38 In this sense, see OPCV's request to submit observations or otherwise be heard on point E of the order of 14 November 2007 and on the issue of the dual status of witnesses/vic-

Indeed, both possibilities should be open and such mechanism could be used when a Chamber considers that a general issue involving victims' rights needs to be explored independently from the particular interest legal representatives of victims participating in the proceedings may have. Accordingly, the Office has already filed requests for leave to appear in the situation in Uganda[39] and in the case *The Prosecutor* v. *Thomas Lubanga Dyilo.*[40]

The *chapeau* of Regulation 81 (4) of the Regulations of the Court clearly provides for an obligation of the Office to provide, where appropriate, support and assistance to victims, *inter alia*, in appearing before the Chamber in respect of specific issues. It appears, therefore, that the Office is entitled to request leave to appear before a Chamber in respect of specific issues which have an impact on the personal interests of the victims that it assists or represents, particularly when the issues may affect the expeditious conduct of the proceedings or when the legal and/or practical implications of the issues require that a standard approach be found.

In relation to the possibility of the Office to request leave to appear before the Chamber in respect of (a) specific issue(s), the question may arise as to whether the Office should be entitled to file such a request only when it is providing legal assistance or legal representation to victims by virtue of a previous decision of the Chamber or of the Registrar; or also when it is providing legal assistance and legal representation at the request of the victims directly.

Regarding this issue, the *chapeau* of Regulation 81 (4) of the Regulations of the Court is drafted in such a way that it can be interpreted as covering both possibilities. Furthermore, nothing in the Rome Statute or in the Rules of Procedure and Evidence prevents victims from asking the Office directly for assistance in matters related to their participation in the proceedings or to reparations.

Moreover, Regulation 81 (4) of the Regulations of the Court seems to confer on the Office a specific mandate regarding the protection of victims' rights. In the framework of this mandate, the Office could play an important role in protecting the general interest of victims in being requested or requesting to appear before the Chamber in respect of specific issues which may have a general impact on victims' rights – in the sense of affecting the position of current and future victims as a whole in the proceedings before the Court.[41] In this respect, it it is worth mentioning that the Office

tims, 21 November 2007, ICC 01/04-01/06-1038, para. 12.

39 See OPCV's Request to appear before the Single Judge or to otherwise be heard on the protective measures for Applicant a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda situation and in the case *The Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen* and to file a response to the Prosecution's Application to vary protective measures, 29 March 2007, ICC-02/04-90.

40 See OPCV's request to submit observations or otherwise be heard on point E of the order of 14 November 2007 and on the issue of the dual status of witnesses/victims, *supra* note 38.

41 In this sense, see OPCV's analysis of the notion of "victims" and of "victims who appear before the Court" with Annexes, 7 December 2007, ICC-01/04-01/06-1063.

has been requested several times by the Trial Chamber during the status conferences in preparation of the trial against Mr. Thomas Lubanga Dyilo to provide legal analysis on specific issues pertaining to victims' participation in the proceedings.[42]

When examining the limited practice of the Court on the possibility for the Office to appear before the Chamber in respect of specific issues, it can also be noted that Trial Chamber I has granted a request of the Office, enabling the Principal Counsel to be heard on the issues of protection of certain applicants and of the dual status of witnesses/victims discussed during the hearing held on 4 December 2007.[43] The Trial Chamber justified this ruling arguing, *inter alia*, that "at this stage of the case, the Chamber may be assisted by the views of the Office of Public Counsel for Victims on these issues of principle".[44]

Moreover, Trial Chamber I established that:

> "the opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by: the Chamber (this will usually relate to issues of general importance and applicability); a victim or his or her representative, who has asked for its support and assistance; the Office, if it is representing one or more victims; or the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability)".[45]

Accordingly, it seems that the decision acknowledges the fact that Regulation 81 (4) of the Regulations of the Court confers on the Office a specific mandate regarding the protection of victims' rights through the protection of the general interest of victims.[46]

3.3. Legal representation of victims

Last but not least, members of the Office may be appointed legal representatives of victims pursuant to Regulation 80 of the Regulations of the Court. This regulation reads as follows:

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42 See, *inter alia*, Observations du Bureau du conseil public pour les victimes suite à l'invitation de la Chambre de première instance, 9 November 2007, ICC-01/04-01/06-1020, and OPCV's analysis of the notion of 'victims' and of 'victims who appear before the Court' with Annexes, *supra* note 41.

43 See Trial Chamber I, Order on the Office of Public Counsel for Victims' request filed on 21 November 2007, 27 November 2007, ICC-01/04-01/06-1046. See also Decision on 'Request to access documents and material', and to hold a hearing in camera and *ex parte*, *supra* note 30, at 5-6.

44 Ibid., para. 5.

45 See Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, *supra* note 17, para. 35.

46 In this sense, see OPCV's analysis of the notion of 'victims' and of 'victims who appear before the Court' with Annexes, *supra* note 42.

"1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.
2. The Chamber may appoint counsel from the Office of Public Counsel for victims".

In addition, nothing prevent victims to indicate in their respective application for participation their wish to be represented by the Office. Rule 90(1) of the Rules of Procedure and Evidence provides for the right of victims to choose their legal representative. When such indication is made, it seems evident that the choice of the person concerned must be respected.

The resources of the Office are not unlimited and neither the Chamber nor the Registrar will be in the position to know *a priori* the workload of the Office at a particular moment. Moreover, they will not be in a position to know about the specific constraints concerning the support and the assistance that the Office is able to grant victims or to legal representatives. This information is strictly confidential and is not communicated to them for reasons linked to the independence of the Office. Therefore, in order to avoid any conflict of interests arising within the Office or in relation to the assistance provided to external legal representatives, it is necessary that the Office be contacted prior to any decision been taken by either a Chamber or the Registrar.

The Single Judge of Pre-Trial Chamber II took these considerations into account when appointing Counsel of the Office as legal representatives of victims allowed to participate in the Situation in Uganda and in the case of the *Prosecutor* v. *Joseph Kony et al.*. Indeed in the Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06, the Single Judge considered the fact that "Principal Counsel of the OPCV confirmed that no conflict of interest would prevent her Office from representing the victims and suggested the appointment of herself and [a counsel from the Office] as legal representatives of the victims concerned".[47]

In respect of the number of victims to be represented, it is foreseen that the Office can assist a group comprising a maximum fifty persons for the purposes of participation in the proceedings, taking into account the available resources and provided that no conflict of interests arises amongst them. With regard to reparation proceedings, no estimate can be be made at ths point in time. This estimation depends on rulings by Chambers on the status of the victims as well as on the extent of the assistance needed from the Office as legal representative.

Counsel of the Office was also appointed to carry out specific functions after a decision on the status of victims by a relevant Chamber. Indeed, prior to appointing counsel of the Office to represent the said victims in his decision of 15 February

47 See Pre-Trial Chamber II, Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06, No. ICC-02/04-01/05-267, 15 February 2008, ICC-02/04-117, at 5. The absence of contact between the Office and the relevant Chamber or the Registrar prior to any decision led to difficulties during the confirmation of charges of *Germain Katanga and Mathieu Ngudjolo Chui*. See ICC-01/04-01/07-T-35-ENG, at 14 and 15.

2008, the Single Judge of Pre-Trial Chamber II appointed "the Principal Counsel of the OPCV … or a counsel from the OPCV designated by her, as legal representative of Victims a/0101/06 and a/0119/06, pending the appointment of a common legal representative in accordance with the Decision on victims' participation, and for the purpose of effectively enabling Victims a/0101/06 and a/0119/06 to exercise their right to file a response to the Application for Leave to Appeal"[48] filed by the Prosecution on 20 August 2007.

Moreover, both Single Judges of Pre-Trial Chambers I and II decided that the Office should continue to provide support and assistance to persons granted the status of victims pending the appointment of a common legal representative for them.[49] However, these decisions create some confusion. It seems that they are founded on Regulation 81 (4) of the Regulations of the Court (since they expressly request the Office to provide "support and assistance"), although they intervene at a stage when the persons concerned have already been granted the status of victims. This legal basis may adversely impact on the rights of victims through the restriction imposed on actions undertaken by the Office.[50] Indeed, the correct legal basis for the appointment of members of the Office as legal representative should be Regulation 80 (2) of the Regulations of the Court.

4. Conclusion

The creation and role of the Office of Public Counsel for Victims derives from the possibility of victims under the Rome Statute to make representations, to submit observations and to have their views and concerns presented at all phases of the proceedings and considered "*where* [their] *personal interests … are affected.*"

The Office marks a potentially very useful tool to enhance the participation of victims in proceedings. The jurisprudence concerning the role of the Office and the practice of the participation of victims in the proceedings and the extent of their participation is still in development. But it is clear that victims of crimes of serious concern of the international community as a whole have finally found a place in the international criminal law. Their voice and their sufferings may be heard in a judicial forum.

48 See Pre-Trial Chamber II, Decision on legal representation of Victims a/0101/06 and a/0119/06, 28 August 2007, ICC-02/04-105, at 5.

49 See Pre-Trial Chamber II Decision on victim's application for participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, 14 March 2008, ICC-02/04-125 and ICC-02/04-125-Anx (Public Redacted version of Document ICC-02/04-124-Conf-Exp), at 71. On 3 July 2008, the Principal Counsel of the Office was requested to provisionally, and exceptionally, represents victims because of an alleged conflict of interests. See PTC I, ICC-01/04-01/07-660, at 4, 5 and 10.

50 See *supra* 2.1.

VI The ICC and Future Review

Chapter 35 The crime of aggression

*Roger S. Clark**

1. Introduction

The crime of aggression is the unfinished substantive business from Rome. There is a reasonable chance that it will be resolved at the First Review Conference. Article 5 (1) of the Rome Statute,[1] lists "the crime of aggression" as one of the four "crimes within the jurisdiction of the Court". Article 5 (2) of the Statute provides, however, that:

> "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."[2]

The Final Act of the Rome Conference instructed the Preparatory Commission for the Court ("PrepCom") to "prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the

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1 Rome Statute of the International Criminal Court, Article 5 (1), U.N. Doc. A/CONF.183/9 (1998) ("Rome Statute").

2 Ibid., Article 5 (2). Articles 121 and 123 deal with amendments, the first of which may not be made until seven years after the entry into force of the Statute. Some essential machinery provisions of an "institutional" nature may be changed earlier and by a simplified procedure under Article 122. Article 121 contemplates amendments agreed upon at regular meetings of the Assembly of States Parties; Article 123 deals with Review Conferences to consider amendments. The first Review Conference must be convened seven years after the entry of the Statute into force. Ibid., Article 123 (1). An open question is whether the additional "provision" will apply to all States Parties once seven-eighths of them ratify it (Article 121 (4)), or whether it will apply only to those States that ratify it – no matter how few (Article 121 (5)). See R. S. Clark, 'Aggression and the International Criminal Court', at <camlaw.rutgers.edu/site/ faculty/pdf/clark.pdf>; A. Reisinger Coracini, 'Amended most serious crimes: a new category of core crimes within the jurisdiction but out of the reach of the International Criminal Court?', (2008) 21 *Leiden Journal of International Law* 699.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 709-723.

International Criminal Court shall exercise its jurisdiction with regard to this crime".[3] These proposals were to be submitted "to the Assembly of States Parties ["ASP"] at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute".[4] "Definition" refers to the substantive "criminal law" issues. "Conditions" relates to the vexed question of the relationship between what the ICC might do in the case of an individual accused and whatever antecedent action needs to be taken in a political or other organ of the United Nations, in particular the Security Council, the General Assembly or the International Court of Justice.[5]

The PrepCom was not successful in finalizing "proposals" before it expired in 2002. Its last work-products on aggression were a Discussion paper proposed by the last Coordinator of its Working Group on the Crime of Aggression, which consisted of a rolling text with a number of options,[6] and a proposal for the creation of a working group of the ASP, open to all states (not only those who are parties to the Statute),[7] to carry the work forward. At its first session, the ASP duly created a Special Working Group on the Crime of Aggression. The Special Working Group plans to complete

3 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, para. 7, U.N. Doc. A/CONF.183/10 (1998), at 8-9.

4 Ibid.

5 Most of the proposals before the PrepCom rolled up these two kinds of issues. Bosnia and Herzegovina, New Zealand and Romania made a valiant effort to distinguish the two (and to support a role for the ICJ) by submitting separate papers on them. See U.N. Doc. PCNICC/2001/WGCA/DP.1 (Conditions under which the Court shall exercise jurisdiction with respect to the crime of aggression) and PCNICC/2001/WGCA/DP.2 (Definition of aggression). There are some good discussions of the PrepCom debates by insiders in M. Politi & G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004).

6 Discussion paper proposed by the Coordinator; Part I, Definition of the crime of aggression and conditions for the exercise of jurisdiction; Part II, Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court), UN. Doc. PCNICC/WGCA/RT.1/Rev.2 (2002). Part I had five articles. The first three dealt with the "definition" and the last two with the "conditions". A footnote to Part II explains that the elements which it contains "are drawn from a proposal by Samoa and were not thoroughly discussed". The delegation of Samoa had insisted, in the last two of the ten meetings of the PrepCom in which aggression was discussed, that *some* effort should be devoted to the mandate in the Final Act of Rome to produce Elements of the crime of aggression. See Elements of the Crime of Aggression – Proposal Submitted by Samoa, U.N. Doc. PCNICC/2002/WGCA/DP.4. There are no current drafts of the Elements on the table. For the PrepCom Coordinator's analysis of the issues, see S. A. Fernandez de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court', (2002) 25 *Fordham I LJ* 589; de Gurmendi, 'An Insider's View', in Politi & Nesi (eds.), *supra* note 5 at 175.

7 U.N. Doc. PCNICC/2002/WGCA/L.2/Rev.1, Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression, adopted by the ASP as ICC-ASP/1/Res.1 (2002).

its work in good time for the first Review Conference. The main drafting work since 2002, using the Coordinator's text as a basis, has taken place at four informal intersessional meetings of the Special Working Group held at the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School, Princeton University, New Jersey, in 2004,[8] 2005,[9] 2006[10] and 2007.[11] Significant re-working of the Coordinator's draft has occurred.

Conceptualizing the crime of aggression faces some fundamental political challenges, given the rather unclear limits to, and interplay between, the roles under the United Nations Charter of the Security Council, and other United Nations organs, in maintaining international peace and security. I shall discuss some of those issues, which have taken on a role as threshold problems, as "conditions under which the Court shall exercise jurisdiction", in Part II below. Part III considers some basic definitional issues, including incorporating the General Assembly's 1974 Definition of Aggression[12] and efforts to articulate the basic "leadership" nature of the crime. A further challenge, the subject of Part IV, is how to apply to aggression the conceptual structure contained in the "general part" of the Rome Statute, as utilized in the Elements of Crimes ("the Elements") concluded by the PrepCom in the middle of 2000.[13] In particular, can the crime of aggression be analysed, like other crimes within the jurisdiction of the Court, in terms of "mental" elements and "material" elements, terms to be found (but not fully explicated) in Article 30 of the Rome Statute?[14] If

8 Doc. ICC-ASP/3/25 (2004) ("2004 SWGCA Intersessional Report").

9 Doc. ICC-ASP/4/SWGCA/INF.1 (2005) ("2005 SWGCA Intersessional Report").

10 Doc. ICC-ASP/5/SWGCA/INF.1 (2006) ("2006 SWGCA Intersessional Report").

11 Doc. ICC-ASP/6/SWGCA/INF.1 (2007) ("2007 SWGCA Intersessional Report").

12 G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 24, U.N. Doc. A/9631 (1975). For a valuable discussion of this Definition, see N. Strapatsas, 'Rethinking General Assembly resolution 3314 (1974) as a basis for the definition of the crime of aggression under the Rome Statute of the ICC', in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (2006).

13 Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 ("The Elements"). The Elements were approved unanimously at the first meeting of the Assembly of States Parties to the Rome Statute held in New York, 3-10 September 2002. On The Elements in general, see R. Lee et al., (eds.), *The International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure* (2001); R. S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offenses', (2001) 12 *Criminal Law Forum* 291.

14 Art. 30 is headed "*Mental* element" and reads:

> "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the *material elements* are committed *with intent and knowledge*.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to *conduct*, that person means to engage in the conduct;
>
> (b) In relation to a *consequence*, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

it can, what are the implications of this? Several matters in the "general part" of the Rome Statute need careful examination before being applied without modification to aggression.

The drafting has proceeded on the basis of a drafting convention that distinguishes between an "act of aggression" and a "crime of aggression." The former is what a state does which engages its state responsibility. The latter is what the individual actor does on behalf of a state and which engages that person's individual responsibility. There can be no "crime of aggression" without an "act of aggression." In terms of the structure of Article 30 of the Rome Statute, the "act of aggression" is probably best seen as a "circumstance" element of the crime.

2. "Conditions for the exercise of jurisdiction": The role of the Security Council or other organs

The final sentence of Article 5 (2) of the Statute states that "Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". Some of the major powers (those with a veto in the Security Council) take the position that this means that there is no act of aggression unless the Security Council says so. On this argument, the Security Council's power is exclusive. Others, not surprisingly, take the position that the Security Council has power for Charter purposes only and that there is no obstacle in the Charter to having the Court itself make the relevant determinations of all elements of the crime. Moreover, some argue that if the United Nations itself has some role, then the General Assembly[15] and the International Court of Justice,[16] which have in practice waded into these waters, also have a claim to participate which is parallel to that of the Security Council. The Security Council, they add, has ample powers under Article 16 of the Rome Statute to put a halt to proceedings in the ICC when its interests are at stake.

A subsidiary part to this argument is the nature of any determination that might be made by the Security Council or some other organ. Is such a determination conclusive as to the presence or absence of the "act of aggression" element of a particular crime? Or is the role of the United Nations organ (at most) that of giving a "green

3. For the purposes of this article, 'knowledge' means awareness that a *circumstance* exists or a *consequence* will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

I have italicized the key words that relate to the "mental" and "material" structure adopted by the drafters of the general part. While "intent" and "knowledge" are defined, "conduct", "consequence" and "circumstance" (what the drafters must have understood as "material elements") are left to the resourcefulness of the commentators and the judges. Nonetheless, these material and mental elements should also provide a basis for the structure of the crime of aggression.

15 See, e.g., the Uniting for Peace resolution, G.A. Res. 377A (V) (1950), and G.A. Res. 498 (V) of 1 February, 1951 (finding that China and North Korea were engaging in aggression in Korea).

16 Most recently, in *Armed Activities on the Territory of the Congo* (DR *Congo v. Uganda*), 2005 ICJ, Judgment of 19 December, 2005.

light" for the ICC to proceed? If the former were to be the case, it would be very difficult in terms of criminal law theory to build the remainder of the structure of the crime around this determination by an outside body. At the very least, it would be necessary to put a large weight on the mental element requirement, and its obverse, the "defence" of mistake. Since there is no guarantee that the Security Council or other organ, would act in a totally principled way, it might be difficult to know in marginal cases what it would do. If an "act of aggression" is whatever the Security Council says it is, after the event, this creates some pretty fundamental problems with the principle of legality. Either it would be necessary to give wide latitude to mistakes, or it would be necessary to include a "manifest" or "flagrant" modifier in the definition, so as to protect, at least in part, against criminal responsibility for the marginal cases. The various options were still in play as this was being written early in 2008.[17]

3. Defining the crime

It should be apparent from what has gone before that there are two aspects to this, what is meant by the element "act of aggression by a state", and how to describe the necessary conduct, circumstance and mental elements required of individual actors.

As to the act of aggression, it is widely accepted that substantial guidance has to be found in the General Assembly's 1974 Definition of Aggression.[18] That resolution contains both a prima facie presumption that the first use of certain kinds of force by a State amounts to aggression (Article 2) and a list of the kinds of force (Article 3). As contained in Article 3, these are:

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

17 There was an inconclusive debate on these issues during the most recent meeting of the Working Group, at the Sixth Session of the ASP, 30 November to 14 December 2007. See Draft report of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/6/SWGCA/CRP.1 ("December 2007 Draft report").

18 See above *supra* note 12.

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

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

Resolution 3314 also says that the Security Council can conclude that other actions amount to aggression and, on the other hand, that even if the conditions in the definition are met, it may conclude that there was not in fact an aggression. This creates some problems for inserting Resolution 3314 into a definition of the crime. In the first place, it deals with state responsibility; in the second, it is open-ended. The first problem can be dealt with by using it to define only the "act of aggression". The second requires either making some general reference to it and leaving the Court to "work it out", or taking the precise parts and incorporating them into a reasonably precise definition. Both (and other) possibilities are still open.[19]

There is the further question of whether *all* the examples of aggressive acts contained in Article 3 of the Definition should come within the criminal ambit of aggression and (perhaps *or*) whether some other "threshold" modifier should be established. There has been some support (and some adamant rejection) for modifying the term "act of aggression" by some phrase like "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof." There is also support (perhaps increasing)[20] for using the phrase "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Both attempts at modification start with the premise that it is only the most grave of acts that should come within criminal jurisdiction, whatever might be said of state responsibility. Using a term like "manifest" injects an evaluative element (some sort of reasonable person test). "War of aggression"[21] and the like suggests that particular kinds of acts of force are inherently more objectionable that others. This proposition is not shared by all. Some states, for example, would be especially offended if the references to bombardments and blockades in Article 3 were not included within the ICC definition.

19 For a possible text incorporating the relevant provisions of Articles 1 and 3 of the Res. 3314 definition, see Non-paper submitted by the Chairman on defining the State act of aggression, in 2007 SWGCA Intersessional Report, *supra* note 11, at 21. Cf. the wide divergence of views on how to deal with G.A. Res. 3314 (XXIX) expressed in the December 2007 Draft report, *supra* note 17 at paras. 14-23.

20 December 2007 Draft report, *supra* note 17, para. 25.

21 Critics of the use of "war" here note the indeterminacy of the concept. It seems to involve a "certain level" of the clash of arms. The critics also point out that the way the Nuremberg Charter was drafted, the conquest of, for example, Bohemia and Moravia by Germany was not a "war" even if it involved a massive military threat. On the other hand it was made criminal by the language of Control Council Law No. 10. Why should a threat to destroy Prague with a massive air attack not qualify as an act of aggression?

As to what the individual actor does, and his or her connection with the State, it is agreed on all sides that "aggression is a leadership crime." It is not a crime that can be committed by the foot-soldier or by the janitor in the Ministry of Foreign Affairs. But how to describe which people can be leaders for these purposes? The current effort to capture the leadership concept is this: "persons being in a position effectively to exercise control over or to direct the political or military action of State."[22] Some in the Working Group worry that this formula is too narrow, in particular that it does not adequately encompass those who are not formally members of the governmental structure but nevertheless contribute strongly to aggressive war. In particular, there is the question of industrialists whose situation was considered at the second round of Nuremberg trials pursuant to Control Council Law No. 10.[23] "Shape or influence" has some support over "control over or to direct" in this regard, both because of its use historically and because it ensures that the potential of prosecuting such persons comes clearly[24] within the definition. The leadership description is, in terms of Article 30 of the Statute, some kind of "circumstance" element, describing the person's function. "Effectively" takes care of the figurehead monarch or president who exercises no control. What the person does (the conduct element) is described as follows: "the planning, preparation, initiation or execution of an act of aggression/armed attack."[25] Obviously, this does not mean that an accused is solely responsible, but he or she must have made some, perhaps substantial, contribution to the act of aggression.

4. Trumping some of the general principles

Article 3 of the Coordinator's final draft,[26] asserted that "[t]he provisions of Articles 25 (3), 28 and 33 of the Statute do not apply to the crime of aggression". The crime of aggression has to be fitted within the structure of the Rome Statute, both as a matter of drafting technique and of substance.

It seems obvious that, if the crime of aggression is to be fully integrated into the Statute, the framework of Articles 30 (mental and material elements) and 32 (mistake of fact or mistake of law) should apply. The same I believe is true of Article 31

22 December 2007 Draft report, *supra* note 17, Annex at p. 9 ("Non-paper by Chairman').

23 Ibid., para. 9; K.J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', (2007) 18 *European Journal of International Law* 477.

24 Some think it already implicit. See December 2007 Draft report, *supra* note 17, at para. 9.

25 See Non-paper, *supra* note 22. "Act of aggression" seems to be winning the day over "armed attack" to describe the "state" element. See December 2007 Draft report, *supra* note 17, para. 13.

26 See above *supra* note 6.

(grounds for excluding criminal responsibility)[27] as indeed the general provisions in Articles 22-24,[28] 26,[29] 27[30] and 29.[31]

The requirement of knowledge opens up the possibility of a mistake "defence" or "ground for the exclusion of responsibility" under Article 32 of the Statute. Article 32 is difficult to explain, but its plain language demonstrates that it permits defences based on mistakes both of fact and of law (and ones of mixed fact and law for that matter).[32] One who is mistaken lacks the intent and knowledge required as a mental element in Article 30. Consider some potential cases:

Case 1: Accused, a general who executed an invasion, says that he was lied to by the politicians and the leaders in the intelligence community. He believed that he was responding pre-emptively to an imminent massive attack. In fact the intelligence reports on the ground demonstrated that no such attack was threatened.
His mistake arguably means that he lacks the "mental element" (knowledge or intent) "required by the crime", in the words of Article 32. He was simply mistaken on the facts as to the fundamental nature of what he was doing, although there may be some potential "mistake of law" variants on this hypothetical.

Case 2: A general knows that aggression is a crime within the jurisdiction of the ICC and knows the basic facts concerning the campaign which he is asked lead. He doubts the legality of the campaign and consults the Legal Advisers to the Ministry of Foreign Affairs and Defence concerning the application of international law, specifically General Assembly Resolution 3314, to these facts. Both render reasoned opinions concluding that there would be no aggression as a matter of law and he goes ahead, believing in their expertise. Later, the ICC concludes that the advice was legally wrong.

27 See 2004 SWGCA Intersessional Report, *supra* note 8 at 349 ("no particular difficulty posed by [the] application [of art. 31] to the crime of aggression").

28 *Nullum crimen sine lege* (art. 22); *nulla poena sine lege* (art. 23); non-retroactivity *ratione personae* (art. 24).

29 Exclusion of jurisdiction over persons under eighteen.

30 Irrelevance of official capacity.

31 Non-applicability of statute of limitations.

32 Article 32 reads:

> "1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
>
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33 [which deals with superior orders]".

Does that general have a mistake of law defence under Article 32?[33] Does his mistake mean that he lacks the necessary mental element for the offense? The paradigm cases in domestic law where a defence that could arguably be categorized as a mistake of law "works" are those involving a circumstance element,[34] as it appears the "act of aggression" is. In common law terms, there is at least a jury question in the hypothetical.[35] I believe that, especially given the current structure of the offense, the mental element and mistake provisions of the Statute are crucial for fairness to the accused. Whether they can carry enough is something on which reasonable minds might differ.

On the other hand, given that the crime of aggression is a leadership crime involving purposive activity, serious questions have been raised whether the structure of Article 25 (3)[36] (individual criminal responsibility) (particularly subparagraphs (a) to

33 The facts in the hypothetical no doubt support a plea of mitigation, but what I am concerned here is whether complete exoneration is possible.

34 See Clark, *supra* note 13 at 309-11.

35 Real life is perhaps even more confusing. In the run up to the 2003 invasion of Iraq, Admiral Sir Michael Boyce, Chief of the British Defence Staff, sought a statement from the Government's legal advisers that the war was legal. The Attorney-General ultimately provided a 337 word statement to the House of Lords that the UK and the US could rely on a revival of the Security Council resolutions that authorized the first Gulf War. There was vigorous debate on the issue among the academic community, in the press and, it seems, within the Government. No definitive evaluation seems to have been sought from the Defence Ministry's lawyers and the Deputy Legal Adviser of the Foreign Office (one of the most prominent members of the British team that negotiated the Rome Statute) resigned, stating: "I cannot in good conscience go along with advice within the office or to the public or Parliament – which asserts the legitimacy of military action without such a resolution, particularly since an unlawful use of force on such a scale amounts to the crime of aggression; nor can I agree with such action in circumstances which are so detrimental to the international order and the rule of law". Quoted in P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005), 189. Should the Chief of the Defence Staff have sought more advice? Can he rely on the Attorney-General? Should he have followed the academic debate reported in the press? What of the responsibility of the Attorney-General himself (especially since he apparently had earlier doubts which he expressed in a lengthy opinion to the then Prime Minister on 7 March 2003 at <www.guardian.co.uk/Iraq/Story/0,2763,1471659,00.html>. What of the Prime Minister (himself legally trained)? Article 32 is a necessary safeguard for the "innocent" but is hardly a carte blanche to rely on disingenuous advice.

36 Rome Statute Article 25 provides in paragraph 1 that the Court shall have jurisdiction over natural persons. Paragraph 2 provides that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute. Paragraph (4) reads: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law". Each of these is compatible with the proposed provision on aggression. Paragraph 3, sub-paragraphs (a) to (d), deal with variations on the principle that one can commit a crime either individually or jointly. If a reference to Article 25 (3) is retained, sub-paragraph (d) on "a group of persons acting with a common purpose" may have significant application to the crime of aggression. Care will be needed to ensure that the

(d)), Article 28 (responsibility of commanders and other superiors) and Article 33 (superior orders and prescription of law) "fits" it. The Coordinator suggested accordingly, that it be defined to exclude any residual effect of those provisions. These exclusions have all generated intense debate at the Special Working Group and a different approach has been emerging to Article 25.

Article 25 (3), subparagraphs (a) to (d), deal in quite complex detail with what is often called "accomplice" liability, "secondary parties" or "complicity". In total, they attach criminal responsibility not only to the perpetrator who personally commits the offense, but also to those who "order", "solicit", "induce", "aid", "abet", "otherwise assist", or contribute to the commission "by a group of persons acting with a common purpose". Articles 6, 7 and 8 of the Rome Statute are drafted in such a way as to describe what the primary actor does; the secondary actors are connected to the primary actor's crime via Article 25. The crime of aggression as formulated at Nuremberg and later by the PrepCom Coordinator was, however, defined in such a way that all the actors were encompassed in one package. Defining the crime of aggression to exclude the application of a general part on complicity applicable to other crimes, indeed, goes well back in the work of the International Law Commission on its Draft Code of Crimes against the Peace and Security of Mankind. The (less than persuasive and somewhat circular) Commentary to the Commission's final word on the subject in 1996 reads:

> "Article 2, paragraph 2, deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3 indicates the various manners in which the role of the individual in the commission of the crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit the act; if he failed to prevent the commission of the act; if he incited the commission of the act; if he participated in the planning of the act; if he was an accomplice in its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual, because the definition of the crime of aggression in Article 16 already provides all the elements necessary to establish the responsibility. According to that Article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. The crime of aggression has particular features which distinguish it from other offenses under the Code. Aggression can be committed only by

net is not cast too wide beyond the leadership. Sub-paragraph (d) is a descendant of the Nuremberg conspiracy theory, but it is conspiracy as a mode for establishing individual responsibility through participation in a group rather than conspiracy as an inchoate offence. See R. S. Clark, 'Nuremberg and the Crime against Peace', (2007), 6 *Washington University Global Studies Law Review* 527, 536-8. Sub-paragraph (e) makes it an offense to "directly and publicly incite others to commit genocide" and sub-paragraph (f) deals with attempts. All of paragraph 3, in short, except sub-paragraph (e) which is unique to genocide, raises issues with respect to the proposed provision on aggression. There does not seem to be any disposition to make incitement to aggression an inchoate crime in its own right.

> individuals who are agents of the State and who use their power to give orders and the means it makes available in order to commit this crime. All the situations listed in paragraph 3 which would have application in relation to the crime of aggression are already found in the definition of that crime contained in Article 16. Hence the reason to have a separate paragraph for the crime of aggression in Article 2."[37]

While the exact language has remained controversial, by 2006 there was a trend in favor of something closer in approach to the drafting of Articles 6-8, relying on using the general part. This came to be called the "differentiated" rather than the earlier "monistic" approach of a self-contained provision on aggression which did not refer to the general part.[38] The most recent effort defines the crime and adds a modifier to Article 25, as follows:

> "Definition:
> For purposes of this Statute, "crime of aggression" means the planning, preparation, initiation or execution of an act of aggression/armed attack....
> Addition to Article 25 (a new paragraph 3 *bis*):
> With respect to the crime of aggression, the provisions of the present Article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of State."[39]

37 Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 20-21, U.N. Doc. A/51/10 (1996). See also the commentary on Article 16 ("crime of aggression"), ibid., at 83 ("The perpetrators of an act of aggression are to be found only in the categories of individuals who have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression. These are the individuals whom Article 16 designates as 'leaders' or 'organizers', an expression that was taken from the Nurnberg Charter. These terms must be understood in the broad sense, i.e. as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nurnberg Tribunal..."). Article 16 of the final ILC Draft provided that: "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression". The key term "aggression committed by a State" is left indeterminate. The whole definition is "rather circular and disappointing" according to A. Cassese, *International Criminal Law* (2003), 112. One might apply the same criticism to the Coordinator's draft (given the ultimate indeterminacy of G.A. Res. 3314 and the role of the Security Council) and to all the other efforts that have come before the PrepCom and the Special Working Group. Is this inevitable, given the role of a political organ? Could the definition be made more precise if the Court was the sole body to determine if an act of aggression occurred?

38 See 2006 SWGCA Intersessional Report, *supra* note 10 at 15.

39 2007 Draft report of SWGCA, *supra* note 17, Annex, at 9.

With the modifier (paragraph 3 *bis*), which might be seen as an overabundance of caution, I am fairly confident that the various modes of complicity in Article 25 "fit" well with the leadership nature of the crime.

Article 25 (3) of the Rome Statute also deals with attempts[40] to commit the crimes within the jurisdiction of the Court. Attempts were not prosecutable under the Nuremberg and Tokyo Charters. They are, however, included in the Rome Statute in respect of genocide, crimes against humanity and war crimes. Should there be Rome Statute liability for attempts at aggression?

Resolution 3314 does not contemplate an "attempted aggression" by a State. Either the invasion, etc., takes place, or it does not. One can perhaps posit an attempt where troops are massed at the border but bombed into oblivion before they can move. Such unlikely cases for prosecution aside, the kind of attempts that could be contemplated are those where the actor tries to contribute to the "planning, preparation, initiation or waging" of an aggression that eventuates, but he fails in the effort to contribute. The Special Working Group's discussion is inconclusive.[41]

I believe that Article 28 of the Statute, on the responsibility of commanders and other superiors, is inapposite to the crime of aggression for the following reasons. Once again, aggression is universally regarded as a "leadership" crime. Article 28 is a leadership provision also, and connects military and other superiors to what those under their control do. It is applicable to each of the other three crimes under the

40 Rome Statute, Article 25 (3) (f) catches a person who:

> "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".

41 The essence of the debate is captured in this para. from the 2005 SWGCA Intersessional Report, *supra* note 9 at 15:

> "In relation to the 'attempt' to commit the crime of aggression, it was stressed that subpara. (f) would relate only to the attempt by an individual to participate in the collective act and not to the collective act *per se*. It was noted that the attempted collective act itself could, however, be covered by the chapeau of the definition. According to another view, although an attempt by a State to commit an act of aggression merited penalization, in practice it would be difficult since the act of aggression was a circumstance element of the individual crime. While the view was expressed that penalizing an attempt to commit an act of aggression was desirable, it was also said that this would prove impossible in the case of a provision requiring a predetermination of such an act by a body other than the Court".

It does take a stretch of the imagination to contemplate a determination by the Security Council that an attempted aggression has occurred, but the determination could be left to the Court. The nearest equivalent in Security Council usage is Art. 39 of U.N. Charter's "threat to the peace". Some ILC drafts included threats of aggression (a somewhat narrower concept) as a crime. See 1991 Draft Code *supra* note 37, art. 16. A case can certainly made for criminalization in such cases, but there does not seem to be any significant support for making such threats an ICC offence.

jurisdiction of the Court, which do not in their own texts make such connections.[42] Since the definition of aggression will have such a specific set of connectors,[43] the general provision is trumped by the specific and this should be made clear by an exception.

This is not, however, a view unanimously shared in the Special Working Group: Most participants shared the view that Article 28 was not applicable by virtue of both the essence and the nature of the crime; aggression as reflected in the Statute was a leadership crime. However, there was no agreement as to whether non-applicability needed to be reflected in the Statute.[44]

I am not quite so confident about Article 33, although I believe that the Coordinator's draft was probably right in excluding it also. This is the controversial superior orders provision in the Statute. Superior orders is a defence in situations where the accused was under a legal obligation to obey, did not know the order was unlawful, and the order was not manifestly unlawful. Article 33's defence appears to be limited to war crimes.[45] There is no particular policy reason for extending the availability of the defence to aggression. Moreover, in the case of genuine mistakes, Article 32's framework[46] seems to provide adequate protection for superiors. The reporter's summary captures the flavour of the debate in the Special Working Group:

> "44. A number of participants considered that article 33 was applicable to the crime of aggression and favoured its retention in order to allay the concern that some perpetrators might evade prosecution. This would not, however, affect the leadership trait inherent in the crime of aggression. It was noted that exclusion of Article 33 might have the effect of actually broadening the scope of application of the provision.

42 In particular instances, Articles 25 and 28 may be used as alternative ways to charge the superior with genocide, crimes against humanity or war crimes.

43 Either the "leadership" words in the ILC's and the Coordinator's formulations, or the proposed additions to Article 25 (3) in the 2005 SWGCA Intersessional Report, *supra,* text at note 39.

44 See 2005 Special Working Group Report, *supra* note 9 at 10. There may also be a question of the appropriate mental element for the leadership crime lurking here. I have inferred from the current approach that most participants favour the application of art. 30's intent and knowledge requirement. Applying Article 28 would open up the possibility of a negligence approach (military leaders) or one based on some kind of recklessness (non-military leaders). Should a leader be responsible for aggression on the basis of a gross failure to pay attention or recklessness as to what is going on? Perhaps a policy decision one way or the other should be stated expressly. The clearest precedents for using a negligence test are in respect of war crimes, In re Yamashita, 327 U.S. 1 (1946); R. J. Pritchard ed., with S. M. Zaide, *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East* (22 vols., 1981).

45 Paragraph (2) of Article 33 says that "For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

46 *Supra* at notes 32-5.

45. According to a different view, Article 33 would not be applicable to the crime of aggression, which was a leadership crime and hence not applicable to mid- or lower-level individuals. Some participants were of the opinion that, for the sake of clarity, a provision specifically indicating that Article 33 did not apply to the crime of aggression merited inclusion. Others, however, opined that, as in the case of many other provisions of the Statute that were not always applicable to all the crimes, there was no need to refer specifically to its non-applicability to the crime of aggression. It would be the role of the Court to make a determination as to whether an Article would apply in specific cases.
46. It was suggested that the crime of aggression should be incorporated in paragraph 2.[47] On the other hand, some caution was urged in light of the fact that paragraph 2 referred to acts that were clearly directed against the civilian population, which was not necessarily the case when a crime of aggression was committed".[48]

In short, this too has yet to be resolved by the Special Working Group.

5. Conclusion

Defining aggression, in both its state responsibility form, and in its individual responsibility form, has been a work-in-progress since the 1920s.[49] Achieving consensus on a provision for the ICC Statute in time for the Review Conference in 2010 is not beyond human ingenuity. It is heartening that there is now a substantial focus on the "technical", criminal law, aspects. Achieving the long-awaited political breakthrough on the "conditions of exercise" will not be sufficient if basic principles of responsibility in Part 3 of the Rome Statute are not addressed – and it is significant that this is now happening! There are also difficult questions of whether, notwithstanding the prior determination by the United Nations organ of the existence of an act of aggression, the accused may raise, as a defence, state responsibility arguments such as that the action could be justified as legitimate self defence by the state. At both Nuremberg and Tokyo, the Tribunals accepted without much ado that the accused were entitled to raise such issues. The defense claims were denied on the merits.[50] There has been no disposition to pursue the details of these matters in the Special Working

47 For paragraph 2, see *supra* note 45.

48 2005 SWGCA Intersessional Report, *supra* note 11 at 10.

49 See Clark, *supra* note 26; O. Solera, *Defining the Crime of Aggression* (2007).

50 See Nuremberg discussion of the invasion of Norway, summarized in the Secretariat's very useful historical review of developments relating to aggression, U.N. Doc. PCNICC/2002/WGCA/L.1 and Add.1, at 22-23 (supplied to the PrepCom). See also Tokyo discussion of the Japanese claim to be acting in self-defense in attacking France, The Netherlands, Great Britain and the United States, summarized ibid., at 99. Article 31 (3) permits the Court to consider a ground for excluding criminal responsibility other than those specifically mentioned in Article 31 (1). It provides a vehicle for such an exercise "where such a ground is derived from applicable law as set forth in Article 21."

Group, its members being content to leave the "defences" for later.[51] There might also be questions such as newly discovered evidence, the examination of which might be compelled by the need to render justice in the particular case. Should these be spelled out, or can they safely be left to the judges to "work it out"?

Resolution 3314 also says that the Security Council can conclude that other actions amount to aggression and, on the other hand, that even if the conditions in the definition are met, it may conclude that there was not in fact an aggression. This creates some problems for inserting Resolution 3314 into a definition of the crime. In the first place, it deals with state responsibility; in the second, it is open-ended. The first problem can be dealt with by using it to define only the "act of aggression". The second requires either making some general reference to it and leaving the Court to "work it out," or taking the precise parts and incorporating them into a reasonably precise definition. Both (and other) possibilities are still open.[52]

51 There are some useful perspectives in G. P. Fletcher and J. D. Ohlin, *Defending Humanity*: *When Force is Justified and Why* (2008); O. Olusanya, *Identifying the Aggressor Under International Law: A Principles Approach* (2006).

52 For a possible text incorporating the relevant provisions of Articles 1 and 3 of the Res. 3314 definition, see Non-paper submitted by the Chairman on defining the State act of aggression, in 2007 SWGCA Intersessional Report, *supra* note 11, at 21. Cf. the wide divergence of views on how to deal with G.A. Res. 3314 (XXIX) expressed in the December 2007 Draft report, *supra* note 17 at paras. 14-23.

Chapter 36 Evaluating domestic legislation on the customary crime of aggression under the Rome Statute's complementarity regime

*Astrid Reisinger Coracini**

1. Introduction

The crime of aggression is a crime under customary international law. At the same time it is listed as one of the 'most serious crimes of concern to the international community as a whole' in an international treaty, the Rome Statute of the International Criminal Court (ICC).[1] Failing to reach consensus on the definition of the crime and the conditions under which the Court shall exercise its jurisdiction with respect to the crime of aggression, the Rome Conference provided for a mechanism to continue the negotiations.[2] The Preparatory Commission for the ICC and the Special Working Group on the Crime of Aggression[3] have been dedicated to codify the customary crime of aggression. Five years after the establishment of the ICC, the Special Working Group has made significant progress regarding the dogmatic structure and legal characteristics of the definition of the crime of aggression.[4]

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1 A/CONF.183/9 of 17 July 1998 as corrected by procès-verbaux (hereinafter 'Rome Statute'), see Article 5 (1).

2 See Article 5 (2); Resolution F (7) Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/10.

3 See ICC-ASP/1/Res.1.

4 For the current state of negotiations see Report of the Special Working Group on the Crime of Aggression, Sixth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, 30 November to 14 December 2007, ICC-ASP/6/SWGCA/1, and Report of the Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression of the Assembly of States Parties of the International Criminal Court, Liechtenstein Institute for Self Determination, Woodrow

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Notwithstanding the current efforts on the international level, a number of states have implemented the crime of aggression under customary international law into their domestic criminal codes in order to protect legal values of the international community as a whole. This paper will analyse national definitions of the international crime of aggression in the light of the current state of the negotiations to codify this crime for adjudication before the ICC. It will give examples of national legislation, provide an overview of the main features and identify convergent and deviating elements. Furthermore, it will examine under what circumstances states establish jurisdiction to adjudicate and actually empower domestic courts to enforce the crime of aggression. The survey deals exclusively with statutory legislation. It does not tackle the question whether or not the crime of aggression under customary international law forms an integral part of certain legal systems or may otherwise be directly applicable.[5]

Before analysing national legislation on the crime of aggression, the legal basis for domestic enforcement of this crime will need to be reviewed. This concerns on the one hand, the indirect enforcement model for crimes under international law, its applicability to the crime of aggression, potential difficulties and the question of universal jurisdiction. On the other hand the Rome Statute's complementary jurisdiction over the crime of aggression and the role of national provisions within this framework will be scrutinized.

The paper will conclude by assessing the findings of the comparative study and analysing the interrelationship between international and domestic definitions of the crime of aggression. It will deal with the question to what extent national provisions may have an impact on the current negotiations on the international level. In addition, the potential impact of an international provision adopted in the context of the Rome Statute on national provisions will be evaluated.

The conditions under which the ICC may exercise its jurisdiction over the crime of aggression are beyond the scope of this research.[6] First, the potential outcome of the Special Working Group's negotiations cannot appropriately be assessed at this point in time.[7] Second, the conditions are understood as procedural prerequisites for

Wilson School, at Princeton University, 11-14 June 2007, ICC-ASP/6/SWGCA/INF.1, hereinafter '2007 Princeton Report'.

5 See e.g. House of Lords in *R. v. Jones et al.*, Session 2005-2006, [2006] UKHL 16; see also T. Gut & M. Wolpert, 'Canada', in A. Eser, U. Sieber & H. Kreicker (eds.), *National Prosecution of International Crimes*, Vol. 5 (2005), 19, at 33.

6 For details see e.g. N. Blokker, 'The Crime of Aggression and the United Nations Security Council', (2007) 20 *Leiden Journal of International Law* 867; C. Kress, 'The Crime of Aggression before the First Review Conference of the ICC Statute', (2007) 20 *Leiden Journal of International Law* 851, at 859 *et seq.*; M. Stein, 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?' (2005) 16 *Indiana International & Comparative Law Review* 1.

7 As regards the conditions, the Special Working Group cannot be expected to produce more than a catalogue of legally possible and viable options. The ultimately necessary *po-*

the exercise of the jurisdiction of the ICC.[8] Consequently, they are not pertinent to prosecutions before national courts.[9]

2. Domestic prosecution of the crime of aggression

2.1. Indirect enforcement of crimes under international law

International criminal law doctrine ascertains two ways to enforce crimes under international law: before international criminal courts and tribunals (direct enforcement model) or national courts (indirect enforcement model).[10] These enforcement mechanisms apply to all crimes under international law, including the crime of aggression. They apply despite the fact that crimes under international law are – not necessarily, but commonly – committed by state organs in pursuance of a state policy. The irrelevance of (functional as well as personal) immunities before international courts and tribunals is generally accepted.[11] In the context of national enforcement the application of this rule among sovereign states and its relation to the principle *par in parem non habet imperium* requires further consideration.

Since the nineteenth century, the principle of state immunity has lost some of its invulnerability. A state's *acta iure gestionis* generally fall out of its scope.[12] Some commentators further argue for a general exemption of serious violations of international law from *acta iure imperii* immunity.[13] With regard to *acta iure imperii* immunity

litical decisions and concessions will – if at all – not be achievable before the 2010 review conference.

8 See e.g. Report of the Special Working Group, *supra* note 4, ICC-ASP/6/SWGCA/1, para. 29.

9 Concurrent, e.g., P. Wrange, 'The Crime of Aggression and Complementarity', in R. Bellelli (ed.), *International Criminal Justice. Lessons Learned and the Challenges Ahead* (forthcoming 2008), at Scenario II.

10 For many see M. Ch. Bassiouni, *International Criminal Law* (1980), at 23; O. Triffterer, 'Preliminary Remarks: The permanent International Criminal Court – Ideal and Reality', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (2008) margin No. 49; G. Werle, *Völkerstrafrecht* (2007), at margin No. 217.

11 See e.g. Article 27 Rome Statute; International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment of 14 February 2002, para. 61. : See also Werle, *supra* note 10, at margin No. 609, 616.

12 See e.g. V. Epping 'Die Grundprinzipien des Völkerrechts über die Beziehungen zwischen den Staaten', in H. Ipsen (ed.), *Völkerrecht* (2004), § 26, margin No. 18 *et seq*.; United Nations Convention on Jurisdictional Immunities of States and Their Property, A/RES/59/38 of 16 December 2004, Part III Proceedings in Which State Immunity Cannot be Invoked; cautiously, I. Brownlie, *Principles of Public International Law* (2003), at 323 *et seq*.

13 For references see e.g. M. Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', (1971) 31 *Zeitschrift für ausländisches und öffentliches Recht* 246, at 255; see in this regard also the Areopag, Distomo-decision of 4 May 2000.

for state organs, a *ratione loci* exception applies.[14] Furthermore, state organs perpetrating crimes under international law are individually criminally responsible. While the existence of such a general principle might have been doubtful before Nuremberg, the initial practice of national and international tribunals in the aftermath of the Second World War followed by the development of a general *opinio iuris* seem to have settled its customary law status.[15] Again, this counts for all crimes under international law, including the crime of aggression.[16] Given the nature of crimes under international law, the predominant view understands the non-applicability of functional immunity for state officials perpetrating crimes under international law as an exception to the notion of state immunity for *acta iure imperii.*[17] However, based on the thought that the commission of crimes are not 'normal state functions', an ICJ *dictum* in the *Congo v. Belgium Case* has reinforced the discussion whether the commission of crimes would need to be categorized as private acts.[18] According to any of these interpretations, the sovereign equality of states and its manifestation in the principle *par in parem non habet imperium* does not impede the indirect enforcement of crimes under international law.

Nonetheless, even if a functional immunity exeption is accepted, the prosecution of certain state organs before national courts may be hampered due to an alleged perpetrator's personal immunity. Heads of state or government, ministers of foreign affairs and diplomats enjoy full procedural immunity during their term of office.[19] Other state officials may be granted *ad hoc* personal immunity when abroad in of-

14 See e.g. K. Schmalenbach, 'Immunität von Staatsoberhäuptern und anderen Staatsorganen', (2006) 61 *Zeitschrift für öffentliches Recht* 397, at 412-3.

15 See e.g. Bothe, *supra* note 13, at 254; Werle, *supra* note 10, at margin No. 613 with further references in note 550; speaking for immunities in general, A. Zahar & G. Sluiter, '*International Criminal Law*' (2008), at 503.

16 For an overview of national prosecutions including aggression see Historical review of developments relating to aggression, PCNICC/2002/WGCA/L.1 of 24 January 2002. Further examples can be found in the Law Reports of Trials of War Criminals. For an account see N. Strapatsas, 'Complementarity & Aggression: A Ticking Time Bomb?', in C. Stahn & L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2008, forthcoming), at 2.2. and 2.3.

17 A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', (2002) 13 *European Journal of International Law* 853, at 870; P. Gaeta, 'Official Capacity and Immunities', in A. Cassese,P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), I, 975, at 979 *et seq*.; Werle, *supra* note 10, at margin No. 613.

18 ICJ *Congo v. Belgium*, *supra* note 11 para. 61, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85. For a possible understanding of para. 61 of the ICJ judgement as exemplary, see Cassese, *supra* note 17, at 867 (note 40).

19 *Congo v. Belgium*, *supra* note 11, Judgment para. 53. For many see Werle, *supra* note 10, at margin No. 607, 614-9. Differently e.g. ICJ *Congo v. Belgium*, Dissenting Opinion of Judge van den Wyngaert, para 11 et seq. and Dissenting opinion of Judge Al-Khasawneh, para 8.

ficial capacity.[20] This personal immunity ceases with the end of office or the mission. Subsequently, the formerly protected person can be prosecuted for any acts committed before, and acts committed in private capacity during his or her term of office. With regard to acts committed in official capacity, state immunity as previously defined exonerates the individual from individual accountability. The *ratione personae* immunity constitutes a temporary, procedural bar to prosecution for any crime under international law. The circle of perpetrators of the crime of aggression, restricted to "leaders and organizers", will often comprise high ranking state officials, who may successfully invoke such immunities before (foreign) national courts.[21] Their prosecution for aggression will consequently be rather exceptional.

Within the limits of international law, states have a broad freedom of choice when regulating the enforcement of crimes under international law. This also concerns the jurisdictional basis provided for the national initiation of proceedings. As in the context of crimes under national law, states may base the jurisdiction of domestic courts on any traditional jurisdictional link. In addition, as regards crimes under international law, states may go beyond and invoke universal jurisdiction to be exercised by domestic courts in the interest of the international community as a whole.[22] The latter is characterised by the absence of a specific connection between the crime and the state exercising jurisdiction over it; it is jurisdiction based solely on the nature of the crime.[23] Endorsing a consistent theory of universal jurisdiction, the concept is applicable to all crimes under international law, including the crime of aggression.[24]

While international law undoubtedly authorizes national prosecution of crimes under international law, some commentators further deduce certain obligations. This regards e.g. a duty to enforce international crimes which constitute a *ius cogens* viola-

20 See Article 29, 31 Convention on Special Missions (A/Res/24/2530) or the bilateral creation of a good faith situation invoking the principle of estoppel, for details see Bothe, *supra* note 13, at 264-6.

21 See *infra* at 3.1. For a nevertheless deterrent effect see Wrange, *supra* note 9, at Scenario I.

22 For the ongoing discussion concerning the scope and limits of universal jurisdiction see e.g. Association Internationale de Droit Pénal, Draft Resolution on Universal Jurisdiction, adopted at the Preparatory Colloquium of Section IV of the XVIIIth International Congress of Penal Law, Xi'an, China, October 2007 (on file with the author); M. Henzelin, *Le Principe de l'Universalité en Droit Pénal International* (2000); C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit international', (2006) 4 *JICJ* 561; S. Macedo (ed.), *Universal Jurisdiction* (2006).

23 See e.g. Princeton Principle 1, para. 1; Macedo, *supra* note 22, at 21.

24 See e.g. M. Ch. Bassiouni, 'International Crimes *Jus Cogens* and *Obligatio Erga Omnes*', (1996) 59 *Law & Contemporary Problems* 63, at 63, 68; Y. Dinstein, *War, Aggression and Self-Defence* (2005), at 145; T. Weigend, 'Grund und Grenzen universaler Gerichtsbarkeit', in: J. Arnold *et al.* (eds.), *Menschengerechtes Strafrecht – Festschrift für Albin Eser* (2005), 955, at 972; see also Principle 2, Princeton Principles on Universal Jurisdiction, printed in Macedo, *supra* note 22, 18, at 22; reluctant e.g. Werle, *supra* note 10, at margin No. 187; Zahar & Sluiter, *supra* note 15, at 498.

tion according to the principle *aut dedere aut iudicare*[25] or a duty of the territorial state to prosecute.[26] The Rome Statute in its Preamble clearly acknowledges a "duty to exercise criminal jurisdiction" and to provide "effective prosecution… by taking measures on the national level".[27] Again such considerations concern all the crimes under international law, or core crimes under the Rome Statute, including the crime of aggression.

The questions of indirect enforcement of crimes under international law and potential obstacles thereto were also considered by the ILC when drafting a code of crimes against peace and the security of mankind. The early versions of the ILC draft code did not particularly deal with methods of enforcement. Since the draft code restricted itself to crimes under international law, the ILC primarily envisaged enforcement through a future permanent international criminal court. However, pending the establishment of such a court, the ILC suggested that "a transitional measure might be adopted providing for the application of the code by national courts".[28] Eventually, the indirect enforcement approach for all crimes within the code, including the crime of aggression, became the ILC's main focus.[29] The inclusion of national enforcement of the crime of aggression can also be evidenced in Article 15 para 5 1991 ILC Draft Code.[30] Its Article 13 confirmed the irrelevance of any official position or responsibility. However, this uniform approach was abruptly discarded for the understanding "that the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court".[31]

This view of some ILC members was expressed in the context of the question, whether or not a national court was able to adjudicate that a state had committed an act of aggression by using armed force against another state. Such a determination was considered to be contrary to the principle of international law *par in parem non habet imperium* and to bear serious implications for international relations and inter-

25 M. Ch. Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in M. Ch. Bassiouni (ed.), *International Criminal Law*, 2nd ed. (1999), Vol. I, 3 at 114.

26 Werle, *supra* note 10, at margin No. 192, with further references.

27 Preambular para. 4 and 6 Rome Statute.

28 Report of the International Law Commission on the work of its third session, 16 May to 27 July 1951, Yearbook of the International Law Commission 1951, Vol. II, hereinafter '1951 ILC Report', at 133.

29 Report of the International Law Commission on the work of its fortieth session, 9 May to 29 July 1988, Yearbook of the International Law Commission 1988, Vol. II (Part 2), hereinafter '1988 ILC Report', at 67.

30 The Commentary clarifies that the brackets around paragraph 5 are due to criticism of introducing a binding force of UN Security Council determinations on the existence or non existence of an act of aggression: "to link the application of the code to the operation of the Security Council would render all the work of elaborating the code pointless", 1988 ILC Report, at 73.

31 Report of the International Law Commission on the work of its forty-seventh session, 2 May to 21 July 1995 (A/50/10), hereinafter '1995 ILC Report', at 39.

national peace and security.[32] Consequently, the 1996 ILC Draft Code introduced two jurisdictional regimes. It provided for concurrent jurisdiction of states and an international criminal court for genocide, crimes against humanity, war crimes as well as crimes against United Nations and associated personnel, whereby states were obliged to establish universal jurisdiction under domestic law for these crimes.[33] Jurisdiction over the crime of aggression[34] was exclusively reserved to an international criminal court "with the singular exception of the national jurisdiction of the state which has committed aggression".[35] National courts were not required to consider an act of aggression by another state. Prosecution of a state's own leaders who participated in an act of aggression was deemed useful e.g. during a process of national reconciliation. Should these national court proceedings fail to meet the required standard of independence and impartiality, a subsequent trial by an international criminal court was not precluded according to the principle of *ne bis in idem* as defined in the 1996 ILC Draft Code.[36]

The ILC's approach has rightly been criticised as 'retrogressive' and inconsistent with state practice.[37] Furthermore, it is not comprehensible why a national court deciding about the commission of an act of aggression would be perceived as substantially different from a national court judging the existence of a wide or systematic attack against a civilian population by a state, or the potential acknowledgement that genocide or war crimes were committed (in particular) as part of a state plan or policy. The previous brief analysis recalled that the crime of aggression is part of the same legal framework as all crimes under international law. Indirect enforcement of the crime of aggression faces the same difficulties and obstacles as the domestic prosecution of other crimes under international law.

2.2. The ICC's complementary jurisdiction

The Rome Statute is based on the primary responsibility of states to prosecute crimes under international law. The crime of aggression, being listed as one category of crimes within the jurisdiction of the ICC, is not subjected to specific procedures within the Statute's general framework. This view has also been endorsed by the Special Working Group, when explaining that "Articles 17, 18 and 19 were applicable in

32 Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-seventh session, 6 May to 26 July 1996 (A/51/10), 9, hereinafter '1996 ILC Draft Code', at 49-50.

33 1996 ILC Draft Code, at 42.

34 Article 16 1996 ILC Draft Code defined the crime of aggression as follows: "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a state shall be responsible for a crime of aggression".

35 1996 ILC Draft Code, at 49.

36 Article 12 (2) (a) (ii) 1996 ILC Draft Code.

37 Wrange, *supra* note 9; at Scenario II; Strapatsas, *supra* note 16, at 2.2.

their current wording' to the crime of aggression.[38] In principle, the complementary jurisdiction of the Court with regard to all core crimes only steps in if states do not genuinely exercise the *ius puniendi* of the international community as a whole.[39] In this context, the lacuna of Article 20 (3) Rome Statute should be kept in mind. While national trials for any crime under the jurisdiction of the ICC are barred once a person has been convicted or acquitted by the Court,[40] the current protection afforded by *ne bis in idem* regarding trials before the ICC subsequent to national prosecutions is limited to conduct defined as genocide, crimes against humanity and war crimes.[41] Accordingly, the ICC would have an increased power to control final decisions and admit cases regarding charges of aggression, even if none of the exceptions listed in Article 20 (3) applied. This would be a viable approach, if states parties wanted to reinforce the supervisory function of the Court. The Special Working Group however, has expressed the view that once the definition of the crime of aggression is adopted, reference to this category of crime needs to be included into the chapeau of Article 20 (3).[42]

Unlike other treaties which define crimes under international law, the Rome Statute does not oblige states to implement its substantive provisions into domestic law.[43] Nonetheless, the Statute's complementarity regime, in particular the authority of the Court to decide that a state is "unable or unwilling" to genuinely enforce crimes within its jurisdiction, serves as a strong incentive.[44] The most coherent method to

38 Report of the Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression of the Assembly of States Parties of the International Criminal Court, Liechtenstein Institute for Self Determination, Woodrow Wilson School, at Princeton University, 21-23 June 2004, ICC-ASP/3/SWGCA/INF.1 (hereinafter '2004 Princeton Report'), para. 27.

39 For details see O. Triffterer, 'Concluding Remarks', in Austrian Federal Ministry for Foreign Affairs/Salzburg Law School on International Criminal Law (eds.), *The Future of the International Criminal Court – Salzburg Retreat, 25-27 May 2006* (2006), available at <www.sbg.ac.at/salzburglawschool/Retreat>, 26, at 32; id., 'Preliminary Remarks: The permanent International Criminal Court – Ideal and Reality', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (2008) margin No. 60.

40 Article 20 (2) Rome Statute.

41 Article 20 (3) Rome Statute. For details see I. Tallgren & A. Reisinger Coracini, 'Article 20 – Ne bis in idem', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, 2nd ed. (2008), at margin No. 41.

42 2004 Princeton Report, para. 34.

43 See Werle, *supra* note 10, at margin No. 77-8. However, good reasons have been employed to support a 'normative force of complementarity', see J. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', (2003) 1 *JICJ* 86, at 90-4.

44 The absence of adequate laws may be interpreted as an indicator of a State's inability to prosecute, see e.g. Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court, 7- 9 July 2004, Marlborough House, London, at 2.

implement the crimes within the jurisdiction of the Court would be the incorporation or reproduction of the relevant definitions as crimes under international law.[45] This is also valid for a future provision on the crime of aggression. However, states are not prevented from legislating beyond a potential compromise solution, wishing to reflect the most progressive definitions of crimes.[46] Where states decide not to specifically implement the crimes of the Rome Statute, national prosecution may be based on regular domestic definitions, of so called "ordinary crimes".[47] In the context of aggression, it may be more difficult to find national counterparts to conduct criminalized under international law. However, a number of states criminalize, in the context of their external protection, conduct which may amount to the crime of aggression if the necessary threshold is met.[48] National offences, falling short of the crime of aggression, might nevertheless play a role with regard to the ICC's potential exercise of complementary jurisdiction over the crime of aggression, when the prescribed conduct amounts to aggression. Depending on the stage of a proceeding before the ICC, the Court may determine the inadmissibility of a case before it, if "the case" is being investigated or prosecuted, has been investigated without the initiation of a prosecution or "the person concerned has already been tried for conduct which is the subject of the complaint".[49] The decisive criteria seem to be national allegations against the same individual for "conduct also proscribed" in the definition of the crime in the Rome Statute.[50] Consequently, national offences based on the same criminal conduct as the crime of aggression might constitute an obstacle for the admissibility of a case of aggression before the ICC, if not one of the exceptions of Articles 17 and 20 para. 3 applies. However, the application of "ordinary crimes" in order to counter the international crime of aggression will need to be carefully scrutinized on a case to case basis, giving due consideration to the concrete charges, the penalty frame as well as the actual sentence, in order to assess whether the proceedings were genuinely conducted to bring the person concerned to justice.

Despite the applicability of the complementarity regime to charges of aggression, national prosecution in specific cases may be precluded by prerogatives of international law, political considerations or factual circumstances. In the language of Article 17 Rome Statute, a state may often find itself 'unable or unwilling' to prosecute an in-

45 See e.g. B. Broomhall, 'The International Criminal Court: A Checklist for National Implementation', (1999) 13*quarter Nouvelles Etudes Pénales* 113, at 149.

46 In this regard e.g. Human Rights Watch, *International Criminal Court. Making The International Criminal Court Work. A Handbook for Implementing the Rome Statute* (2001), at 16. For the legal consequences see Kleffner, *supra* note 43, at 99-100.

47 For details see Kleffner, *supra* note 43, at 95-9; Tallgren & Reisinger Coracini, *supra* note 41, at margin No. 32.

48 For details see A. Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression', in R. Bellelli (ed.), *International Criminal Justice. Lessons Learned and the Challenges Ahead* (forthcoming 2008), at III.

49 See Article 17 (1) (a) to (c).

50 See also Article 20 (3). For details see Tallgren & Reisinger Coracini, *supra* note 41, at margin No. 39 et seq.

dividual for the crime of aggression.[51] For instance, a state may not be in a position to prosecute because its domestic criminal code does not provide for adequate offences and international law is not directly applicable. Where customary international law forms part of a national legal system, courts may employ judicial self restraint and declare the matter non justiciable.[52] Further potential obstacles to prosecution, in particular of high officials of a foreign state, may include difficulties in obtaining evidence or getting hold of the accused, or concern immunities under international law.[53] Even if it was in a position to prosecute, a "victim" state may refrain from trying alleged perpetrators for aggression out of fear of the "aggressor state".[54] Lastly, national proceedings, if carried out, may not satisfy the plea to bring alleged perpetrators to justice. One may think of a sham trial conducted in an "aggressor state" against its former leaders,[55] or of a 'victorious state' that had previously been a victim of aggression and installs proceedings which are not being "conducted independently of impartially", depriving an alleged perpetrator of his or her rights.[56] Despite these potential perils, states should not *a priori* be suspected of being unwilling to genuinely prosecute, in particular when their performance will be under the scrutiny of the ICC.

3. National provisions defining the crime of aggression

A survey of ninety national criminal codes identified statutory provisions relating to aggression as a crime under international law in some twenty-five countries,[57] predominately Eastern European and Central Asian states. The relevant norms carry different denominations. Many provisions are simply titled "war of aggression", "aggressive war",[58] or "aggression".[59] The Latvian criminal code uses the term "crimes

51 W. A. Schabas, 'Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"' in M. Politi & G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004), 17, at 18, assesses that "the complementarity regime, … seems virtually inapplicable"; see also Strapatsas, *supra* note 16, at 4.

52 On the act of state doctrine and the political question doctrine see e.g. Strapatsas, *supra* note 16, at 3.2 and 3.3; Wrange, *supra* note 9, at Scenario I.

53 See *supra* at 2.1.

54 On this scenario see e.g. 2004 Princeton Report, para. 25.

55 Article 17 (2) (a) Rome Statute.

56 Article 17 (2) (c) Rome Statute. See also 2004 Princeton Report, para. 25.

57 Armenia, Bosnia and Herzegovina (Criminal Codes of the Federation, Brcko District and Republika Srpska), Bulgaria, Croatia, Cuba, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Montenegro, Poland, Portugal, Russian Federation, Serbia, Slovenia, Tajikistan, Ukraine, Uzbekistan. For details see Reisinger Coracini, *supra* note 48, at II.

58 See Article 384 Armenian Criminal Code; Article 157 Croatian Criminal Code; Article 442 Montenegrin Criminal Code; Article 386 Serbian Criminal Code; Article 395 Tajik Criminal Code.

59 § 91 Estonian Criminal Code; Article 151 Uzbek Criminal Code.

against peace".[60] In the majority of cases the denomination of the crime already mentions particular modes of participation. These range from very specific acts, such as "instigating an aggressive war",[61] "incitement to war",[62] or "stirring up of an armed conflict"[63] to the complete spectrum of "planning, preparing, unleashing, or waging an aggressive war".[64]

Provisions on the crime of aggression are located in such chapters of national criminal codes which comprise crimes under international law that are enforceable by domestic courts. The titles of these chapters mirror the international legal values they seek to protect. Chapter XIII of the Croatian Criminal Code, for instance, which also includes individual criminal responsibility for "war of aggression" (Article 157), refers explicitly to "criminal offences against values protected by international law". Other criminal codes similarly refer to crimes against "rights guaranteed under international law", crimes against the "international legal order" or generally to crimes against "international law".[65] Frequently, references to the ILC Draft Code of "crimes against the peace and security of mankind" can be found.[66] Next to "peace" and "security", the category "humanity" is listed as a protected interest in some cases.[67] At least twice, the term "crimes against humanity" serves as a generic denomination for crimes under international law, including crimes against peace.[68] Occasionally, the chapter headings simply list those crimes under international law which are subsequently defined.[69]

60 Section 72 Latvian Criminal Code. See in this regard also Chapter I of Title III Portuguese Criminal Code "dos crimes contra a paz" which includes Article 236 on incitement to war.

61 Article 165 Bosnian Federal Criminal Code; Article 159 Bosnian Criminal Code (Brcko District); Article 444 Bosnian Criminal Code (Republika Srpska); Article 385 Slovenian Criminal Code.

62 Article 114 Cuban Criminal Code; Section 153 Hungarian Criminal Code; Article 236 Portuguese Criminal Code.

63 Article 297 Mongolian Criminal Code.

64 Article 353 Russian Criminal Code. Similarly e.g. Article 139 Moldovan Criminal Code; Article 156 Kazakh Criminal Code; Article 117 (1) Polish Criminal Code; Article 437 Ukrainian Criminal Code.

65 See, for instance, Chapter 35 Montenegrin Criminal Code; Chapter 34 Serbian Criminal Code; Chapter 35 Slovenian Criminal Code; Chapter 20 Ukrainian Criminal Code; Chapter 14 Kosovan Criminal Code; Title I, Chapter 3 Venezuelan Criminal Code.

66 Section 13, Chapter 33 Armenian Criminal Code; Chapter 4 Kazakh Criminal Code; Title Ten, Chapter 30 Mongolian Criminal Code; Section XV Chapter 34 Tajik Criminal Code; Section 2, Chapter 8 Uzbek Criminal Code; Chapter 34 Russian Criminal Code.

67 Chapter 16 Bosnian Federal Criminal Code; Chapter 14 Bulgarian Criminal Code; Chapter 8 Estonian Criminal Code.

68 Section 14 Georgian Criminal Code; Chapter 11 Hungarian Criminal Code.

69 See e.g. Chapter 9 Latvian Criminal Code; Chapter I Moldovan Criminal Code; Chapter XVI Polish Criminal Code.

The majority of national criminal codes, however, do not contain the crime of aggression under international law. In same countries, respective legislative proposals were discussed,[70] but rejected e.g. in Sweden due to lack of an agreed definition of the crime on the international level,[71] or in Finland because aggression was understood as a matter between states.[72]

3.1. Leadership element

At first glance, it is striking that national provisions on aggression scarcely refer to the one component of the crime of aggression over which there seems to be a broad international consensus: the leadership element. Although there has been some discussion as to whether or not the leadership element was an integral part of the definition of the crime (definitional element) or whether it was to be understood as restricting the jurisdiction of the ICC (jurisdictional element),[73] it is generally understood that only high ranking officials, persons who are in a decision-making position in their country, shall bear responsibility for the crime of aggression.[74] The established qualification of a potential perpetrator of the crime of aggression as "being in a position ef-

70 For the discussion in Canada in the context of the preparation of the ICC implementation act see Gut & Wolpert, *supra* note 5, at 34.

71 See K. Cornils, 'Schweden', in A. Eser & H. Kreicker (eds.), *National Prosecution of International Crimes*, Vol. 2 (2003), 183, at 220.

72 See D. Frände, 'Finnland', in A. Eser & H. Kreicker (eds.), *National Prosecution of International Crimes*, Vol. 2 (2003), 21, 45.

73 This discussion arose following the circulation of a proposal for alternative language for the definition of the crime of aggression by the Chairman of the SWGCA at the fifth resumed session of the Assembly of States Parties. It suggested that "[t]he Court shall have jurisdiction with respect to the crime of aggression when committed by a person being in a position effectively to exercise control over or to direct the political or military action of a state". See Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/3 of 31 January 2007, Annex, at 7. Meanwhile, the question seems to have been settled with a vast majority of delegates expressing their understanding of the leadership element as an integral part of the definition of crime. See 2007 Princeton Report, para. 9,. During the discussions some delegations voiced the opinion that they would not see a substantive change regarding the result of the two different formulations. This may be true regarding prosecutions before the ICC. However the question of whether the leadership element forms part of the customary definition of the crime may have an impact on domestic enforcement.

74 This consensus can also be illustrated by the drafting history for a provision on aggression. All but one proposal on the definition of the crime expressly refer to the leadership element and even PCNICC/1999/DP.12 (Russian Federation), introducing Article 6 (a) IMT Charter, is to be understood as implicitly incorporating this element. See also e.g. Kress, *supra* note 6, at 855.

fectively to exercise control over or to direct the political or military action of a state" originates from the 2002 Discussion Paper and has since remained unchanged.[75]

None of those national norms, which strictly relate to conduct punishable under the Charter of the International Military Tribunals of Nuremberg and Tokyo,[76] expressly limit the circle of potential perpetrators to certain groups of individuals. Legal commentaries to these provisions offer the following guidelines for interpretation. First, since the national norm implements a crime under international law, it has to be read in accordance with the customary law definition of the crime. Second, a potential perpetrator of the crime of aggression has to be capable and in the position to carry out the *actus reus*. Therefore, it is suggested that only persons who have a leading position in the military or the political decision-making bodies are *per se* capable of perpetrating the crime of aggression, but not, for instance, persons conducting military operations.[77]

An implicit reference to criminal responsibility of persons in a superior position can be found in the criminal codes of Montenegro and Serbia. Next to any person who "calls for or instigates aggressive war", "anyone who orders waging war"[78] is liable for punishment. Comparably, the Croatian criminal code specifies waging a war of aggression as "commanding an armed action of one state against the sovereignty, territorial integrity or political independence of another state". The conduct verbs "order" and "command" imply the existence of a hierarchical, superior-subordinate

75 See Discussion paper proposed by the Coordinator, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II Proposals for a provision on the crime of aggression, PCNICC/2002/2/Add.2 of 24 July 2002, 3, at I 1 and Discussion paper on the crime of aggression proposed by the Chairman, ICC-ASP/5/SWGCA/2 of 16 January 2007, at 3.

76 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945 (hereinafter IMT Charter or Nuremberg Charter); Special Proclamation of General MacArthur, the Supreme Commander for the Allied Powers, of 19 January, 1946 (hereinafter 'IMTFE Charter').

77 See e.g. E. Weigend, 'Polen', in A. Eser & H. Kreicker (eds.), *National Prosecution of International Crimes,* Vol. 2 (2003), 77, at 113; A. Parmas/T. Ploom, 'Estonia', in A. Eser/U. Sieber/H. Kreicker (eds.), *National Prosecution of International Crimes,* Vol. 5 (2005), 89, at 123. An Estonian Commentary bases individual criminal responsibility on "strategic leadership in a war as a whole", a person giving orders and instructions for warfare on the highest state level (political and military governance). State representatives as well as other persons not belonging to the public service, but having nevertheless sufficient power to commit the crime (e.g. leaders of the political party currently in power or an influential business figure) similarly qualify as perpetrators. See § 91 in J. Sootak & P. Pikamäe (eds.), *Penal Code. The Commented Edition,* 2nd ed. (2004), at 4.2 and 5.

78 Article 442 Montenegrin Criminal Code; see also Article 386 Serbian Criminal Code. Employment of the conduct verb "order" has also been discussed on the international level, see in this sense e.g. Article 16 1996 Draft Code; 2002 Discussion Paper, at I 1; 2007 Discussion Paper I 1 Variant (a).

relationship and thus limit criminal responsibility to persons *de facto* in a position to give such orders or commands.[79]

In addition, however, the Croatian Criminal Code provides equal punishment for a person who wages aggressive war and 'whoever acts according to a command for action from armed forces or paramilitary armed forces for the purpose of waging a war of aggression.'[80] This norm is consistent with the general principle of international criminal law according to which acting pursuant to an order of a government or of a superior does not relieve a person from criminal responsibility for the perpetration of a core crime.[81] Yet, if extended to anyone within a chain of command, the provision would contradict the *ratio* behind the possible limitation of the circle of perpetrators for the crime of aggression on the international level, to exclude ordinary soldiers from criminal responsibility for acts which they may not be in a position to judge as being in conformity with or against international law.[82]

The leadership element is more frequently referred to with regard to conduct going beyond the Nuremberg acts. Estonia, for instance, expressly punishes "a representative of the state who *threatens* to start a war of aggression".[83] Other states, in the context of the crime of war propaganda, public incitement, or calls for a war of aggression consider a perpetrator's high official position as an aggravating circumstance for punishment.[84]

The fact that a majority of national provisions on aggression lack explicit reference to the leadership element as well as the suggested interpretation of national laws on

79 See e.g. ICTR, Trial Chamber, *Prosecutor v. Akayesu,* 2 September 1998, para. 483: "Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence"; see also ICTR, Trial Chamber, *Prosecutor v. Rutaganda,* 6 December 1999, para. 39; Trial Chamber, *Prosecutor v. Musema,* 27 January 2000, para. 121.

80 Article 157 (3) Croatian Criminal Code.

81 See Article 8 IMT Charter yet allowing for the mitigation of punishment and Article 33 Rome Statute refining the applicable test.

82 Article 33 (1) Rome Statute specifies that acting pursuant to an order may relieve a person under the legal obligation to obey such orders (*litera* a) from criminal responsibility, if the person did not know that the order was unlawful (*litera* b) and the order was not manifestly unlawful (*litera* c). According to Article 33 (2), only orders to commit genocide or crimes against humanity are "manifestly unlawful". The test for a subordinate under a legal obligation to obey an order with regard to the crime of aggression, therefore, would be whether the person knew that the order was unlawful.

83 Emphasis added, § 91 Estonian Criminal Code.

84 '[T]he highest state authority' according to Article 385 Armenian Criminal Code is to be understood as "the President of the Republic of Armenia, the members of the Government of the Republic of Armenia, the members of the National Assembly of the Republic of Armenia", ibid. para. 3. Article 405 Georgian criminal code refers to "a person holding a statepolitical office"; see also references to an "official holding a responsible position", Article 156 Kazakh Criminal Code; "civil servant" Article 298 Mongolian Criminal Code; or "holding a state position' Article 396 Tajik Criminal Code.

aggression in accordance with international law demands further consideration of the customary law nature of the leadership element.

The leadership element can barely be traced in definitions and draft definitions of the crime of aggression before the 1991 ILC Draft Code. The definition of crimes against peace in the IMT and the IMTFE Charter did not restrict individual criminal responsibility to a certain circle of perpetrators.[85] Albeit, the tribunals' jurisdiction was limited per definition to "the trial and punishment of the major war criminals of the European Axis countries" and "in the Far East" respectively.[86] To determine criminal responsibility for crimes against peace, the military tribunals relied on the alleged perpetrator's high position in government, military, politics or as state official. The determination of such high position, however, was not based on formal requirements, but foremost on a person's ability to actually exercise power in a leadership, policy or decision-making, or otherwise influencing position.[87] These criteria do not necessarily constitute a limitation of the circle of perpetrators, but could equally be seen as a manifestation of the principle of personal guilt. Nonetheless, Control Council Law No. 10 subsequently confined responsibility for crimes against peace to persons who "held a high political, civil or military (including General Staff) position in Germany or one of its Allies, cobelligerents or satellites or held high position in the financial, industrial or economic life of any such country".[88]

85 See Article 6 (a) IMT Charter and Article 5 (a) IMTFE Charter respectively. The definitions of crimes against peace in these documents differ only in that Article 5 (a) specifies a war of aggression to be "declared or undeclared". Further references to Article 6 (a) IMT Charter are therefore understood as to comprise Article 5 (a) IMTFE Charter. The IMT judgment confirmed that '[the argument that such common planning cannot exist where there is complete dictatorship is unsound. … Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen". See *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946, Vol. I (1947), at 226.

86 See Article 1 IMT and IMTFE Charter.

87 For an overview, see Historical review of developments relating to aggression, Addendum, PCNICC/2002/WGCA/L.1/Add.1 of 18 January 2002, at 32 *et seq*.

88 Art II paragraph 2 (f) Control Council Law No. 10. As occupation law, Control Council Law No. 10 is not per se a source of international law. Nonetheless, it has been invoked by the *ad hoc* tribunals as one indicator in determining international customary law. See e.g. ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Judgment, 15 July 1999, para. 289. Given the exceptional appearance of the leadership element in this legal text, its customary nature cannot be assumed unconditionally. Control Council Law No. 10 served as basis for national prosecutions before military tribunals of the occupying powers as well as German courts. See e.g. Werle, *supra* note 10, at margin No. 35. Applying the "high position" standard, e.g. in the *High Command Case*, the accused were acquitted of the count crimes against peace since, since "[t]he acts of commanders and staff officers below the policy level … do not constitute the planning, preparation, initiation and waging of war of the initiation of invasion"; criminality was not to be determined by their rank or status but by the defendants "power to shape or influence the policy of his state". See *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. XI (1950), 462, at 490-1. The *IG Farben Case*, though the accused were again acquitted for being followers

The ILC's formulation of the Nuremberg principles,[89] literally repeats the definition of crimes against peace in the Nuremberg Charter. Consequently, it does not limit the circle of perpetrators. However, the ILC Commentary explains that "waging of a war of aggression" was understood as to "refer only to high-ranking military personnel and high state officials".[90] The 1951 and 1954 versions of the ILC Draft Code again do not restrict the group of perpetrators according to their position. Hence, they make clear that since aggression can only be committed by a state, only state officials qualify as principal offenders of the crime of aggression.[91] Nonetheless, private individuals could participate in the commission of the crimes as accessories.[92]

The discussion about the circle of perpetrators of the crime of aggression in the second phase of the ILC's elaboration of a draft code was dominated by the question whether only government officials or also other person bearing political and military responsibility or even private persons "who place their economic or financial power at the disposal of the authors of the aggression" should be criminally liable.[93] The question had not yet been resolved when the ILC provisionally adopted a draft Article on aggression in 1988.[94] With the lapidary explanation that "the Commission either added an introductory paragraph or slightly recast the Articles to cover the question of attributing the crimes to individuals and of punishment",[95] the 1991 ILC Draft Code expressly limits individual criminal responsibility for the crime of aggression to leaders or organizers.[96] The 1996 Draft Code retained this qualification in the final formulation: "An individual who, as leader or organizer, actively participates in

rather then leaders, confirmed that economic leaders can be held accountable for crimes against peace. See *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. VIII (1952), 1081, at 1126. For details on the applied 'shape or influence' test see K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', (2007) 18 *European Journal of International Law* 477, at 482 et seq.

89 See Report ILC, 2nd. Sess., 5 June - 29 July 1950 (UN Doc A/1316) para. 95 et seq.

90 See Report, supra note 89, Yearbook of the International Law Commission 1950, Vol. II, at 376. The ILC did not intend that "everyone in uniform who fought in a war of aggression" should be charged with waging such a war.

91 See Article 2 (1) Draft Code of Crimes Against the Peace and Security of Mankind, 1951 ILC Report, at 57 et seq., hereinafter '1951 Draft Code', and Article 2 (1) Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its sixth session, 3 June to 28 July 1954 (A/2693), 462 et seq., hereinafter '1954 ILC Draft Code'.

92 See e.g. Article 2 (12) 1951 ILC Draft Code and Commentary thereto, ibid. at 137.

93 1988 ILC Report, at 72.

94 See draft Article 12 (1), 1988 ILC Report, at 71.

95 Report of the International Law Commission on the work of its forty-third session, 29 April to 19 July 1991, Yearbook of the International Law Commission 1991, Vol. II (Part 2), at 93.

96 See Article 15 Draft Code of Crimes Against the Peace and Security of Mankind, 1991 ILC Report, *supra* note 95, 94 *et seq*., hereinafter '1991 ILC Draft Code'.

or orders the planning, preparation, initiation or waging of aggression".[97] To appease critical voices,[98] the ILC Commentary clarified that the terms "leaders" or "organizers" "must be understood in the broad sense, i.e. as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nürnberg Tribunal …".[99]

This overview shows that the leadership element has not necessarily constituted an explicit part of the definition of the crime of aggression. At the same time, it is evident that it has been understood from the very beginning as an implicit component of the definition of crime. The difficulty therefore lies in the codification of criteria exemplifying the personal authority or power of an offender to be in a position potentially to play a decisive role in committing aggression without narrowing down the circle or perpetrators. Pending the final outcome of the work of the Special Working Group on the Crime of Aggression and the adoption of a provision of aggression, the formulation of the leadership element, though certainly constituting a strong hint as to the scope of this element under customary law, may leave open some margin for states to enlarge the circle of perpetrators under domestic law, e.g. with a view to the leadership requirement for a secondary offender.

3.2. The individual's conduct

Structurally, the examined national provisions define the crime of aggression as the participation of an individual perpetrator in an act of aggression by a state.[100] In that aspect, they correspond to the definition of crimes against the peace as contained in the IMT Charter and are in conformity with the ongoing negotiations on the international level.

As regards the definition of the individual's conduct, national laws to a large extent implement the modes of participation and stages of criminal responsibility contained in the IMT Charter. Again, this practice is in line with the international negotiations. Although the Preparatory Commission and the Special Working Group on the Crime of Aggression have been discussing various variants, late developments indicate a revival of the Nuremberg formula. By listing specific modes of perpetration in the definition of the crime itself, the provisions seem to follow what has been described as the "monistic approach".[101] However, despite the use of specific conduct verbs, none

97 The Commentary on draft Article 16 indicates a broad understanding of this formulation, see 1996 ILC Draft Code, at 83.

98 See e.g. 1995 ILC Report, at 35.

99 1996 ILC Draft Code, at 83. Critically whether the "control or direct" test currently referred to would include all groups of perpetrators, see *Heller*, *supra* note 88, at 488.

100 For details on alternative terminology regarding the act of state, see *infra* 3.3.

101 Whereas the differentiated approach would formulate the definition in a neutral way and regulate modes of participation in the General Part. See generally Discussion paper 1: The Crime of Aggression and Article 25, para. 3, of the Statute, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The

of the examined criminal codes expressly excludes the application of its general part. It is therefore assumed that the provisions of the respective general part apply and potential overlaps or contradictions, should they occur, would have to be sorted out by way of interpretation.[102]

In accordance with individual conduct criminalized by the IMT Charter,[103] a majority of states that have implemented the crime of aggression prohibit the classic canon of "planning,[104] preparation,[105] initiation[106] or waging[107] of a war of aggression or a war in violation of international treaties, agreements or assurances."[108] While many countries have implemented all four modes of perpetration, others were selec-

Hague, 28 November to 3 December 2005, Official Records, ICC-ASP/4/32, Annex II.B, at 376; Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States of America, from 8 to 11 June 2006, ICC-ASP/5/SWGCA/INF.1, hereinafter '2006 Princeton Report', para. 84 *et seq*.

102 See in this direction also 2007 Princeton Report, para. 7.

103 Article 6 (a) IMT Charter defines crimes against peace as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". Article 5 (a) IMTFE Charter employs the same definition, though specifying the war of aggression as "declared or undeclared".

104 Article 384 (1) Armenian Criminal Code; Article 409 Bulgarian Criminal Code; Article 404 (1) Georgian Criminal Code; Article 156 (1) Kazakh Criminal Code; Section 72 Latvian Criminal Code; Article 139 Moldovan Criminal Code; Article 353 Russian Criminal Code; Article 396 Tajik Criminal Code; Article 437 Ukrainian Criminal Code; Article 151 Uzbek Criminal Code.

105 Article 384 (1) Armenian Criminal Code; Article 409 Bulgarian Criminal Code; § 91 Estonian Criminal Code; Article 404 (1) Georgian Criminal Code; Article 156 (1) Kazakh Criminal Code; Section 72 Latvian Criminal Code; Article 139 Moldovan Criminal Code; Article 117 (20 Polish Criminal Code; Article 353 Russian Criminal Code; Article 396 Tajik Criminal Code; Article 437 Ukrainian Criminal Code; Article 151 Uzbek Criminal Code.

106 Different conduct verbs are used, e.g. "starting" Article 384 (2) Armenian Criminal Code; "unleashing" Article 404 (2) Georgian Criminal Code; Article 139 Moldovan Criminal Code; Article 353 Russian Criminal Code; Article 396 Tajik Criminal Code; Article 156 (1) Kazakh Criminal Code; "stirring up of an armed conflict" Article 297 Mongolian Criminal Code; Article 117 (1) Polish Criminal Code; "commencement" Article 151 Uzbek Criminal Code.

107 Article 409 Bulgarian Criminal Code; Article 157 (1) Croatian Criminal Code; Article 404 (2) Georgian Criminal Code; Article 139 Moldovan Criminal Code; Article 117 § 1 Polish Criminal Code; Article 353 Russian Criminal Code; Article 437 Ukrainian Criminal Code. Some translations use the term "conduct", e.g. Article 384 (2) Armenian Criminal Code; Article 156 (1) Kazakh Criminal Code; Section 72 Latvian Criminal Code; Article 396 Tajik Criminal Code; Article 151 Uzbek Criminal Code.

108 § 91 Estonian Criminal Code; Section 72 Latvian Criminal Code.

tive.[109] In particular, it is noteworthy that some states do criminalize preparatory acts but do not penalize the initiation or execution of an act of aggression as such. Fewer states included into their domestic definition of aggression "participation in a common plan or conspiracy for the accomplishment of any of the foregoing".[110] Yet, the absence of this mode of conduct in other national definitions is without prejudice to the application of a general conspiracy provision enshrined in the general part of a respective penal code.

In addition to the traditional modes of criminal responsibility for the crime of aggression, a number of states use conduct verbs going beyond the Nuremberg canon. The criminal codes of Montenegro and Serbia, for instance, provide punishment for a person who "orders waging a war of aggression".[111] Other criminal codes contain provisions criminalizing "calls for",[112] "instigation of",[113] "public calls for",[114] or "(public) incitement of"[115] a war of aggression. The Latvian criminal code, for instance, incorporates instigation as an additional mode of participation into the definition of the crime of aggression.[116] Usually, however, these modes of perpetration are implemented as distinct unlawful acts, which complement[117] or substitute the traditional defini-

109 Article 409 Bulgarian Criminal Code, for instance, punishes a person "[w]ho plans, prepares or wages aggressive war"; § 91 Estonian criminal code limits criminal responsibility to "leading or participating in preparations for a war of aggression".

110 See in this regard, Section 72 Latvian criminal code; Article 437 Ukrainian Criminal Code; Article 151 Uzbek Criminal Code.

111 Article 386 Serbian Criminal Code; Article 442 Montenegrin Criminal Code. For implications on the leadership element, see *supra* note 78.

112 Article 165 Bosnian Federal Criminal Code; Article 157 (4) Croatian Criminal Code; Article 405 (1) Georgian Criminal Code; Article 442 Montenegrin Criminal Code; Article 386 Serbian Criminal Code; Article 385 Slovenian Criminal Code.

113 E.g. Article 165 Bosnian Federal Criminal Code; Article 408 Bulgarian Criminal Code; Article 157 (4) Croatian Criminal Code; Article 130 Kosovan Criminal Code; Article 442 Montenegrin Criminal Code; Article 386 Serbian Criminal Code; Article 385 Slovenian Criminal Code.

114 E.g. Article 385 Armenian Criminal Code; Article 130 Kosovan Criminal Code; see also "public appeals to unleash an aggressive war" Article 354 Russian Criminal Code and Article 396 Tajik Criminal Code.

115 E.g. Section 77 Latvian Criminal Code; Article 117 (3) Polish Criminal Code; Article 236 Portuguese Criminal Code. Article 114 Cuban Criminal Code does not only cover incitement to a war of aggression. The provision equally provides punishment for instigating the public in favour of war during the course of diplomatic negotiations for the peaceful solution of an international conflict.

116 Section 72 Latvian Criminal Code holds accountable "a person who commits crimes against peace, that is, commits planning, preparation or instigation of, or participation in, military aggression". It should be noted in this context that instigation to war in some countries is codified as a treasonable offence (e.g. Chapter 12 Section 2 Finnish Criminal Code).

117 See e.g. Article 157 Croatian Criminal Code; Article 404 and 405 Georgian Criminal Code; Section 72 Latvian Criminal Code; Article 436 and 437 Ukrainian Criminal Code.

tion of the crime of aggression.[118] As a distinct category of crime, these definitions usually criminalize instigation or incitement as an inchoate offence.[119] The respective Bulgarian provision, for instance, reads: "Who, directly or indirectly, through publications, speeches, radio or in any other way aims at provoking armed attack by one country to another shall be punished for war instigation by imprisonment of three to ten years".[120]

Closely related to instigating or inciting an act of aggression as an inchoate crime, a number of states punish propaganda of war as a crime under international law.[121] These national provisions partly stem from an international treaty obligation. Article 20 (1) of the International Covenant on Civil and Political Rights (ICCPR) requires states to prohibit by law any propaganda for war.[122] The obligation includes the provision of appropriate sanctions, although they do not necessarily need to be of a penal

118 See e.g. Article 165 Bosnian Federal Criminal Code; Article 442 Montenegrin Criminal Code; Article 386 Serbian Criminal Code. Section 153 Hungarian Criminal Code and Article 236 Portuguese Criminal Code expressly implement incitement to war as a crime against peace. For the Portuguese provision, see e.g. M. J. Antunes, "Título III – Dos crimes contra a paz e a humanidade", in J. De Figueiredo Dias (ed.), *Comentário Coimbricense do Código Penal, Parte Especial, Tomo II* (1999), 559, at 559.

119 On the international level, instigation, as opposed to public incitement, is usually understood as a mode of participation in the crime, not an inchoate offence. See e.g. "'Instigating' means prompting another to commit an offence" (ICTY, Trial Chamber, *Prosecutor v. Krstić*, 2 August 2001, para. 601; Trial Chamber, *Prosecutor v. Blaškić*, 3 March 2000, para. 280); "By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime" (ICTR, Trial Chamber, *Prosecutor v Bagilishema*, 7 June 2001, para. 30). National criminal codes seem to use these notions interchangeably, at least as regards their English translation, see e.g. *infra* note 121.

120 See Article 408 Bulgarian Criminal Code.

121 E.g. Article 407 Bulgarian Criminal Code; § 92 Estonian Criminal Code; Section 153 Hungarian Criminal Code; Article 157 Kazakh Criminal Code; Article 140 Moldovan Criminal Code; Article 298 Mongolian Criminal Code; Article 436 Ukrainian Criminal Code; Article 150 Uzbek Criminal Code. Article 115 Cuban Criminal Code only criminalizes the distribution of *false* information with the purpose of disturbing international peace. The borders between instigation, incitement and war propaganda are permeable. In some cases these notions seem interchangeable in others they define distinct criminal acts. § 92 Estonian Criminal Code for instance defines "propaganda for war" as "any incitement to war". The Bulgarian Criminal Code on the other hand contains separate provisions on propaganda of war (Article 407) and war instigation (Article 408).

122 See GA Res. 2200A (XXI) of 16 December 1966. For details on Article 20 see M. Kearney, *The Prohibition of Propaganda for War in International Law* (2007). See in this context also, e.g. GA Resolution 380 (V) which condemns "incitement to conflicts or acts of aggression" as "propaganda against peace" or GA Resolution 33/73 (1978). It should be noted in this regard, that some states have implemented their obligation under the ICCPR as a crime under national law, see Reisinger Coracini, *supra* note 48, at III B.

nature.[123] As of today, 160 states have ratified or acceded to the ICCPR.[124] However, several states have made reservations or declarations with regard to Article 20.[125] A possible criminalization of war propaganda was also discussed in the context of the ILC Draft Code. The ILC did not include propaganda for war as a separate offence in its early versions of the Draft Code but understood such conduct to be covered by the inchoate crime of incitement according to Article 2 (12) 1951 ILC Draft Code.[126]

As regards the mental element, the examined criminal codes provide for no specific rules. The *actus reus*, therefore, is to be conducted with the default *mens rea* provided for in the respective criminal code. No deviating degree of *dolus*, or purpose going beyond the realization of the *actus reus* or *animus aggressionis* is required to meet the definition of the crime of aggression.[127] Purpose becomes of relevance only, where incitement or propaganda of war are punishable as inchoate offences. In these cases, which do not demand the occurrence of a result of the criminal conduct, the criminality manifests itself particularly in the perpetrator's *mens rea*.[128]

Finally, a different type of norms merits attention. They do not claim to implement the crime of aggression nor fit the particular structure of this crime. However, they criminalize as crimes against international law, conduct, which may lead to an inter-

123 See in this regard M. Nowak, *U.N. Covenant on Civil and Political Rights,* 2nd ed. (2005), at 474.

124 See <www2.ohchr.org/english/bodies/ratification/4.htm>.

125 See <www.unhchr.ch/pdf/report.pdf>. For freedom of speech concerns reflected in the vote on the adoption of the Covenant, see Nowak, *supra* note 123, at 471.

126 In response to the 1954 ILC Report, several representatives spoke up for a future inclusion of a prohibition of war propaganda in the ILC Draft Code, e.g. Mongolia, Bulgaria, Afghanistan. See Analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its forty-fourth session, UN Doc A/Cn.4/365 of 25 March 1983 para 89.

127 The concept of *animus aggressionis* as requiring an alleged perpetrator of the crime of aggression to act with a specific intent was endorsed by S. Glaser, 'Culpabilité en droit international pénal', (1960) 99 *Recueil des Cours* 467, at 504 and recently reinforced by A. Cassese, 'On Some Problematical Aspects of the Crime of Aggression', (2007) 20 *Leiden Journal of International Law* 841, at 848. However, international law sources do not reflect such an element regarding the individual perpetrator. Accordingly, the current negotiations on the crime of aggression demand "intent and knowledge" to commit the *actus reus* and knowledge with regard to the existence of an act of aggression by the state, see e.g. R. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', (2002) 15 *Leiden Journal of International Law* 859, at 875 et seq.

128 See, in particular, Article 236 Portuguese Criminal Code. The crime of "incitement to war" is defined by "inciting hatred against a people", Portuguese or other, with the specific intent to "unleash a war". For details see Antunes, *supra* note 118, at 562. Article 5 Portuguese criminal code provides universal jurisdiction over this crime, see also *infra* note 164.

national war.[129] The Hungarian and Portuguese criminal codes, for instance, criminalize as a crime against peace the attempt to recruit military personnel.[130] The Cuban Criminal Code contains a crime of conscription or hostile acts against another state, conducted without the authorization of the government, with the purpose of exposing Cuba to the danger of a war.[131] Persons, who on Cuban territory commit acts which infringe the independence of a foreign state, its territorial integrity, or the stability and authority of its government, are equally liable for punishment.[132] Similarly, Venezuelan nationals and foreigners who on Venezuelan territory prepare or commit hostile acts to attack or invade a friendly or neutral nation on land or sea are liable for punishment.[133] The respective Panamanian provision again prescribes unauthorized conscription, rearmament or other hostile acts against another state, which expose Panama to the danger of war or the rupture of international relations.[134] Although the last two provisions are specified as crimes against international law, they are to be seen in the primary national context of protecting the existence of the state.[135]

3.3. Act of aggression by a State

The prerequisite act of aggression by a state, *condition sine qua non* for the establishment of individual criminal responsibility for the crime of aggression[136] is referred to as "war of aggression" or "aggressive war" in the majority of national provisions.[137]

129 If such acts reach the necessary threshold of an act of aggression and are attributable to the state, conduct falling under the definition of these offences may come close to the crime of aggression. For details see Reisinger Coracini, *supra* note 48, at III D.

130 The two provisions contain different aspects. Article 237 Portuguese Criminal Code applies to the 'recruitment of elements of the Portuguese armed forces for a war against a foreign state or territory'. For details Antunes, *supra* note 118, at 563-5. Section 153 Hungarian Criminal Code refers to recruitment on Hungarian territory "for military service, paramilitary service or for military training in a foreign armed organization".

131 See Article 110 (1) Cuban Criminal Code; see also Article 111 ibid.

132 See Article 112 Cuban Criminal Code.

133 See Article 154 Venezuelan Criminal Code.

134 See Article 312 Panamanian Criminal Code.

135 Article 312 Panamanian Criminal Code falls under Title IX "de los delitos contra la personalidad jurídica del estado", Chapter III "delitos contra la comunidad internacional"; Article 154 Venezuelan Criminal Code can be found under Title I "de los delitos contra la independencia y la seguridad de la nación", Chaper III "de los delitos contra el derecho internacional".

136 For a recent quest to establish individual criminal responsibility for acts of aggression by non-state actors, see Cassese, *supra* note 127, at 846.

137 Article 384 Armenian Criminal Code; Article 165 Bosnian Federal Criminal Code; Article 409 Bulgarian Criminal Code; Article 157 Croatian Criminal Code; § 91 Estonian Criminal Code, Article 404 Georgian Criminal Code; Article 156 Kazakh Criminal Code; Article 130 Kosovan Criminal Code; Article 442 Montenegrin Criminal Code; Article 117 Polish Criminal Code; Article 353 Russian Criminal Code; Article 385 Slovenian Criminal

Some states use the term "war" without further specification.[138] Others refer to "military aggression",[139] "armed conflict"[140] or "military operations".[141]

In this context, a commentator on the Polish Criminal Code clarifies that the notion "war of aggression" has remained part of Polish law, despite the fact that the term "war" was replaced by "armed aggression" in international law. Notwithstanding the use of the traditional denomination, it is generally understood that Article 117 (1) Polish Criminal Code on the crime of aggression comprises the initiation and waging of any international armed conflict in violation of international law. Only minor, sporadic and isolated cross border use of force is considered to fall short of the definition of the crime.[142]

The vast majority of national provisions do not provide for any definition of the prerequisite act of aggression by a state, which forms a major element of the definition of the crime. Commentary literature suggests an interpretation in conformity with international law and particularly refers to General Assembly Resolution 3314.[143] In addition, Polish literature also cites the 1933 London Convention on the Definition of Aggression.[144] It is left to the competent national court to interpret the notion according to international law. Such judicial discretion is criticized as a rather atypical loophole in the light of the principle of legality by some authors.[145]

As a marginal hint, § 91 Estonian Criminal Code specifies that a "war of aggression" is "directed by one state against another state". A more detailed definition can

Code; Article 395 Tajik Criminal Code; Art. 437 Ukrainian Criminal Code, Article 151 Uzbek Criminal Code.

138 Section 153 Hungarian Criminal Code; Article 139 Moldovian Criminal Code.

139 Section 72 Latvian Criminal Code.

140 Article 130 Kosovan Criminal Code; Article 297 Mongolian Criminal Code; Article 437 Ukrainian Criminal Code.

141 See Article 437 Ukrainian Criminal Code.

142 See Weigend, *supra* note 77, at 112.

143 GA Res. 3314 (XXIX) of 14 December 1974. See e.g. Weigend, *supra* note 77, at 113; Skulic, ibid., at 241.

144 See in this regard Weigend, *supra* note 77, at 113. The Convention for the Definition of Aggression of 3 July 1933 (LNTS 1934, 69) was signed by Afghanistan, Estonia, Latvia, Persia, Poland, Romania, the Soviet Union, Turkey and later Finland; it entered into force on 16 October 1933. See e.g. B. Broms, 'The Definition of Aggression', (1978) 154 *Recueil des Cours* 301, at 389; B. Ferencz, *Defining International Aggression. The Search for World Peace. A Documentary History and Analysis (1975), Vol. I The Tradition of War and the Aspiration of Peace*, at 34. For details on the negotiations of the Disarmament Conference 1932-34 and the Litvinov-Politis proposal, see A. Reisinger Coracini, *Verbrechen gegen den Frieden* (forthcoming 2008), at III C 1.

145 See e.g. M. Škulić, 'Serbien und Montenegro', in A. Eser, U. Sieber & H. Kreicker (eds.), *National Prosecution of International Crimes,* Vol. 3 (2004), 211, at 241; M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression: historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes* (2001), at 87.

only be found in Article 157 Croatian Criminal Code. This relatively new provision[146] combines a generic definition of acts of aggression by a state, based on Article 1 GA Definition of Aggression, with a selection of acts listed in Article 3 of the same document:

> "(1) Whoever, regardless of whether a war has previously been declared or not, wages a war of aggression by commanding an armed action of one state against the sovereignty, territorial integrity or political independence of another state, so that such an action is performed by invasion or by an armed attack on its territory, aircraft or ships, or by the blockading of ports or shores or by the military occupation of the territory, or in some other way which denotes the forcible establishment of rule over such a state, shall be punished by imprisonment for not less than ten years or by long-term imprisonment.
> (2) The same punishment as referred to in paragraph 1 of this Article shall be inflicted on whoever, for the purpose of waging a war of aggression of one state against another, commands or enables the sending of armed mercenary groups or other paramilitary armed forces into a state, so that these forces achieve the aims of a war of aggression".[147]

At first glance, Article 157 Croatian Criminal Code has similarities with a proposal on the definition of the crime of aggression that emerged as a potential compromise solution just before the Rome Conference.[148] However, the Croatian provision reaches further by reflecting acts of "indirect aggression" according to Article 3 (g) of the GA Definition of Aggression and including "other ways" of establishment forcible rule over a state. The latter may serve as a catch clause for those acts, listed in GA Resolution 3314, which are not expressly reflected and also leaves open some space for interpretation regarding other potential ways to perform an act of aggression. By relying on GA Resolution 3314, Article 157 Croatian Criminal Code is in compliance with the ongoing negotiations on the international level. According to the Special Working

146 Chapter XIII of the Croatian Criminal Code which deals with crimes under international law was amended in 2004 to bridge gaps between the existing definitions of crimes and the definition of core crimes in the Rome Statute. Above all, the former criminal code did not include crimes against humanity as a separate offence. For details see P. Novoselec, 'Kroatien', in A. Eser, U. Sieber & H. Kreicker (eds.), *National Prosecution of International Crimes*, Vol. 3 (2004), 19, at 43. See also P. Novoselec, 'Substantive International Criminal Law Amendments of the Croatian Criminal Code of 15 July 2004', in I. Josipović (ed.), *Responsibility for War Crimes* (2005), 255, at 260-1.

147 See Article 157 (1) and (2) Croatian Criminal Code.

148 Revised proposal submitted by a group of interested states including Germany, Preparatory Committee on the Establishment of an International Criminal Court, 16 March-3 April 1998, A/AC.249/1998/DP.12 of 1 April 1998; see also Informal Discussion Paper submitted by Germany, Preparatory Committee on the Establishment of an International Criminal Court, 1-12 December 1997, Working Group on Definitions and Elements of Crime, A/AC.249/1997/WG.1/DP.20 of 11 December 1997.

Group's current approach all acts of aggression listed in Article 3 of the GA Definition of Aggression may qualify as basis for individual criminal responsibility.[149]

Next to criminal responsibility for a war of aggression, § 91 of the Estonian criminal code criminalizes participation in a "war violating international agreements or security guarantees provided by the state".[150] This additional basis for individual criminal responsibility enshrined in the IMT Charter, has not received the same continuous attention as its counterpart "war of aggression".[151] The Nuremberg judgement did not invoke this basis for responsibility. But as the ILC elaborated, since the German war was judged as "aggressive war", there was no need for the tribunal to further examine, whether it would also constitute a 'war in violation of international treaties, agreements, or assurances'.[152] Consequently, the ILC upheld the criminality of both acts of state in the Nuremberg principles.[153] In this context it is worthwhile to mention that Article 137 Bolivian criminal code similarly criminalizes the violation of certain types of international treaties, in particular agreements guaranteeing a truce, armistice or safe passage, as a crime against international law.[154]

With regard to the prerequisite act of state forming a basis for individual criminal responsibility for the crime of aggression, only Estonia goes beyond the acts en-

149 See e.g. 2007 Princeton Report, para. 36 et seq.

150 § 91 Estonian Criminal Code; Section 72 Latvian Criminal Code similarly refers to "war of aggression in violation of international treaties, agreements or assurances".

151 Earlier, the aspect of individual criminal responsibility for the violation of certain international treaties as aggression can be traced in Article 227 Versailles Peace Treaty, 28 June 1919 by which former German Emperor Wilhelm II was publicly arraigned "for a supreme offence against international morality and the sanctity of treaties". A major accusation of aggressive acts related to the violation of international treaties guaranteeing the neutrality of Belgium and Luxembourg, see Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, Report presented to the Preliminary Peace Conference, March 29, 1919, printed in (1920) 14 *American Journal of International Law* 95, at 107, 112. For details on the principle *pacta sunt servanda* in the context of the crime of aggression, see Reisinger Coracini, *supra* note 144, at III B 2.

152 See 1950 ILC Report, *supra* note 90 at 376. See in this regard also Discussion paper proposed by the Coordinator, Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, PCNICC/1999/WGCA/RT.1 of 9 December 1999.

153 See Principle VI (a) (i), 1950 ILC Report, at 376.

154 However, the provision has to be seen in the context of protecting state security (see Title I, Chapter IV Bolivian Criminal Code). See also *supra* text before note 135. Comparable offences can be found in Article 220 Argentinean Criminal Code; Article 113 Chilean Criminal Code; Article 123 Ecuadorian Criminal Code; Article 340 Peruvian Criminal Code. These norms criminalize domestically certain violations of international law, which at the same time constitute a danger for the peace and national security of a state, see e.g. for Chile, A. Etcheberry, *Derecho Penal,* 3rd ed. (1997), at 110; for Argentina, E. A. Donna, *Derecho Penal, Parte Especial*, Tomo II-C (2002), at 396-7.

shrined in the Nuremberg Charter. § 91 Estonian criminal code renders liable "a representative of the state who threatens to start a war of aggression".[155]

4. Jurisdiction of State Courts

The preceding examination has shown that a considerable number of states have implemented the crime of aggression under international law into domestic legislation. Relying on established drafting techniques, these definitions are formulated in a generic way. Read alone, they may appear applicable to any crime of aggression, committed by a national of any state, at any place. To evaluate the ability of domestic courts to give effect to these norms, the following section takes a closer look at the provisions on the establishment of jurisdiction in states which criminalize the crime of aggression domestically.

Since an act of aggression necessarily involves cross-border activities, a potential prosecution on charges of aggression may be based on various principles of jurisdiction. Every state, victim of an act of aggression, may establish jurisdiction on the principle of territoriality.[156] At the same time, where available, the principle of passive nationality may apply if an act of aggression caused individual victims. In addition, a number of states provide for jurisdiction upon the protective principle, where that state's interests are violated.[157] An aggressor state may as well invoke jurisdiction upon the principle of territoriality, where preparatory acts have taken place on its territory.[158] It may usually also assume jurisdiction according to the basis of active personality.[159] These jurisdictional links, may eventually also be established by a third state.

155 Article 16 (2) 1991 ILC Draft Code, defined the crime of threat of aggression as "declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State"; see also Article 2 (2) 1954 ILC Draft Code and generally GA Resolutions 2625 (XXV), 1970 and 42/22 (1987).

156 All examined states, which implement the crime of aggression, provide for jurisdiction on the principle of territoriality. See e.g. Article 14 Armenian Criminal Code; Article 130 Bosnian Federal Criminal Code; Article 13 Croatian Criminal Code; Article 6 Estonian Criminal Code; Article 4 Georgian Criminal Code; Section 4 (3) Latvian Criminal Code.

157 For the passive personality or protective principle see e.g. Article 15 (3) (2) Armenian Criminal Code; Article 132 Bosnian Criminal Code (Brcko district); Article 9 Estonian Criminal Code; Article 5 (3) Georgian Criminal Code; Article 6 (4) Kazakh Criminal Code.

158 Very explicit in that regard e.g. Article 6 (2) Kazakh Criminal Code.

159 See e.g. Article 15 (2) Armenian Criminal Code; Article 132 Bosnian Federal Criminal Code; Article 14 (2) Croatian Criminal Code; Article 7 Estonian Criminal Code; Article 5 Georgian Criminal Code; Section 3 Hungarian Criminal Code; Article 6 Kazakh Criminal Code; Section 4 (3) Latvian Criminal Code. Given the leadership nature of the crime of aggression and frequent restrictions of public employment to nationals, potential perpetrators of this crime will be nationals of the aggressor state in many cases.

Only few states go beyond these established principles of jurisdiction and do not require a specific link to the offence for their courts to enforce the crime of aggression. Bulgaria justifies its universal jurisdiction "regarding foreigners who have committed a crime against the peace and mankind abroad" by its effect on the interests of another country or foreign citizens.[160] The Moldovan Criminal Code equally provides universal jurisdiction for "crimes against the peace and security of mankind and war crimes". It provides that "[f]oreign citizens and persons without citizenship that do not have permanent domicile on the territory of the Republic of Moldova, who committed crimes outside the territory of the Republic of Moldova, incur criminal responsibility under the present Code and are subject to criminal responsibility on the territory of the Republic of Moldova", as long as they were not held criminally liable or convicted by a foreign state.[161] The Croatian Criminal Code establishes universal jurisdiction for all "criminal offences against values protected by international law", including the crime of aggression, "if the perpetrator is found within the territory of the Republic of Croatia and is not extradited to another state".[162] Hungary and Portugal also allow for universal jurisdiction for crimes against the peace, which are defined as incitement to a war of aggression in both codes.[163] The Portuguese criminal code specifies that this jurisdictional basis is only applicable if not banned by an international treaty, if the perpetrator is present on Portuguese territory and cannot be extradited.[164]

In addition, a number of criminal codes contain blanket universal jurisdiction clauses. They allow prosecution of non nationals for crimes committed abroad against foreigners, if such crimes are prescribed by a recognized norm of international law or an international treaty binding upon that state.[165] Depending on the specific formulation and interpretation of such a clause, it may apply to the crime of aggression as a crime under customary law, or as a crime prescribed by treaty law, if the state in question is a

160 Article 6 (1) Bulgarian Criminal Code. The reference to another state's interests instead of the common interest of the international community as a whole brings this provision in vicinity to the principle of vicarious jurisdiction. See in this regard also e.g. Article 14 (4) Croatian Criminal Code. In relation to vicarious jurisdiction, some states expressly exclude the requirement of double criminality for the crime of aggression, see e.g. Article 15 (2) Armenian Criminal Code.

161 Article 11 Moldovan Criminal Code.

162 Article 14 (4) and (5) Croatian Criminal Code. For details see Novoselec, *supra* note 146, at 262.

163 Section 4 (1) (c) Hungarian Criminal Code states that "Hungarian law shall also be applied to acts committed by non-Hungarian citizens abroad, if they are … crimes against humanity (Chapter XI) or any other crime, the prosecution of which is prescribed by an international treaty".

164 Article 5 (1) (b) Portuguese Criminal Code.

165 Article 15 (3) (1) Armenian Criminal Code; § 8 Estonian Criminal Code; Article 5 (2) and (3) Georgian Criminal Code; Article 6 (4) Kazakh Criminal Code; Article 15 (2) Tajik Criminal Code.

party to the London agreement or the Rome Statute.[166] In the latter case, the prerequisite prescription might already be met, since the Statute confirms the existence of individual criminal responsibility for the crime of aggression and lists it as one of the "most serious crimes of concern to the international community as a whole" falling within the jurisdiction of the ICC. From a more cautious approach, complete international prescription can only be assumed, once a provision on aggression will be adopted and binding upon a state party. Some states, however, do not only require the international prescription of the crime in this context, but only accept the establishment of universal jurisdiction if explicitly foreseen by an international treaty obligation.[167]

5. Conclusion

It is noteworthy that a considerable number of states have implemented the crime of aggression under international law into domestic criminal law. These norms are directly interrelated with international law as the source of criminalization. By enabling national courts to enforce this crime, states contribute to the protection of legal values of the international community as a whole. The relevant provisions usually date from a time before the negotiation of the Rome Statute and were not introduced in the process of implementing the Rome Statute.

National norms relating to aggression reflect two main sources of international law: On the one hand, the customary crime of aggression, which originates from Article 6 (a) of the Nuremberg Charter, and on the other hand, the prohibition of propaganda for war under the International Covenant on Civil and Political Rights. In some cases it is notable that states seem to understand these provisions as components of one crime under international law.

With regard to the customary crime of aggression, national definitions of the crime draw largely upon the definition of crimes against peace in the Nuremberg Charter. However, it is clearly understood that this blanket, rather rudimentary definition has to be interpreted in the light of subsequent developments. National definitions are therefore apt to take into account customary developments with regard to the crime of aggression under international law, as long as they do not contradict the implemented legislation.

In the light of the Nuremberg Charter, most national definitions do not limit the circle of perpetrators of the crime of aggression. However, should the leadership element be understood as an integral element of the definition of the crime under customary international law, national norms may be interpreted and warrant an interpretation reflecting this element. The final outcome of the work of the Special

166 In addition to the four signatory states of the London Agreement, France, the USSR, United Kingdom and United States of America, 19 states ratified or acceded to the Agreement: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, Yugoslavia.

167 See in that regard e.g. Section 4 (3) Latvian Criminal Code; Article 144 Mongolian Criminal Code; Article 12 (3) Russian Criminal Code.

Working Group on the Crime of Aggression will certainly be a strong hint as regards the customary status of the leadership element.

With regard to individual conduct, most states rely on the Nuremberg precedent. However, some states chose a selective approach or went beyond by introducing additional modes of liability. Despite the incorporation of specific modes of perpetration in the definition of the crime, no national criminal code expressly excludes the application of its general part. Potential conflicts of norms, therefore, need to be solved by way of interpretation.

The definition of the act of aggression by a state, *conditio sine qua non* for individual criminal responsibility for the crime of aggression, remains rudimentary in national provisions. Most states implement parts of the wording of the Nuremberg Charter and criminalize a "war of aggression". However, national commentaries underline that this notion has to be interpreted with a view to customary law developments, in particular, with regard to GA Resolution 3314. In some cases the use of this term has been criticised for its lack of legal certainty in the light of the principle of legality. Only one national legislation contains a specific definition of the prerequisite act of aggression by a state. The Croatian Criminal Code relies on a combination of a generic definition and the reference to specific criminal acts, in accordance with Articles 1 and 3 of the GA Definition of Aggression.

National provisions on the crime of aggression are largely orientated alongside a well established definition under customary international law and are formulated flexibly enough to incorporate subsequent customary law developments. They will presumably be in compliance with the final proposal elaborated by the Special Working Group on the Crime of Aggression, which will serve as a basis for a provision on aggression enabling the ICC to exercise its jurisdiction over this crime, or may be interpreted accordingly. *Bona fide* prosecutions on this basis are likely to satisfy the complementarity test.

However, the majority of states have no national provisions on the crime of aggression. If states seek to enforce this crime on the national level, it is advisable that they fully implement the crime of aggression into national legislation. Only in this way, they will ensure that the complete range of criminal acts can be prosecuted before national courts and that all aspects of this crime are adequately taken into account by national judges. Such implementation would serve various aims. States would foster their ability to exercise primary responsibility under the Rome Statute's complementarity regime. They would contribute to the endeavours of the international community to ensure that the most serious crimes do not go unpunished. Furthermore, national provisions on aggression may serve as a deterrent, protecting states from outside aggression.

In light of the ongoing negotiations to define the crime of aggression on the international level, some aspects of national definitions merit particular attention. First of all, one may observe that domestic provisions on the crime of aggression do not expressly reflect the leadership element in the definition of crime. Secondly, national legislators usually do not appear to have any difficulty in applying the general part of the national criminal code to a definition of crime which itself contains specific modes of perpetration. Last but not least, one may note that the definition of the

crime of aggression in Article 157 of the Croatian Criminal Code provides an interesting example of innovative codification.

Despite the international character of the crime of aggression, only few states provide a basis for its enforcement on the basis of universal jurisdiction. The vast majority of states base their jurisdiction on the establishment of one of the traditional jurisdictional links between the criminal act and a state's territory, its nationals or interests.

National provisions on the crime of aggression have hardly been enforced by national prosecuting authorities. Apart from a number of national trials conducted in the aftermath of the Second World War, e.g. on the basis of Control Council Laws No. 10, hardly any prosecutions have been reported. The crime of aggression, however, has played a significant role in some cases relating to civil disobedience in relation to the Vietnam war, Iraq and Afghanistan.[168]

168 For a rough overview of anti-war litigation before United States tribunals, see C. Villarino Villa, 'The Crime of Aggression before the House of Lords-Chronicle of a Death Foretold', (2006) 4 *JICJ* 866, at 876, note 53. On the House of Lords decision in *R. v. Jones et al.*, *supra* at 5, see e.g. R. Clark, 'Aggression: a crime under domestic law?', (2006) *New Zealand Law Journal* 349; R. Cryer, 'Aggression at the Court of Appeal', (2005) 10 *Journal of Conflict & Security Law* 209, at 230; D. M. Ferencz, 'Introductory Note to the United Kingdom House of Lords: R v. Jones, et al.', (2006) 45 *International Legal Materials* 988; Villarino Villa *op. cit.*

Chapter 37 Demystifying the procedural framework of the International Criminal Court: A modest proposal for radical revision

*Bacle Don Taylor III**

1. Introduction

The 2006 Strategic Plan of the International Criminal Court purports to light the way for the next ten years of the Court's operation in realizing the aims of the Rome Statute.[1] In the Strategic Plan, the Court's mission establishes three overarching goals, the second of which is to "act transparently and efficiently".[2] This aspiration is laudable and, in principle, transparency and efficiency are mutually attainable. Unfortunately, a decade after the historic six weeks of the Rome Conference, the normative framework governing the day to day functioning of the Court promotes neither attribute as ably as it could. The Court's Byzantine procedural structure, although necessary for the Court's initial creation, has outlived its usefulness. Its purposes served, that framework promises in practice to be both unnecessarily complex and cumbersome.

As the Court's first Review Conference looms, vigorous substantive debates – *inter alia*, defining and adding aggression to the core crimes over which the Court will exercise jurisdiction – attract the lion's share of attention.[3] Ultimately, however, the Court's ability to function transparently and effectively is much more driven by its

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1 Strategic Plan of the International Criminal Court, ICC-ASP/5/6, 4 August 2006 (Strategic Plan).

2 Ibid., at 4. The first goal is to "[f]airly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes". Ibid. The third is to "[c]ontribute to long lasting respect for and the enforcement of international criminal justice, to the prevention of crime and to the fight against impunity". Ibid.

3 See W. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (2007), 366–367 (describing other issues anticipated to be considered, such as the possible inclusion of terrorism and drug crimes, whether Article 124 should be retained, and the addition of a list of prohibited weapons).

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procedures than by the substantive law of its core crimes. To the extent the Court's aspirations to efficiency and transparency may now be hindered by a framework created to serve political exigencies which no longer exist, the states parties should consider radically revising that structure.

2. A cacophony of codification: Voluminous, needlessly fragmented, and hierarchically ambiguous

The Court's procedural framework has been described as possessing a "vertical and horizontal complexity that has no precedent".[4] This is understatement. There are currently more than 700 provisions appearing in the four primary texts governing the operations of the Court; (in descending hierarchical order) the Statute, the Rules of Procedure and Evidence (RPE) – both drafted by the states parties with direct amending authority vested in the Assembly of States Parties (ASP) – the Regulations of the Court,[5] and the Regulations of the Registry,[6] the latter two texts drafted and/or approved by the judges. Given that procedural provisions are to be found in all four texts, counsel must be at least minimally conversant with all four texts if he or she is to competently represent the Prosecutor, an accused, or a victim at any stage of proceedings. The Statute comprises 128 Articles. There are 225 separate rules in the RPE. The Regulations of the Court – which the judges have already amended twice since adopting them in 2004[7] – are divided into nine chapters with 126 total provisions. The Regulations of the Registry number 223. This multi-dimensional framework dwarfs that of any of the *ad hoc* international criminal tribunals. For example, the Statute of the ICTY has 34 Articles, and its most current Rules of Procedure and Evidence number 158.[8] Even considering that the ICTY's procedural framework operates with numerous formal Practice Directions similar to some of what appears in both the Regulations of the Court and the Registry, it is small by comparison.

Admittedly, comparing raw numbers alone reveals nothing about whether the Court's governing procedural provisions are prolix. The Court's status as a conventional creation of multi-state consent makes it unique in the field,[9] and necessitates its operation in spheres beyond the remit of any of its predecessors. Moreover, criti-

4 C. Kress, 'The Procedural Texts of the International Criminal Court', (2007) 5 *JICJ* 2, 543.

5 Regulations of the Court, ICC-BD/01-01-04.

6 Regulations of the Registry, ICC-BD/03-01-06-Rev.1 (2006).

7 See ICC-BD/01-01-04/Rev.01-05, ICC –BD/01-02-07.

8 Although the highest numbered rule is Rule 127, there are a total of 36 rules designated *bis*, *ter* or *quater*. Additionally, five rule numbers represent deleted rules with no replacement. ICTY Rules of Procedure and Evidence, IT/32/Rev. 40, 12 July 2007.

9 See e.g. F. Guariglia, 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in international Adjudication of Individual Criminal Responsibility', A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the international Criminal Court: A Commentary* (2002), Vol. II, 1114 (noting that the ICC 'will operate in a much more rigid legal setting that the one in which the *ad hoc* Tribunals work').

cism of the process by which the Court's framework came into being would be misdirected. Others have ably documented the political exigencies at Rome and during the drafting of the RPE which resulted in the fragmentation of the Court's procedural provisions, the pressures in constructing the Statute and the RPE which resulted in procedural lacunae, and the reasons why distinctly different mechanisms for amending the different texts were thought to be necessary.[10] Indeed, 'constructive ambiguity' in parts of the Statute and the RPE – which created the procedural gaps that to a large extent have now been filled by the Regulations – was as ingenious as it was necessary.[11] However, with the completion of the framework, the original purposes of the textual fragmentation have arguably been served. Accordingly, it is appropriate to consider whether the current structure is the optimal way forward.

To those looking for transparency and efficiency, the multi-dimensional, overlapping procedural texts cannot help but be bewildering. Their character and content are not clearly demarcated, nor are they in practice governed by readily ascertainable standards as to appropriate subject matter placement.[12] As one commentator notes: "No discernable criteria exist for assigning a procedural provision to either the ICC Statute or the RPE. The delegates [at the Rome Conference] were certainly guided by some notion of significance, but this does not yield a clear-cut designation in many instances".[13] Much the same might be said of the relationship between the RPE and the Regulations of the Court, the latter of which – although statutorily limited to matters "necessary for [the Court's] routine functioning"[14] – contain important procedural provisions "in a spot within the house of international criminal procedure where not

10 See e.g., B. Broomhall, 'Article 51' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (1999), 679–694; H. Behrens, 'Article 52,' Ibid., 695–699; S. Fernandez de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence', in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 235–257; K. Ambos, 'International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?', (2003) 3 *International Criminal Law Review* 2 (noting with regard to the Statute, the RPE, and the Regulations of the Court that it was difficult to disentangle these three sets of norms in the negotiations at Rome).

11 See C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 3, 605–606; S. Fernandez de Gurmendi, in Lee (ed.), *supra* note 10, 240.

12 But for the legislative history, this would be odd, as the Statute draws some, albeit indistinct, boundaries. For example, although no definition is discernable in Article 51, the very name of the RPE at least suggests categorization. Moreover, the Regulations of the Court should be provisions 'necessary for its routine functioning'. Statute, Article 52 (1). Note also that the RPE defines the Regulations of the Registry as 'regulations to govern the operation of the Registry'. RPE, Rule 14 (1).

13 See Kress, *supra* note 4, 539.

14 Statute, Article 52 (1).

everybody would [bother] to search".[15] Nor can the competent practitioner remain ignorant of the Regulations of the Registry – themselves a creation of the RPE.[16]

The fragmented framework is not only voluminous, but hierarchically ambiguous in some important regards. Read together, Articles 21 and 51 of the Statute, which define the sources of law for the Court's decision-making and establish a hierarchy within the sources, muddy the water somewhat.[17] The Court is bound to apply "[i]n the first place, [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence".[18] Here, the Statute is supreme.[19] The Court next looks to applicable treaties and the principles and rules of international law.[20] "Failing that", the Court looks to law of national legal systems including, where appropriate, the national law of states that would normally prosecute the case, provided such national law does not conflict with the Statute, international law, or internationally recognized norms and standards.[21]

Neither the Regulations of the Court nor those of the Registry are mentioned in Article 21's catalog of sources, nor does either appear in the hierarchy of Article 51 (5). It is not surprising that Trial Chamber I of the Court recently acknowledged that the Regulations of the Court are subordinate to both the Statute and the RPE.[22] Indeed, any other construction would be untenable.[23] But this begets more questions than it answers. What, exactly, is the relationship of the Regulations of the Court and the Registry to the statutory sources of law? Where do they fall in the statutory hierarchy? More importantly, by what authority? What if the operation of a Regulation of the Court or the Registry were to conflict with an applicable treaty, or with identifiable principles or rules of international law? What if, in the absence of applicable international law, a Regulation conflicts with the national law of the state that

15 Kress, *supra* note 4, 541 (noting specifically Regulation 55 which provides the Trial Chamber with authority to modify the legal characterization of the facts).

16 RPE, Rule 14. The Regulations of the Registry '[do] not simply dispose of trivialities.' C. Kress, *supra* note 4, 541.

17 See e.g. A. Pellet in Cassese, Gaeta & Jones (eds.), *supra* note 9, 1077 (noting that the formal hierarchy created between the sources of applicable law is overlaid by another substantial hierarchy between the applicable norms).

18 Statute, Article 21 (1) (a).

19 Statute, Article 51 (5).

20 Statute, Article 21 (1) (b).

21 Statute, Article 21 (1) (c).

22 Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in Trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06 (*Lubanga* Trial Chamber Decision of 13 December 2007), at para. 47 (citing Article 21 (1) (a) of the Statute as authority for the proposition that if the use of Regulation 55 conflicted with any provision in the Statute or the RPE, the latter would take precedence).

23 Regulation 1 (1) states that the Regulations of the Court "shall be read subject to the Statute and the [RPE]".

might have initially prosecuted the case? What if a Regulation of the Court were to conflict with a Regulation of the Registry?[24] That these questions are not specifically addressed in the directly applicable texts creates more than an interesting theoretical discussion. It has already invited litigation in the first case to come before the Court.

In *Prosecutor v. Thomas Lubanga Dyilo*, the Prosecution – dissatisfied with the Pre-Trial Chamber's Confirmation Decision – asked the Trial Chamber to remedy the situation, outlining as one option the Court's power, pursuant to Regulation 55, to modify the legal characterization of the facts for the charges confirmed by the Pre-Trial Chamber. Regulation 55 authorizes the Trial Chamber to

> "change the legal characterization of facts to accord with the crimes under Articles 6, 7 or 8, or to accord with the form of participation of the accused under Articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges".[25]

The Defence objected, *inter alia*, that the operative provisions of Regulation 55 are contrary to the Statute and the RPE and go beyond the statutorily limited subject matter of the Regulations.[26] The Defence further referred to the hierarchy of applicable sources of law in Article 21 and invited the Trial Chamber to declare the Regulation *ultra vires*. The representatives of the victims submitted that Regulation 55 could not be characterized as illegal given its adoption by the ASP.[27]

For what seems to be a fundamentally important question with implications well beyond the confines of the case before it, the *Lubanga* Trial Chamber's reasoning in rejecting the Defence challenge to the character of Regulation 55 was extraordinarily sparse. As to the regulation's legality, the Chamber noted that it 'was recommended by the judges in plenary and thereafter adopted by the Assembly of States Parties, which underlines its legitimacy.'[28] Almost as an afterthought, the Chamber then acknowledged that "if use of Regulation 55 conflicted with any statutory provision or one contained in the [RPE], then the latter take precedence".[29] Finally, the Chamber concluded that Regulation 55 does not conflict with "the main relevant provision,

24 Presumably, the Regulation of the Court would prevail, as the Regulations of the Registry "shall be read subject to the Statute, the Rules *and the Regulations of the Court*". Regulation 1 (1), Regulations of the Registry (emphasis supplied). But this is by no means apparent, given that this specific hierarchy is self-imposed, emanating not from the RPE which create the Regulations of the Registry in the first instance, but from the nominally "inferior" source.

25 See Regulation 55 (1) of the Regulations of the Court. For a comprehensive exposition of the character, purpose and legality of Regulation 55, see C. Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55', (2005) 16 *Criminal Law Forum* 3.

26 *Lubanga* Trial Decision of 13 December 2007, *supra* note 22, para. 33.

27 Ibid., para. 38.

28 Ibid., para. 47.

29 Ibid.

Article 74(2) [of the Statute]".[30] The merits of this latter conclusion aside, the Trial Chamber's holding avoided the core Defence challenge in two important respects. Holding that the Regulations were drafted and "adopted" in accordance with the Statute does not address the conspicuous absence of the Regulations from the sources of law listed in Article 21. Nor does it solve the hierarchy ambiguities. Additionally, holding that Regulation 55 does not conflict with Article 74 (2) of the Statute does not address whether Regulation 55 exceeds the "routine functioning" limitation of the Statute in Article 52 (1). This is a glaring omission given the directness of the Defence challenge and the clear directive of the Statute's language. Arguably, the Chamber's implicit holding that Regulation 55 does not exceed the 'routine functioning' limitation of Article 52 (1) requires a construction of the words which is so broad as to deprive them of all meaning. The Chamber's reluctance to deal with these issues directly is understandable, for they are thorny problems, but artfully glossing over the issue means that none of the important questions posed in the preceding pages are answered.

Such ambiguity invites further litigation and permits potentially conflicting constructions, creating further difficulties for practitioners and judges looking for certainty as they grapple with concrete cases. Moreover, those on the 'business end' of the Court are not the only ones affected. States may face additional issues with domestic implementation. And states not yet party to the Statute must contend with an institution grown more complex, making it that much more difficult to balance national concerns and international interests.[31] Any such ambiguity – at least to the extent it could be clarified – is unbecoming a Court to which over a hundred states have entrusted the prosecution of the most serious crimes of international concern, and potentially crippling to an institution striving for universal acceptance.

3. The multiple mechanisms of amendment

The unwieldy nature of the Court's procedural framework is exacerbated by the diverse mechanisms for amending the texts. Each of them is subject to a different process by which amendments are proposed, considered and adopted. These processes involve different bodies operating in some instances independently of each other. The Statute may be amended only by the states parties.[32] Similarly, the RPE are amended by the states parties, although in exceptional circumstances the judges may amend the RPE by adopting provisional rules – the latter subject to the approval of the states parties at the following session of the ASP.[33] Conversely, the Regulations of the Court

30 Ibid.

31 See e.g. B. Broomhall in Triffterer (ed.), *supra* note 10, 683 (noting that undecided states might be influenced in their decisions whether to sign and how to implement the Rome Statute based on the final form of the RPE).

32 Even then, different mechanisms govern the processes by which amendments to the Statute enter into force, depending upon the nature of the provisions amended. See Statute, Articles 121 and 122.

33 Statute, Articles 51, 121–123.

are drafted, adopted and amended in the first instance by the judges.[34] Although the Regulations of the Court are subject to rejection by a majority of the states parties, the *Lubanga* Trial Chamber's characterization of them as "*adopted* by the [ASP]" seems to stretch that term almost to its breaking point.[35] Acquiescence is a more appropriate descriptor, for the Regulations enter into force – and remain valid – unless a majority of the states parties object within six months of their being circulated.[36] Amendments to the Regulations of the Court follow the same process. Finally, the Regulations of the Registry – themselves a creation of the RPE – are drafted and amended by the Registrar, subject to approval by the Presidency of the Court.[37]

Within this superstructure, one must also understand the Court's self-created mechanism for addressing textual changes. Regulation 4 created an Advisory Committee on Legal Texts (ACLT). The six members of the ACLT – three judges (one of whom will always chair the committee) and one representative each from the Prosecution, the Registry, and "listed" defence counsel – are to consider all proposals for amendments to the RPE, the Elements of Crimes, and the Regulations, and report their recommendation on such proposals to a plenary session of the judges.[38] The Chairperson of the ACLT may invite "other interested groups or persons" to present their views, and may seek the advice of experts.[39] There is no duty, however, to consult any entity beyond the members of the ACLT. Moreover, with proposals for provisional rules invoking Article 51 (3), the Presidency may bypass the ACLT and submit such proposals directly to a plenary session.[40] In "urgent cases" the Presidency may also bypass the ACLT and submit proposed amendments to the Regulations of the Court directly to a plenary session.[41] In essence, this small, judicially dominated body is the gateway to amending the RPE and the Regulations of the Court, and its non-judicial voices can be ignored at the discretion of the Presidency. Finally, the ACLT does not consider amendments to the Regulations of the Registry, over which the Presidency wields total control.[42]

These mechanisms quite clearly put the judges in the legislative driver's seat so far as amendments to the Regulations of the Court are concerned.[43] While a coordinated

34 Statute, Article 52 (1).

35 *Lubanga* Trial Chamber Decision of 13 December 2007, *supra* note 22, para. 47 (emphasis supplied).

36 Statute, Article 52 (3). See B. Broomhall in Triffterer (ed.), *supra* note 10, 680 (describing such a method as "passive approval").

37 RPE, Rule 14 (1). The three judges of the Presidency comprise an organ of the Court that presides over its administration. The members of the Presidency are elected by an absolute majority of the judges and serve terms of three years. Statute, Articles 34, 38.

38 Regulation 4 (1), (2) and (4). Regulations of the Court.

39 Regulation 4 (3) Regulations of the Court.

40 Regulation 5 (2). Regulations of the Court.

41 Regulation 6 (2). Regulations of the Court.

42 Regulation 4 (2). Regulations of the Registry.

43 With regard to the Regulations of the Registry, the Presidency is even more in control.

effort by states parties to reject an amendment to the Regulations is not inconceivable, it is difficult to imagine the circumstances under which judicial tinkering could overcome the diplomatic hurdles required to provoke such a response. Moreover, no mechanism exists whereby states parties can forcibly amend the Regulations directly. The only options would seem to be to amend Article 52 of the Statute to provide for such, or to amend either the Statute or the RPE so as to indirectly bring a Regulation into conflict with a superior text.

4. Modifying the framework to promote transparency and efficiency

If the states parties are serious about aiding the Court's commitment to transparency and efficiency, at least two major modifications to the current procedural framework should be considered: (i) amending the Statute to merge the Regulations of the Court and any appropriate Regulations of the Registry into the existing RPE, creating one master source of applicable procedure defining the Court's relationship to the parties before it, and (ii) amending the Statute to delegate the primary authority to amend the new RPE to the judges, subject to rejection by the states parties in the manner currently applicable to the Regulations.

4.1. Creating one secondary source of procedural rules; the new RPE

Much of the Statute addresses procedural rules and nothing herein is to suggest they should be moved or amended. Negotiating states found them important enough to place them wholly beyond even the provisional power of the judges to amend, and there is no reason they should not so remain. However, merging the scattered procedural provisions of the secondary sources into a single, comprehensive RPE – involving no particular changes to the substance of any of the existing texts beyond those necessary to effect the merger itself – would have several distinct advantages.[44] Although large, such a text would be eminently more user-friendly, obviating the need for cross-referencing of sources and soothing the suspicion that something important might be overlooked simply because its placement is counter-intuitive. More importantly, the fundamental problems of source, hierarchy, and problematic conflict of norms would disappear. Finally, diverse legislative processes within the framework would be considerably reduced, simplifying the ability to remain abreast of the Court's procedural functioning and the directly applicable provisions.

4.2. Giving the judges primary authority to amend the new RPE

The creation of a single source text as outlined above would be complemented by a corresponding simplification of the rule-amending process. This would be arguably best accomplished by delegating primary authority to amend the RPE directly to the

44 Only the states parties could effect such a change to the existing regime, which would involve, at a minimum, significant amendments to Articles 51 and 52 of the Statute.

judges, subject to the ultimate control of the states parties using the mechanism currently governing amendments to the Regulations of the Court in Article 52.[45]

4.2.1. The Spectre of Judges as 'Quasi-Legislators'

Judicial rule-making and rule-amending at the *ad hoc* international criminal tribunals has been extensively commented upon.[46] Although most commentators agree that the authority of the *ad hoc* tribunal judges to amend their own rules promotes efficiency and flexibility, many are also skeptical of the practice. Some object to the principle.[47] Others find fault in specific applications of the authority, arguing that the judges appear to have occasionally used the power to circumvent unpopular decisions in individual cases.[48] It has also been noted that the process by which the *ad hoc* tribunal judges amend their rules is opaque, lacks sufficient opportunity for stakeholder participation, and provides no guidance in interpretation.[49]

Few quibble with the proposition that the judges are well placed to assess the effectiveness of procedural provisions, both in expediting the process and protecting the fundamental rights of accused and victim alike.[50] Nor can one deny that judicial rule-making provides dynamic flexibility. What is questioned is whether the judges are sufficiently detached to legislate appropriately.[51] Whether international judges should, in principle, have the power to amend their own procedural rules is beyond

45 Again, this would require a significant amendment to the Statute.

46 See e.g. F. Guariglia in Cassese, Gaeta & Jones (eds.), *supra* note 9, 1115–1124; G. Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY', in G. Boas and W. Schabas (eds.) *International Criminal Law Developments in the Case Law of the ICTY* (2003), 6; D. Mundis, 'The Legal Character and Status of the Rules of Procedure and Evidence of the *ad hoc* International Criminal Tribunals', (2001) 1 *International Criminal Law Review* 191; M. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 823–827; M. Fairlie, 'Rulemaking From the Bench: A Place for Minimalism at the ICTY', (2004) 39 *Texas International Law Journal* 257.

47 See Kress, *supra* note 4, 538 (citing the experience of the *ad hoc* tribunals and noting that their practice 'yields the advantage of quick adjustments to the often novel intricacies of international criminal procedure' but stating that giving such powers 'to participants in the proceedings, even if impartial, seems contestable as a matter of principle').

48 See e.g. M. Swart, 'Ad Hoc Rules for Ad Hoc Tribunals? The Rule-Making Power of the Judges of the ICTY and ICTR', (2002) 28 *South African Journal of Human Rights* 570–589.

49 See e.g. Fairlie, *supra* note 46, 260, footnote 17; Swart, *supra* note 48.

50 See e.g. G. Boas, 'Comparing the ICTY and the ICC: Some Procedural and Substantive Issues', (2000) 48 *Netherlands International Law Review* 273 (noting that judges are often 'in the best position to understand the needs of the institution whilst considering the balancing of the various issues at play – issues which should be primarily legal and not political').

51 See F. Guariglia in Cassese, Gaeta and Jones (eds.), *supra* note 9, 1116 (arguing that judges are more likely than detached legislators to 'accommodat[e] the legislation to the practical problems that they have to deal with').

the scope of this brief Article. It is also a question which may retain only marginal relevance for the Court, whose judges have already consolidated extensive procedural rule-amending authority in the guise of the Regulations, some of which extend well beyond the "routine functioning" limitation in Article 52 of the Statute adopted by the delegates in Rome.[52] As described above, one must look no further than Regulation 55 to understand clearly that the power of the judges to shape the procedural framework of the Court is considerable. And the *Lubanga* Trial Chamber Decision of 13 December 2007 suggests that the judges will not easily relinquish their influence.

Additionally, the competing amendment mechanisms create a massive incentive for the Court's judges to address procedural change through the Regulations rather than through the RPE – where their influence is quite constrained.[53] In practical effect, this may be a positive, if unintended, effect of the structural fragmentation. To the extent the judges can act through the Regulations, the procedural structure may largely enjoy the efficiency and dynamic flexibility exercised by the *ad hoc* tribunal judges. This comes at a price, however, because it requires a bit of jurisprudential sleight of hand; simultaneously reading the 'routine functioning' language of Article 52 so broadly as to impose no limitation, while requiring a party challenging the legality of any regulation to demonstrate a clear conflict with either the Statute or the RPE – or, by extension, with any other norm expressly provided in Article 21. The *Lubanga* Trial Chamber arguably engaged in just such an exercise.

The central question then is whether the current structure is the optimal way forward, or whether the influence which the judges now wield *de facto* should be acknowledged *de jure*. Those who object to judicial rule-amending in principle – already suspicious of judicial objectivity – will see ominous portents of overreaching in any such contemplation. Ironically, these objectors should be the most concerned

52 See e.g. Behrens in Triffterer (ed.), *supra* note 10, 697 (noting that the phrase should be construed narrowly and that '[t]he word 'internal' is probably the best indicator for the line to be drawn between the Regulations and the [RPE]: The routine functioning includes the internal organization and administration of the Court, but not its relations to the parties before it.'); see also J. de Hemptinne, 'The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?', (2007) 5 *JICJ* 402 (describing Regulation 48 (1) as reflecting an expansionist approach to the powers of the Pre-Trial Chamber); see also Kress, *supra* note 4, 540 (noting that the Regulations specify the conditions of admission for defence counsel appearing before the Court and 'are surely not limited to rules of a purely internal nature'); see also A. Markel, ' The Future of State Secrets in War Crimes Prosecutions', (2007) 16 *Michigan State Journal of International Law* 423–425 (describing the Regulations' effect on states seeking protection from requests for assistance on national security grounds).

53 In addition to being cumbersome, many have remarked that the provisional rules contemplated in Article 51 are potentially problematic, as nothing clarifies the legitimate applicability of provisional rules that are subsequently rejected by the states parties. See Remarks Made by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, to the Preparatory Commission for the International Criminal Court, New York, 30 July 1999. See also A. Pellet in Cassese, Gaeta & Jones (eds.), *supra* note 9, 1065.

with the current structure, in which the power is held by the judges but is exercised on a plane sure to breed suspicion. To the extent the Regulations already provide a mechanism whereby the judges can effect significant procedural change, the states parties have long since ceded primary control.

Those who are concerned primarily with judicial rule-amending in *application* should be comforted by the knowledge that the states parties retain ultimate control. Unlike the situation obtaining in the *ad hoc* tribunals, where there is no similar oversight, the Court's judges are subject to the states parties in the exercise of any such authority. To be sure, the "acquiescence" mechanism of Article 52 (3) favors the judges. But as this mechanism already applies to the Regulations – where one can reasonably expect the judges to primarily wield their influence – the revisions proposed herein make little difference. This would, of course, extend the judges' amending authority to the RPE. However, to the extent states purposefully kept the original rule-*making* in their own hands, the principle concerns of states largely no longer pertain. With the adoption of the Regulations of the Court and the Registry, the "constructively ambiguous" lacunae have been filled, without objection. Moreover, there is little reason to suspect that the judges – if delegated such authority – would opt for radical change. The comprehensive detail of the governing framework has probably made the Court so path dependant that anything other than minor course corrections are highly unlikely.[54]

Of course it is entirely possible that no one is completely satisfied with the current distribution of 'rule-amending' authority in the Court's procedural framework. Some undoubtedly will feel that the judges have gone beyond their mandate and arrogated to themselves rule-making powers they should not exercise. Conversely, those who are supportive of judicial rule-making in principle probably consider the Court's judges to be unnecessarily constrained and are presumably uncomfortable with the problematic status of the Regulations vis-à-vis the sources and hierarchy of applicable law. But regardless of where one stands on this ideological continuum, the current framework arguably promotes neither transparency nor efficiency as optimally as it should.

4.2.2. Oversight by a specialized subsidiary body of the ASP

If the states parties are hesitant to delegate further rule-amending authority to the judges subject only to Article 52 style oversight,[55] there is a further option which should be considered. Pursuant to Article 112 (4) the ASP may establish subsidiary bodies as necessary. Thus, the states parties might create a subsidiary body special-

54 For an interesting description of path dependence as limiting the possibilities for introducing substantial changes to the model initially adopted by an international criminal tribunal, specifically in the context of the ICTY, see M. Langer, 'The Rise of Managerial Judging in International Criminal Law', (2005) 53 *American Journal of Comparative Law* 835, 905–908 (listing extensive sources of path dependence analyses in a multiplicity of disciplines, at fn. 363).

55 Amendments remain in force absent express objection of a majority of the states parties within six months of adoption and circulation. See Article 52 (3) of the Statute.

ized in the procedures of the Court and its legal texts. This body could be tasked with oversight of the judges' rule-amending activities. Such a body might be delegated the power to solicit and consider comments on amendments from any relevant sources or interested stakeholders, the power to ratify or reject judicially adopted amendments, or to recommend to the states parties whether the ASP itself should consider the matter. With regard to this subsidiary body, the structural possibilities are numerous and need not here be explored. Suffice it to say that such a body could strike a delicate but important balance; providing enough oversight and transparency to satisfy those wary of the judges' role, while promoting maximum efficiency and flexibility to the dynamic processes attending the Court's growth and operations.

5. Conclusion

Regardless of the merits of the changes proposed herein, it is only natural for the states parties to resist radical revision of the current structure. But to the extent aspects of the Court's procedural framework are the result of political concerns long since satisfied, needlessly clinging to the structure devised at Rome may potentially impede the Court's ability to fulfill its mandate. Necessity is the mother of invention, but every child must grow up. Concomitantly, every mother must learn to cede control. The current framework promotes neither transparency nor efficiency as well as must be demanded of any serious endeavor 'to guarantee lasting respect for and the enforcement of international justice.'[56] Accordingly, sincere thought should be given to whether radical structural change is now in order.

56 See the Preamble of the Statute.

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