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An Introduction to the Law of International Criminal Tribunals

A Comparative Study
Second Revised Edition

By

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Preface

The first edition of this book was published in 2003. Ten years have passed since then. This new edition captures these years in terms of developments of the laws of the international criminal tribunals. The new edition specifically addresses developments within the International Criminal Court, which became operational in 2002; just one year before the first edition was published. Since then a number of decisions and judgments have been rendered by the International Criminal Court and other new tribunals such as the Special Court for Sierra Leone. This new edition provides for a comprehensive overview of these developments, while addressing the implications for prosecution and defense counsel.

International criminal justice has been stagnant since the post-WWII trials before the International Military Tribunal at Nuremburg, and the International Military Tribunal for the Far East at Tokyo, and their respective subsequent proceedings conducted by the Allies in the two theaters of Europe and the Far East, until the creation of the ICTY and ICTR. Almost half a century passed without much progress, even though the world community witnessed during that period the occurrence of some 250 conflicts in various regions of the world, which produced estimated casualties of between 70 million at the low end, and 170 million at the high end. Yet, tragically, the leaders and senior executors of these tragedies have benefited from impunity. In part, this was due to the existence of the "Cold War," and in part, because the international community was not committed to accountability for *jus cogens* international crimes, in particular, genocide, crimes against humanity, and war crimes.

With the end of the Cold War in 1989 and the emergence of the era of globalization, governments driven by international civil society became more committed to international accountability for such crimes. The first step was taken by the Security Council when it established in 1992 the Commission of Experts to Investigate Violations of International Humanitarian Law in the former-Yugoslavia. The work of that commission and the evidence that it gathered paved the way for the Security Council to establish first the International Criminal Tribunal for the former-Yugoslavia (ICTY), and then the International Criminal Tribunal for Rwanda (ICTR).

The work of these two tribunals evidenced to the international community that international criminal justice is achievable, and this paved the way for the United Nations to establish the International Criminal Court (ICC) in 1998.

The jurisprudence of the ICTY and ICTR, as well as the functioning of these two tribunals, has already benefited from the work done in connection with

the statute of the ICC, the "Elements of Crimes" for genocide, crimes against humanity and war crimes, and the "Rules of Procedure and Evidence." The ICTY and ICTR are therefore landmark experiences in international criminal justice that will surely have a long-lasting impact on the work of the ICC. The work of these two tribunals and their respective jurisprudence is, however, complex, particularly after two decades of their existence. To understand this complexity and to appreciate its significance, requires careful study.

The author, Professor Dr. Alexander Knoops, a specialist in international criminal law, has prepared this thoughtful and well-structured text, with a view of bringing to the students of international criminal law in general, and of the ICC, ICTY and ICTR specifically, the complexity of the work of international criminal courts and tribunals in an accessible form.

This book, which is principally intended for students of international criminal tribunals, collects its rules and jurisprudence on the basis of its different subjects, and makes the study of their work easily accessible. It offers the reader a systematic text, which synthesizes the major decisions, and lays out mechanisms and procedures.

The book consists of twelve chapters starting with the establishment of international criminal tribunals, a brief comparison with other contemporary mechanisms of international criminal justice, and jurisdictional issues. Chapter 2 deals with the substantive crimes and their elements as developed by the jurisprudence of these tribunals. Chapter 3 delves into the crime of aggression under the Rome Statute system, and is new to the second edition of this book. The new Chapter 4 discusses issues of jurisdiction and complementarity. Chapter 5 goes into the general principles of criminal responsibility, and outlines the different liability modes that are used in international criminal law. Chapter 6 deals with specialized defenses, a subject with which the author is particularly familiar since he wrote a book on the subject published in this series, entitled Defenses in Contemporary International Criminal Law (2008, 2nd ed.)

Having covered first the "special part," the crimes, and then the "general part," the next chapter deals with the "procedural part" as developed by the tribunals' rules and practice, which is followed in Chapter 7 by the rules of evidence, also developed by the tribunals' rules, but mostly by its practices. This subject was extensively covered in a book published in this series by Judge Richard May and Dr. Marieke Wierda, entitled International Criminal Evidence (2002). Chapter 8 also goes into principles of criminal evidence, but focusses particularly on the different levels of proof for the different stages of the proceedings. It also discusses the rules for disclosure of evidence, as well as the admissibility of certain types of evidence, such as hearsay evidence and the

use of anonymous witnesses. The jurisprudence of the European Court of Human Rights (ECtHR) on hearsay and anonymous witnesses is outlined, as international criminal tribunals have often sought guidance at ECtHR case law. Chapter 9 focuses on the emergence of international standards of due process in international criminal processes.

Chapter 10 addresses the questions of international cooperation in penal matters and in particular, as they arose in the tribunals' context. This is also a subject of the author's expertise evidenced by his book, Surrendering to International Criminal Courts: Contemporary Practice and Procedure (2002).

Chapter 11, which is a new chapter to the second edition, addresses the impact of the ICC on the geopolitical world order. The new Chapter 12 covers trials in absentia before international criminal tribunals and the legitimacy thereof.

It is therefore with great pleasure that I write this preface to this book, which I am sure will be a valuable tool for students and researchers, and more particularly, as a text that can be used in courses on international criminal law, as well as in specialized courses and seminars on the ICTY, ICTR and ICC.

M. Cherif Bassiouni
30 June 2014

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ICC

ICJ

ICTR

ICTY

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STL

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Introduction

The goal of this volume is to provide a comprehensive overview of and introductory guide to the law and practice of contemporary international criminal tribunals (ICTs). The proliferation of ICTs, as evidenced by the mixed internationalized courts such as the Sierra Leone Special Court and the Cambodia Tribunal, have a considerable positive impact on both states and individuals that may lead to an ever greater acceptance of the rules of international criminal law (ICL) in the suppression and prosecution of international crimes. In recognition of this rapidly growing and specialized field, it was felt that a textbook dedicated to this innovative area of legal theory and practice was needed in order to appraise the law of these tribunals as a discrete branch of international criminal law with a view to integrating it into academic international criminal law programs. I hope therefore that students, as well as practitioners appearing before ICTs and scholars, will find this volume a timely contribution to the study of the law of contemporary ICT. I have made every effort throughout the text to maintain a comparative point of view among the various tribunals on every subject. This volume does not and cannot address all the developments in this ever-growing subject area; rather, it is an introductory treatise designed to frame a basic understanding of this dynamic and constantly changing field of international criminal law. It focuses on the salient issues, elucidating their essential contours and highlighting areas that remain in flux as it offers views on the current and future state of affairs in the field.

This study proceeds in three parts. The first part provides an overview of contemporary ICTs and their legal characteristics (Chapter 1), also considers (in Chapter 2) the most important international crimes falling within the jurisdictional purview of these ICTs and discusses (in Chapter 3) the upcoming adoption of the crime of aggression in the Rome Statute. The second part examines the body of substantive and procedural law of the ICTs (Chapters 4–9), starting with an overview of the jurisdiction and complementarity of the ICTs (Chapter 4), the criminal liability principles of the ICTs (Chapter 5), the international criminal law defences incorporated in the Statutes of the ICTs (Chapter 6), the general principles of procedural criminal law envisioned by the ICTs (Chapter 7), an overview of the major evidentiary (pre-) trial issues related to this law (Chapter 8), an analysis of due process rights before ICTs (Chapter 9) and finally an overview of the state cooperation mechanisms before the ICTs (Chapter 10). The last part comprises of a critical analysis of the practice of international criminal law, by discussing the ICC within the geopolitical world order (Chapter 11) and the emergence of the newest method of promoting expedience in international criminal law, namely trials in absentia (Chapter 12).

In the first edition a chapter was dedicated to the topic of redressing miscarriages of justice before ICTs. This chapter has not been included in this second revised edition, since this topic has been extensively covered in the second edition of "Redressing Miscarriages of Justice: Practice and Procedure in (Inter) National Criminal Law," 2nd Rev. Ed. (2013), written by the same author.

The emphasis of the second revised version is laid upon the development on procedural and substantive criminal law within the International Criminal Court. Now that the ICTY and ICTR are in its final stage, it is to be expected that the jurisprudence of the ICC will have a more overarching role within the realm of international criminal law.

The law of the ICTs analyzed in this volume is stated as at 1 May 2014.

I am indebted to my international criminal law mentors, M. Cherif Bassiouni and William A. Schabas. My colleagues at Knoops' lawyers in Amsterdam deserve thanks for their patience. As always, Ms. Evelyn Bell, academic researcher at Knoops' lawyers, performed a masterly task in preparing the text at its various stages. I am also indebted to my colleague Ms. Eva Vogelvang, paralegal at Knoops' lawyers, who specifically prepared the chapter on trials in absentia, a topic that formed her master's thesis of the University of Amsterdam and Columbia Law School. Both Ms. Bell and Ms. Vogelvang were instrumental in updating all the chapters with the jurisprudence and developments after 2003, while incorporating in specific the relevant decisions of the ICC. Without their support and academic input this book could not have been found its way to the publishing company. Additionally, Brill Publishing Company gave the opportunity to write this second edition for which I thank the staff of Brill, especially Lindy Melman and Bea Timmer.

I also thank my academic friends and colleagues from Shandong University (Jinan, China), with whom I am affiliated as visiting professor of international criminal law since October 2013, for their inspiration and trust. It is to be expected that this second edition will be translated into Chinese and will (hopefully) find its way to Chinese students in the near future. This connection with Shandong University could not have taken place without the academic trust and support of my colleague and friend Tom Zwart, professor of Human Rights Law and director of the School of Human Rights research at Utrecht University.

Finally, I owe gratitude to my legal partner and wife Carry, whose inspiration is of indispensable value to my work. Especially her position as director of the Knoops' Innocence Project, as of January 1, 2012, part of the worldwide Innocence Network, and the cases she directed under this project were of additional inspiration to complete this book.

Geert-Jan Alexander Knoops
Amsterdam, 1 August 2014

CHAPTER 1

International Criminal Tribunals

Distinctions and Main Features

1 Values and Goals of ICTs

The functioning of International Criminal Tribunals (ICTs) is premised on the assumption that, at least to some extent, "…the proliferation of international judicial institutions has a socializing effect on states that leads to the ever greater acceptance by them of the jurisdiction and role of international tribunals…."[1] As of 1993, the international community created ICTs on the assumption that: (i) States would be willing to lend its support to ICTs, and (ii) ICTs could have a deterrent and protective effect. In the same vein, apart from the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993), the International Criminal Tribunal for Rwanda (ICTR, 1994), the Special Court for Sierra Leone (SCSL, 2002) and the International Criminal Court (ICC, 2002),[2] other (regional) ICTs were established, such as, the Special Tribunal for Lebanon (STL, 2009), the Bangladesh War Crimes Tribunal (2009)[3] and the Extraordinary Chambers in the Courts of Cambodia (ECCC, 2003).[4] Among other arguments, two observations should be made:

(i) The creation of ICTs promote, without a doubt, the cross-fertilization of international criminal law jurisprudence, enriching international criminal law (both procedurally and substantive) as a growing discipline.[5]
(ii) At the same time, however, one should bear in mind that the proliferation of ICTs could, in its effect, also result in some adverse consequences for a spontaneous development of international criminal law.

1 Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is it good or bad?," *Leiden Journal of International Law* 14/2 (2001): 275. doi: 10.1017/S0922156501000139.

2 Throughout this book the wording "International Criminal Tribunals (ICTs)," is used to refer to both the international criminal tribunals and courts.

3 Also referred to as the International Crimes Tribunal of Bangladesh.

4 In 1997 the Government of Cambodia requested the United Nations to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge regime (1975–1979) in Cambodia. Cambodia requested the assistance of the international community due to the weakness of the Cambodian legal system and the nature of the crimes. In 2003, Cambodia reached in agreement with the UN, detailing how the international community would assist; see "Introduction to the ECCC," accessed March 28, 2014, http://www.eccc.gov.kh/en/about-eccc/introduction.

5 Buergenthal, "Proliferation of International Courts and Tribunals," 269.

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> The existing principles and practices in international criminal law could give rise to differences in jurisprudence which could jeopardize the unity of international criminal law if its case law yields conflicting or mutually exclusive legal doctrines.[6]

While establishing ICTs, the international legal community endeavors to create a world legal order. This implies, *inter alia*, that the various benches of these tribunals should be regarded of equal jurisprudential value.[7] In particular, regional and *ad hoc* ICTs in specific regions of post-conflict, such as the UN Special Court for Sierra Leone, have resulted in several convictions of the "most responsible" individuals, such as Charles Taylor. Moreover, such regional courts can be instrumental to both the proliferation of national legislation and jurisprudence, whilst at the same time endorsing the social and moral fabric of the people in question. Most importantly, their functioning can contribute to the restoration of peace and security. However, critics question whether ICTs can realize these goals.[8] These critics also refer to divergent legal views, stemming from the conflicts and overlap between regional ICTs and the ICC's jurisdictional parameters. A potential solution could be to reverse hierarchical relationships in that primacy is given to the jurisdiction of the particular regional ICT rather than to the ICC. In fact, the ICC's jurisdiction is complementary to national jurisdictions and prosecution. This complementarity rule may also apply to regional ICTs.

2 The ICTY and ICTR

2.1 *Unique Origins*

Both the ICTY and the ICTR have been engaged in prosecuting war criminals. At present, the ICTY is finalizing its last four cases, while at the ICTR only a few cases are pending in appeal.[9]

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6 Id., 272.

7 Id., 274.

8 See for example: Mirjan Damaška, "What is the point of international criminal justice?," *Chi.-Kent L. Rev.* 23 (2008): 329–367; Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008), accessed March 28, 2014, http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ICC%20in%20Africa.pdf.

9 At the time of writing, four cases (Goran Hadžić, Radovan Karadžić, Ratko Mladić and Vojislav Šešelj) were in the trial phase at the ICTY and sixteen cases were pending on appeals,

In February 1993, the United Nations Security Council requested the Secretary-General to prepare a report authorizing a statute of an international criminal tribunal to prosecute violators of international humanitarian law during the former Yugoslavia conflict.[10] On 3 May 1993, the Secretary-General produced such a report including a draft ICTY Statute.[11] It took only 22 days for the Security Council to adopt the proposed Statute, which signifies the urgency of the situation in the former Yugoslavia. Accordingly, the first *ad hoc* ICT since the 1945 Nuremberg and Tokyo Tribunals became a legal reality.[12] This unusual procedure is a result of the fact that the ICTY was not based on a (state consent) treaty but was in fact an enforcement measure pursuant to Chapter 7 of the UN Charter. It was believed that by setting up such a tribunal, international peace and security could be restored and violations of international humanitarian law could be redressed.[13] Only nineteen months later, in December 1994, the Security Council asserted its Chapter 7 powers again by establishing a second *ad hoc* international criminal tribunal for the prosecution of individuals responsible for violations of international humanitarian law on the territory of Rwanda during the Rwandan conflict.[14] In doing so, the Security Council relied on its power to create a subsidiary body pursuant to Article 29 of the UN Charter. Just as with the creation of the ICTY, the urgency of the internal situation in Rwanda in 1994 led the UN to forgo a treaty solution as a basis for the ICTR, and did not allow the General Assembly to frame the ICTR Statute.[15] The uniqueness of the ICTY and ICTR with respect to their origins becomes even more clear when they are compared with other newly established tribunals. For instance, the Security Council took a different approach when creating the Special Court for Sierra Leone. On 16 January 2003, the UN and the Government of Sierra Leone entered into an agreement to establish a special court. While still maintaining its sovereign rights, the Sierra Leone Government consented to the establishment of this court.

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see "Key figures of ICTY Cases," accessed April 16, 2014, http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf; Sixteen cases were pending on appeal before the ICTR, see "Status of Cases," accessed March 28, 2014, http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx.

10 Resolution 808, UN Doc S/Res. 1808, February 22, 1993.

11 Report of the Secretary-General pursuant to Paragraph 2 of SC Resolution 808 (1953), UN Doc. S/25/94, May 3, 1993.

12 Security Council Resolution 827, UN Doc. S/Res/827, May 25, 1993.

13 Snežana Trifunovska, "Fair Trial and International Justice: the ICTY as an example with special reference to the Milosevic Case," *Rechtsgeleerd Magazijn Themis* 164 (2003): 3–12 at 10–11.

14 Security Council Resolution 955, UN Doc. S/Res/955 (1994).

15 Trifunovska, "Fair Trial and International Justice," 6.

Remarkably, while the conflict in the former Yugoslavia was considered, at least in part, to be of an international character,[16] the conflict in Rwanda was qualified as primarily of a non-international nature. The Security Council, however, regarded the concept of crimes against humanity as universally applicable and in doing so it extended the scope of this category of international crime to encompass both internal and international conflicts.[17] The Security Council nevertheless does acknowledge a distinction between these two types of conflict; it also defines the concept of "crimes against humanity" differently in the ICTY and ICTR Statutes. Whereas Article 5 ICTYSt. provides that a connection is required between these crimes and the presence of an "armed conflict" – regardless of whether it is of an international or internal nature, Article 3 ICTRSt. does not explicitly say that such a link is required; it merely proscribes that the conduct has to be "widespread" or "systematic." [18] One possible explanation for this difference is that the ICTY drafters may have anticipated challenges to the legality of the Statute and therefore chose for some link with an armed conflict requirement. As the Rwandan conflict drew less political attention in Western society and the Government of Rwanda consented to the ICTR's establishment, the connection to any "armed conflict," so it was argued, was politically superfluous.[19]

2.2 *ICTY Characteristics*

2.2.1 ICTY Jurisdiction

The ICTY has jurisdiction over the Balkan conflict based on the 1949 Geneva Conventions and the 1977 Additional Protocols regarding international armed conflict.[20] Its subject-matter jurisdiction extends to those crimes in violation of international humanitarian law which have been established "beyond doubt" under customary law. Generally, international law applies and affects States only; however, a new trend has developed pursuant to which individuals

16 M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999), 193, which refers to the conclusion of the Commission of Experts in its First Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274, February 10, 1993; this finding was confirmed by the ICTY Appeals Chamber in *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," Case No. IT-94-1-AR72, October 2, 1995.

17 Bassiouni, *Crimes Against Humanity in International Criminal Law*, 194.

18 Id., 194; see further Chapter 2.

19 Id., 195.

20 The former Yugoslavia was party to the Geneva Conventions. On July 13, 1992, the Security Council adopted Resolution 764, mandating that all those involved in the Yugoslav conflict to comply with these Conventions; S/RES/764 (1992).

who carry out the objectives of the State can be held criminally responsible. Therefore the ICTY, under Article 6 of its Statute, asserts personal jurisdiction over those individuals who participate in the "planning, preparation or execution of serious violations of international humanitarian law."[21] The exact territory over which the ICTY has jurisdiction is defined under Article 8 ICTYSt. as "the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters."[22] As to temporal jurisdiction, the ICTY only has jurisdiction over those crimes which have occurred since 1 January 1991 (see Article 8 ICTYSt.). Finally, according to Article 9 (1), the ICTY and national courts have concurrent jurisdiction, although, pursuant to Article 9 (2) ICTYSt., the ICTY has "primacy over national courts."[23]

2.2.2 ICTY Subject Matter

The ICTYSt. governs both the scope of the crimes that may be tried as well as the organizational structure of the Tribunal itself.[24] The Statute provides for the prosecution of three types of crimes: (1) war crimes (Articles 2 and 3), which consist of grave breaches of the Geneva Conventions and violations of the laws or customs of war[25]; (2) crimes against humanity (Article 5), which include two groups – (a) murder, extermination, enslavement, deportation, and other inhumane acts against any civilian population, and (b) persecutions on political, racial or religious grounds; and (3) genocide (Article 4), which means the "intent to destroy, in whole or in part, a national ethnic, racial or religious group" by "killing members of the group," "causing serious bodily or mental harm to members of the group," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," "imposing measures intended to prevent births within the group," or "forcibly transferring children of the group to another group."

The Statute also provides an organizational structure for the Tribunal. It stipulates the composition of the Tribunal's trial and appellate chambers (Article 12)[26] and dictates that the Tribunal has three Trial Chambers and one Appeals Chamber.[27]

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21 Article 6 ICTYSt.

22 Article 8 ICTYSt.

23 Article 9 ICTYSt.

24 Articles 2, 3, 5, 12, 14, 16, 17 ICTYSt.

25 Articles 2–3 ICTYSt. The appropriate methods of warfare are detailed in the Geneva Conventions and the Hague Convention.

26 Article 12 ICTYSt.

27 The composition of the ICTR is quite similar, as it has three Trial Chambers and one Appeals Chamber.

2.3 *ICTR Characteristics*

2.3.1 The Specific Origins of the ICTR and Its Legal Basis

After receiving a report from the Commission on Human Rights of the United Nations as to the "gravity of the Rwandan situation," the Security Council, on 30 June 1994, adopted Resolution 935, establishing an impartial Commission of Experts to investigate the violations of international humanitarian law in Rwanda. The Commission recommended the creation of a criminal tribunal for Rwanda, similar to the one in the former Yugoslavia. The Security Council subsequently adopted Resolution 955, establishing the ICTR. Interestingly, Rwanda, after urging intervention by the United Nations, dissented from the creation of the ICTR for three reasons: (1) the Tribunal's temporal jurisdiction was seen as insufficient; (2) the procedural rules did not include the death penalty; and (3) the ICTR would neither use Rwandan judges nor hold trials in Rwanda. The Tribunal was created despite Rwanda's dissent.

2.3.2 ICTR Jurisdiction and Subject Matter

The ICTR's jurisdictional requirements are the same as those of the ICTY. Jurisdiction over the conflict, subject matter, and persons are all identical. The only obvious differences pertain to the territory and time period covered. As well as Rwanda itself territorial jurisdiction includes neighboring states where Rwandan citizens committed genocide or other violations after 1 January 1994. Like the ICTY, the ICTR has concurrent jurisdiction with national courts but has primacy over them. The ICTR provides for the prosecution of the same crimes as the ICTY: war crimes (Article 4), genocide (Article 2), and crimes against humanity (Article 3).

2.4 *ICTY-ICTR Rules of Procedure and Evidence*

In order to develop the Rules of Procedure and Evidence, the ICTY's first two Trial Chambers "relied heavily on proposals from the United States government, non-governmental organizations (NGOs), and major legal systems of the world." [28] The rules adopted are more in keeping with the common law than with its civil counterpart; the Tribunals primarily follow an adversarial model rather than inquisitorial one. The rules adopted to apply to the ICTY and ICTR are broad, leaving much room for interpretation and variation. This breadth indicates that the Rules are not intended to be comprehensive, which in turn ensures that the international rules on evidentiary matters before the Tribunals

28 Daniel D. Ntanda Nsereko, "Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia," *Criminal Law Forum* 5/2-3 (1994): 507–508.

can be developed through their own decisions. The discretion of the Trial Chamber to develop new rules within the context of an actual case is frequently evidenced.[29]

2.5 *Similarities*

The ICTY and ICTR are (institutionally) linked in that they were both established by the UN Security Council, acting under Chapter 7 of the UN Charter, whilst both Tribunals can be characterized by their *ad hoc* nature. The ICTR Statute – enacted 18 months later – was modelled after the ICTY Statute. The Rules of Procedure and Evidence (RPE), are also much alike, even though they have been amended on different occasions throughout the Tribunal's operation.[30] Both Tribunals are subjected to the same Appeals Chamber judges. Initially, the Prosecutor of these Tribunals was identical. This practice yet ceased to exist after the UN Security Council adopted Resolution 1503 (2003) on the closing strategy of the Tribunals, holding that "the ICTY and ICTR can most efficiently and expeditiously meet their respective responsibilities if each has its own Prosecutor." [31]Finally, unlike the ICC, the ICTY and ICTR had primacy over national courts. In light of the completion strategies of both tribunals, gradually more cases were being referred to national jurisdictions.[32] Yet, most referred cases will be monitored by a special monitoring mechanism established thereto by the UN Security Council.[33]

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29 See Chapter 4.

30 The ICTR RPE were adopted on 29 June 1995 and contained a rule that was not listed in the original ICTY RPE, adopted on 11 February 1994 (Rule 117 ICTR RPE titled "Expedited Appeals Procedure"; Rule 116 *bis* ICTY RPE as amended on 30 January 1995); the ICTY RPE have been amended on 49 occasions (as of 28 March 2014), the ICTR RPE have been amended on 24 occasions.

31 S/RES/1503 (2003).

32 Geert-Jan Knoops, "Compatibility of the *Uwinkindi* case with Human Rights: Comparison with the 2008 Referral Decisions of the ICTR," in *The Global Community Yearbook of International Law & Jurisprudence* 2011 (I), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2012), 195–214; Geert-Jan Knoops, "The International Criminal Tribunal for Rwanda in 2012," in *The Global Community Yearbook of International Law & Jurisprudence* 2012 (II), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2013), 515–522.

33 The Mechanism for International Criminal Tribunals (MICT) was established by UN Security Council Resolution 1966 on 22 December 2010 and is endowed with the task to carry out several functions of the ICTY and ICTR after the completion of their mandates, one of these tasks is to assist and monitor national jurisdictions, see "United Nations Mechanism for International Criminal Tribunals," accessed March 28, 2014, http://unmict.org/about.html.

2.6 *The Legacy of the ICTY/ICTR*

The ICTY and ICTR have paved the way to the establishment of a permanent international criminal court. It has been said that without these *ad hoc* tribunals the Rome Statute negotiations – which led to the establishment of the ICC – might have not been successfully concluded.[34]

An important aspect to bear in mind is the concept of "victor's justice," meaning that only one side to the conflict is being prosecuted, while the other side ("the victors") evades prosecution, despite the fact that both sides to the conflict allegedly committed international crimes. This was one of the main criticisms of the Nuremberg Tribunal, which has not been overcome by the ICTR, where members of the Rwandan Patriotic Front (RPF) have never been indicted.[35] The ICTY, on the other hand, has been praised for prosecuting both sides to the conflict.[36] Maybe it is for this reason that the acquittals in 2012 by the ICTY Appeals Chamber of the Croatian General Ante Gotovina and Mladen Markač raised controversy among the Serbian population.[37] This 'dual' prosecutorial policy (i.e., ensuring that both sides of the conflict are being prosecuted) has not yet been adopted by the ICC, which is heavily criticized for its one-sided prosecutorial policy. This is evidenced by the observation that all current situations under ICC investigation concern African states.[38]

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34 Leila Nadya Sadat, "The Legacy of the International Criminal Tribunal for Rwanda," *Washington University in St. Louis*, July 3 (2012): 10, accessed January 7, 2014, http://law.wustl.edu/harris/documents/ICTRLecture-LegacyAd%20HocTribunals9.12.12.pdf.

35 *Ibid.*

36 *Ibid.*

37 President Nikolić from Serbia stated that the acquittal was clearly a "political, not legal, decision," Serbia's deputy prime minister, also responsible for engaging with the ICTY, said, after the decision, "it doesn't mean cooperation with the court will end, but it will be scaled down to a technical level" and "this verdict is a slap in the face to international justice and to the reconciliation process," see Enis Zebic, Ognjen Zorić, Branka Mihajlovic, Ljudmila Cvetkovic, "Croatian Joy, Serbian Anger at Gotovina Acquittal," *Institute for War and Peace Reporting, tri* 765, November 19, 2012, accessed March 28, 2014, http://iwpr.net/report-news/croatian-joy-serbian-anger-gotovina-acquittal; "Hague war court acquits Croat Generals Gotovina and Markac," *bbc News*, November 17, 2012, accessed March 28, 2014, http://www.bbc.com/news/world-europe-20352187.

38 The situations under investigation before the ICC (as of 28 March 2014) are: Uganda, Democratic Republic of the Congo (DRC), Central African Republic, Darfur (Sudan), Kenya, Libya, Ivory Coast and Mali; the ICC Office of the Prosecutor is conducting preliminary investigations into *inter alia* Afghanistan, Georgia, Colombia, Honduras, Guinea, Nigeria and Korea. On April 25, 2014 the ICC OTP announced that it would investigate the situation in Ukraine. On April 17, 2014, Ukraine – not being an ICC Member State – lodged a declaration in which it accepted the ICC's jurisdiction for alleged crimes committed in

The most prominent legal legacy of ICTY and ICTR probably pertain to their judgments and decisions defining the scope of disclosure obligations, evidentiary requirements and outlining of liability modes for international crimes. At the same time, the RPEs, the practices of the Tribunal, the Office of the Prosecutor and the Registrar form part of the legal legacy. Together with the judgments and decisions, the practices of the *ad hoc* tribunals have contributed to the development of procedural and substantive international criminal law and humanitarian law.[39]

Another contribution of the tribunals revolves around the influx of its principles at a national level. First, the judgments of the tribunals might impact national decisions. Noticeably, the ICTY has contributed to the development of national war crimes chambers in the former Yugoslavia, while the ICTR has contributed to the criminal justice system in Rwanda, so that several ICTR-cases could be transferred to Rwanda for trial.[40] Both tribunals have promoted the rule of law and contributed to peace and stability in both the former Yugoslavia[41] and Rwanda, even though many critics maintain that the effects of the ICTR only have a short- and medium-term effect on all levels; both locally, regionally and internationally.[42]

3 The Origin and Character of the ICC

3.1 *Treaty-Basis and Differences with ICTY-ICTR*

On 9 December 1948, one day before the adoption of the Universal Declaration of Human Rights, the UN General Assembly adopted a resolution mandating the International Law Commission (ILC) to enact a Draft Statute of an

Ukraine from 21 November 2013 to 22 February 2014. See "Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014," ICC Press Release, No. ICC-CPI-2010417-PR997, April 17, 2014; "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine," ICC Press Release, ICC-OTP-20140425-PR999, April 25, 2014; see Chapter 4 on jurisdiction.

39 "Assessing the legacy of the ICTY – Background Paper," 20–24 February 2010, The Hague, accessed January 7, 2014, http://www.icty.org/sid/10292.

40 Geert-Jan Knoops, "The International Criminal Tribunal for Rwanda in 2012," in *The Global Community Yearbook of International Law & Jurisprudence* 2012 (II), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2013), 515–522.

41 "Assessing the legacy of the ICTY – Background Paper," 20–24 February 2010, The Hague, accessed January 7, 2014, http://www.icty.org/sid/10292.

42 Sadat, "The Legacy of the ICTR," 10.

International Criminal Court.[43] Nearly 50 years later, the Statute of the International Criminal Court (ICC) (hereinafter: the ICCSt), the first permanent international criminal tribunal, was adopted on 17 July 1998 by the UN Diplomatic Conference on the Establishment of an International Criminal Court.[44] Following the 60th ratification of the Statute in April 2002, the Statute and the Court came into operation on 1 July 2002. Its judges were inaugurated on 11 March 2003.

The ICC has a more distinct character than the ICTY-ICTR:

(i) The nature of the International Criminal Court is quite different from that of the ICTY and ICTR in that it is not founded on a Security Council Chapter 7 Resolution, a basis which results in a mandatory obligation for States to cooperate.[45] The ICC is created on the basis of a complex and detailed treaty granting it the power to try and punish the most serious violations of international humanitarian law and human rights law, in the event domestic criminal law systems are not able to prosecute or fail to do so. Thus, unlike the ICTY-ICTR, the ICC itself is not a subsidiary organ of the Security Council or any other organ of the United Nations, albeit that it was drafted under the auspices of the United Nations. In this context, it should be noted that the negotiation process for the ICCSt. and its Rules of Procedure and Evidence was quite different from that which led to the ICTY-ICTR Statutes. The Draft ICTYSt. was promulgated by predominantly common law experts and enacted under severe time constraints.[46] In contrast, the ICCSt., being a treaty, was negotiated by 120 States over a period of several years and drafted by legal experts from numerous different jurisdictions (both civil and common law systems).

(ii) Contrary to the ICTY-ICTR, the jurisdiction of the ICC is geographically not restricted; unlike the Statutes of the *ad hoc* tribunals, its jurisdiction *ratione temporis* (i.e., temporal jurisdiction) is limited to crimes committed after the entry into force of the ICCSt., i.e., after 1 July 2002.[47]

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43 General Assembly Resolution 216 B (III).

44 A/CNF. 183/9; see for an extensive analysis of its creation M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, 1998).

45 See Chapter 8 for State cooperation.

46 Donald Piragoff and Paula Clarke, *The Emergence of Common Standards of "Due Process" in International and Criminal Proceedings* (Romonville Saint Agne: Erès, 2004), 363–396.

47 Article 11(1) ICCSt.

(iii) Third, in contrast to the ICTY and ICTR, the ICC's jurisdiction is complementary to national criminal jurisdictions[48]; the latter jurisdictions precede over the ICC's jurisdiction. It is only when a State party is unwilling or unable genuinely to carry out the particular investigation or prosecution that the ICC may find a case admissible before it.[49]

3.2 *Principles of Jurisdiction*

Unlike the *ad hoc* tribunals, the ICCSt. sets forth a procedural distinction between the term "jurisdiction" and "admissibility"; the former is meant to trigger the Court's operation, whereas the latter concept empowers the Court to actually try the case once it has jurisdiction.

There are two preconditions to the exercise of ICC jurisdiction: the crime in question must be committed on the territory of a state which is party to the ICCSt., or the accused in question is a national of a state party to the Statute.[50] Two exceptions exist to these preconditions:

(a) Non-states parties may, on an *ad hoc* basis, accede to the ICCSt. and its jurisdiction with respect to a specific crime by lodging a declaration with the ICC Registrar, in which case the cooperation regime with the court becomes operative for that state.[51]

(b) The two jurisdictional preconditions (i.e., territorial or personal jurisdiction) do not apply in case the Security Council, acting upon Chapter 7 of the UN Charter, refers a situation to the ICC; a situation in which one or more ICC-crimes have allegedly been committed.[52] This follows from Article 12(2) *juncto* Article 13(b) ICCSt. For instance, a situation within which an ICC-crime was committed on the territory of Pakistan (which state did not ratify the ICCSt.) by a U.S. soldier (the U.S. likewise refrained from ratifying the ICCSt.) could be referred to the ICC Prosecutor by the

48 Article 17 ICCSt.; see also Preamble to the ICCSt.

49 *Ibid.*

50 Article 12(2) ICCSt.

51 Article 12(3) ICCSt.; Ivory Coast, the Palestinian Authority and Ukraine, for example, lodged a declaration with the ICC Registrar under Article 12(3) ICCSt., accepting the ICC's jurisdiction for alleged crimes committed within a specific time frame. All States were non-ICC Member States at the time the declaration was lodged. Ivory Coast acceded to the Rome Statute on February 15, 2013, while the declaration dates from April 18, 2003; see "Declarations Art. 12(3)," ICC Registry, accessed April 28, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx.

52 This happened twice to date (28 March 2014): Sudan (Resolution 1593 adopted on 31 March 2005) and Libya (Resolution 1970 adopted on 26 February 2011).

Security Council and be prosecuted before the ICC, even absent territorial and/or personal jurisdiction.

The exercise of ICC jurisdiction can be activated by:

– a State party;
– the UN Security Council acting under Chapter 7; or
– the ICC Prosecutor *proprio motu* after receiving authorization of the Pre-Trial Chamber.[53]

3.3 *ICC: Subject Matter Jurisdiction*

The complementary jurisdiction of the ICC encompasses the following crimes:

(a) genocide;
(b) crimes against humanity;
(c) war crimes; and
(d) the crime of aggression.[54]

Articles 6, 7 and 8 ICCSt. all contain an extended and detailed elaboration of the crimes (a), (b) and (c) in comparison to the ICTYSt. and ICTRSt. According to Article 5 (2) ICCSt. the ICC shall exercise jurisdiction over the crime of aggression (d), once the newly created provision enters into force. This provision was promulgated during the 2010-ICC Review Conference in Kampala, Uganda, and has been encapsulated in Article 8 *bis* ICCSt. Article 15 *bis* and *ter* ICCSt. provides that the Court shall exercise jurisdiction over the crime of aggression, after two thirds of the ICC States Parties have consented to activate the Court's jurisdiction at any time after 1 January 2017 and after at least 30 ICC States Parties have ratified or accepted the amendments on the crime of aggression.[55] However, as of now, only fifteen States Parties have ratified or acceded to the amendments, which include a definition of the crime of aggression.[56]

53 Article 13 ICCSt.

54 Article 5 ICCSt.

55 Coalition for the International Criminal Court, "Delivering on the promise of a fair, effective and independent Court. The Crime of Aggression," accessed March 28, 2014, http://www.iccnow.org/?mod=aggression; see Chapter 3 on the crime of aggression.

56 United Nations Treaty Collection, Status of Chapter 18 of the Rome Statute, as of July 21, 2014, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en.

3.4 *ICC: General Principles of Criminal Law*

In contradiction with the ICTY and ICTR Statutes, the ICCSt. embodies a relatively extensive body of general principles of criminal law. Neither the Statutes of the 1945 Nuremberg and Tokyo Tribunals, nor those of the ICTY and ICTR, contain as many principles. The ICCSt., inspired by ICTY and ICTR prosecutions, seeks to "delimit in great detail any possible exercise of judicial discretion."[57] Therefore, Part 3 of the Statute (General Principles of Criminal Law) instructs the court on such principles as:

(i) *Nullem crimen sine lege, nulla poena sine lege* (Articles 22–23);
(ii) Non-retroactivity *ratione personae* (Article 24);
(iii) Criminal participation (Article 25);
(iv) Superior responsibility (Article 28);
(v) The mental element of crimes (Article 30);
(vi) Criminal law defenses (Article 31–33); and
(vii) Exclusion of statute of limitations (Article 29).

3.5 *ICC Procedural Law and Rules of Procedure and Evidence*

Contrary to the Rules of Procedure and Evidence (RPE) of the ICTY and ICTR, the drafting of the ICC Rules is not assigned to the judges themselves but left to the Assembly of States Parties to the Rome Statute; only in "urgent cases" the ICC judges may enact provisional rules to be applied to the RPE.[58] On the one hand, this endorses a favorable distinction between legislative and judicial powers. On the other hand, it endorses flexibility to amend the RPE in case of urgency.

Furthermore, unlike the ICTY-ICTR Statutes, the ICCSt. (comprised of 128 provisions in total, plus three additional articles as soon as the crime of aggression enters into force,[59] as opposed to less than 35 Articles in the ICTY-ICTR Statutes) contains multiple provisions of procedural character pertaining to all stages of the ICC process.[60] The already expansive ICCSt. has been further refined in its RPE, which amount to an additional 225 Rules. Therefore it may be said that, contrary to the ICTY-ICTR system, the drafting of the ICCSt. and its RPE resembles that of a true legislative code of criminal procedure in a civil

57 William A. Schabas, *An introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007), 194.

58 Article 51 ICCSt.

59 Article 8 *bis*, 15 *bis* and 15 *ter* ICCSt. have been inserted by resolution RC/Res.6 of 11 June 2010.

60 Parts 5, 6, 8, 9 ICCSt.

law system.[61] Chapter 7 will address the nature of this procedural law, which is a more balanced blend of common law and civil law traditions compared to the ICTY and ICTR systems.

4 The Emerging Concept of *ad hoc* Internationalized or Mixed Courts

4.1 *Introduction*

As of 2002, the concept of *ad hoc* internationalized or mixed courts emerged in the area of prosecuting international crimes and restoring justice in certain areas of the world. It was felt that such courts are more likely to achieve these goals in a more legitimate way than the national courts in question. The independence of the trials before internationalized or mixed courts were deemed to be more secured as opposed to national systems, since the judiciary in the victim state might be affected by own sentiments. Of course these internationalized courts must be effectively equipped with resources and staff (see also paragraph 4.2, 4.3 and 4.5).[62] This paragraph briefly examines the major features of six of these internationalized courts, located in four different parts of the world:

(i) Sierra Leone (paragraph 4.2);
(ii) Cambodia (paragraph 4.3);
(iii) East Timor (paragraph 4.4); and
(iv) Kosovo (paragraph 4.5);
(v) Special Tribunal for Lebanon (paragraph 4.6);
(vi) Bangladesh War Crimes Tribunal (paragraph 4.7).

Notably, the mixed courts in East-Timor and Kosovo operate within the local criminal law systems as opposed to the tribunals of Sierra Leone, Cambodia and Bangladesh, which are all equipped with their own Statutes. The Special Tribunal for Lebanon has a quite distinct character, as it combines Lebanese criminal procedure and international criminal law.

4.2 *Special Court for Sierra Leone* (SCSL)

From 31 May 2002 until 2 December 2013, the Special Court for Sierra Leone was in operation, in spite of its envisaged time span of three years. This *ad hoc*

61 Richard May and Marieke Wierda, *International Criminal Evidence* (Leiden: Transnational Publishers, 2002), 26.

62 Sylvia de Bertodano, "Current Developments in Internationalized Courts," *Journal of International Criminal Justice* 1 (2003): 226–244 at 244. doi:10.1093/jicj/1.1.226.

tribunal was based on an agreement entered on 4 October 2000 between the United Nations and the government of Sierra Leone to establish this special court,[63] albeit that this special court was not a United Nations body. Its legal basis, though, was framed upon Security Council Resolution 1315 of 14 August 2000.

The Statute of this special court, pertaining to the agreement made in Freetown on 16 January 2002, provided for jurisdiction *ratione materiae* of the Court with respect to:

(i) crimes against humanity;
(ii) violations of Common Article 3 to the Geneva Conventions and Protocol II to these Conventions;
(iii) other serious violations of international humanitarian law;
(iv) serious abuse of female children; and
(v) deliberate destruction of property as defined by the national laws of Sierra Leone.[64]

Temporal Jurisdiction (*Ratione Temporis*)

Contrary to the ICCSt., which prohibits the exercise of jurisdiction over crimes committed prior to the entry into force of the ICCSt. by virtue of Article 11(1) ICCSt., the Special Court for Sierra Leone was empowered to try these five aforementioned crimes, when committed after 30 November 1996.[65]

Composition and Structure

The Special Court for Sierra Leone consisted of one Trial Chamber, composed of two international judges, nominated by the UN Secretary-General, and one judge to be appointed by the government of Sierra Leone. The Appeals Chamber was to sit as a bench of five judges; three international and two domestic (Sierra Leonean) judges. According to Article 14 SCSLSt., the RPE of this special court were borrowed from those of the ICTR, including the power of the judges to amend the RPE.

In its eleven years of operation, the SCSL issued judgments against nine accused, who were all found guilty and sentenced to lengthy prison terms.[66] In

63 Report of the UN Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, October 4, 2000.

64 Articles 2–5 SCSLSt.

65 The ICTY and ICTR follow the same approach as regards temporal jurisdiction.

66 *Prosecutor v. Fofana and Kondewa* (CDF Case), Appeals Chamber Judgment, Case No. SCSL-04-14-A, May 28, 2008, sentences of respectively 15 and 20 years imprisonment; *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case), Appeals Chamber Judgment, Case No.

2013, the ninth judgment was rendered by the SCSL Appeals Chamber in the Charles Taylor case.[67] Three other persons had been indicted by the SCSL, two indictments were withdrawn due to the death of the accused and another accused is considered to be at large.[68]

4.3 *The Extraordinary Chambers in the Court of Cambodia* (*ECCC*)

This special court was established based upon an Agreement between the UN and the government of Cambodia on 17 March 2003. This Agreement was made possible due to a law adopted by the Cambodian Parliament in January 2001, which received Royal approval on 10 August 2001.[69] The negotiations for the creation of this special court took more than six years and were meant to enable prosecution of former members of the Khmer Rouge, relating to the period 1975–1979, during which period 1.7 million Cambodians were killed due to executions, starvation, illness and forced labor. It was only after the Khmer Rouge party fell apart in 1998 that these negotiations to establish this special court became possible in Cambodia.

Subject Matter Jurisdiction

This tribunal is attributed with jurisdiction to prosecute and try the following crimes:

(i) crimes against humanity;
(ii) violations of grave breaches of the Geneva Conventions;
(iii) destruction of cultural property during armed conflict[70]; and
(iv) crimes against internationally protected persons.[71]

SCSL-04-15-A, October 26, 2009, sentences of respectively 52, 40 and 25 years imprisonment; *Prosecutor v. Brima, Kamara and Kanu* (AFRC Case), Appeals Chamber Judgment, Case No. SCSL-2004-16-A, February 22, 2008, sentences of respectively 50, 45 and 50 years imprisonment (upheld in appeal); *Prosecutor v. Taylor*, Appeals Chamber Judgment, Case No. SCSL-03-Ol-A, September 26, 2013, sentenced to 50 years imprisonment.

67 *Prosecutor v. Taylor*, Appeals Chamber Judgment, Case No. SCSL-03-Ol-A, September 26, 2013.

68 The indictments against Sam Bockarie and Fonday Sankoh were withdrawn on December 8, 2003, due to their death, Johnny Paul Koroma is considered to be at large, "SCSL Cases," accessed March 28, 2014, http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx.

69 See the Law on the Establishment of Extra Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea of 10 August 2001.

70 See The Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict of 14 May, 1954.

71 UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

Temporal Jurisdiction

As noted, the temporal jurisdiction (*ratione temporis*) of this "Khmer Rouge" Tribunal is, according to Article 2 of its Statute, limited to the period of 17 April 1975 until 6 January 1979.

Composition and Structure of "Extraordinary Chambers"

The initial proposal, according to which the Trial Chambers would have been composed of national judges with a minority of international judges, turned out to be unacceptable to the United Nations. A compromise was made resulting in the establishment of one Trial Chamber composed of three Cambodian judges and two international judges (the SCSL's Trial Chamber, for example, has three judges, one national and two international), whereas the Appeals Chamber is to sit as a full bench of seven judges, four Cambodian and three international. Significantly, the Cambodian judges of the Trial and Appeals Chamber have no authority to unilaterally render a judgment; the international judges must consent so that their minority position is respected. In effect, the Cambodian and the non-Cambodian judges must reach an agreement on the verdict. These so-called "Extraordinary Chambers" of the Cambodian Courts may therefore only reach a verdict on guilt or innocence based on a "super-majority," meaning that the consent of at least one of the international judges is required.

Furthermore, two co-prosecutors and two co-investigating judges (in each instance, one international and one Cambodian) are in the same position: disputes between them must be resolved by a panel of pre-trial judges.

The structure of the Extraordinary Chambers has proven to be ineffective, as the international and Cambodian judges turned out to be involved in several conflicts without an effective solution. The Cambodian judges often contested the international judge's authority to investigate, which already resulted in two resignations of international judges.[72] To date, only five former Khmer Rouge leaders have been indicted, while in 2012 the ECCC Supreme Court Chamber delivered its first, and (until now) only judgment.[73] The proceedings against one accused, Mrs. Ieng Thirith, the Minister of Social Affairs during the Khmer

72 United Nations News Centre, "UN voices concern as second judge resigns from Cambodia genocide court," March 19, 2012, accessed April 16, 2014, http://www.un.org/apps/news/story.asp?NewsID=41578&Cr=Cambodia&Cr1=#.UyB3UoWqtoE.

73 On July 6, 2010, Mr. Kaing Guek Eav was convicted for crimes against humanity and grave breaches of the 1949 Geneva Conventions and sentenced to 35 years imprisonment by the ECCC Trial Chamber; on July 3, 2011, the Supreme Court Chamber partially confirmed and amended the Trial Chamber Judgment and sentenced the accused to life imprisonment, see "ECCC Case 001," accessed March 28, 2014, http://www.eccc.gov.kh/en/case/topic/1.

Rouge regime, were stayed and Mrs. Ieng was released from prison on 16 September 2012, because she was deemed unfit to stand trial.[74]

4.4 *The UNTAET (East Timor) Serious Crimes Panel*

Following the violence in Indonesia, relating to the Indonesian occupation of East Timor, the Security Council of the United Nations, in its Resolution 1272 of 25 October 1999, established the UN Transitional Administration for East Timor (UNTAET). Subsequently, UNTAET Regulation 15/2000 of 6 June 2000 "on the establishment of panels with exclusive jurisdiction over serious criminal offences" was promulgated.

Subject Matter and Temporal Jurisdiction

According to UNTAET Regulation 15/2000, the "Serious Crimes Panel" of the District Court of Dili (Article 20) has exclusive jurisdiction with regard to certain crimes committed in East Timor between 1 January and 25 October 1999. As regards the subject matter jurisdiction of this Panel, interestingly, substantive parts of Regulation 15/2000, including section 5 that deal with crimes against humanity, genocide and war crimes, are adopted almost verbatim from the Rome Statute. The East Timor Serious Crimes Panel is thus the first court to apply substantive provisions of the ICCSt., and its case law may be regarded as precedent for future prosecutions before the ICC. Such future prosecutions, however, will most likely take place in completely different settings than East Timor.[75] However, this interrelationship between two international court systems may serve as an example for future judicial proceedings.[76] Significantly, except for murder and sexual crimes, UNTAET Regulation 15/2000 implements the universality principle (Article 2). The Special Panels of the Dili District Court sat from 2000 to 2006.

Composition and Structure

The UN's budget provided for two Special Panels, each comprising of three judges, two international and one judge from East Timor (Section 22.1). These

74 Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, Trial Chamber, 13 September 2012; Decision on co-prosecutor's request for stay of release order of Ieng Thirith, Supreme Court Chamber, 16 September 2012, see also Ieng Thirith, case profile, accessed March 28, 2014, http://www.eccc.gov.kh/en/indicted-person/ieng-thirith.

75 Kai Ambos and Steffen Wirth, "The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000," *Criminal Law Forum* 13 (2002): 1–90 at 1.

76 See also Chapter 9 regarding uniform standards of due process norms.

Panels operated as part of the Dili District Court and the Dili Court of Appeal. The latter Court also included two international judges and one East Timorese. The Supreme Council of the Judiciary was responsible for the appointment of these judges. The prosecution before these Panels was conducted by a special prosecution unit, staffed by UN international civilian and police officers.

UNTAET Regulation 15/2000 provided for a separate Code of substantive law and definitions of crimes; however, the crimes of murder and torture and sexual crimes are governed by the East Timor Penal Code (Indonesian Penal Code). Regarding procedural law, UNTAET Regulation 2000/30, as amended by Regulation 2001/25 of 14 September 2001, introduces a compact Code of Penal Procedure, comprising in total 56 provisions, containing both civil and common law elements as well as elements borrowed from international tribunals.

Conclusion

Major problems for the East Timor Special Panels were a lack of sufficient resources, the lack of ability to gain custody over indictees in Indonesia and lack of independence of the Office of the General Prosecutor of the government.[77] As a result, many accused have been provisionally detained for up to three years without commencement of their trials.[78] During 2002, fifty-one accused were charged but only a few of them were apprehended. Unfortunately, these difficulties affect the effectiveness of internationalized Panels in general.

4.5 *The Kosovo Internationalized Panels*

Following NATO's intervention from 24 March 1999 until 9 June 1999 in Kosovo, Security Council Resolution 1244 established the UN Interim Administration Mission in Kosovo (UNMIK).[79] The mandate pursuant to this Resolution did not empower UNMIK to establish an international tribunal to try the crimes related to the conflict between the Serbs and Kosovar Albanians, as it referred to the mandate of, and cooperation with, the ICTY. The UNMIK mandate merely "authorises the Secretary-General…to establish an international civil presence in Kosovo in order to provide an interim administration."[80] This meant that the

77 Caitlin Reiger and Marieke Wierda, "The Serious Crimes Process in Timor-Leste: In Retrospect," *International Center for Transitional Justice*, March 2006, 14, 41.

78 De Bertodano, "Current Developments in Internationalized Courts," 231.

79 S/RES/1244 (1999), June 10, 1999.

80 Id., para. 10.

prosecution of international crimes related to the Kosovo conflict had to be created as a legal derivative of the international civil presence in Kosovo.

The UNMIK initially proposed the establishment of the Kosovo War and Ethnic Crimes Court (KWECC), endowed with an intermediary task between the ICTY and local courts while having jurisdiction over all territories that were once part of the former Yugoslavia.[81] When this plan failed, the domestic courts in Kosovo were tasked with hearing cases that would have been brought for the KWECC, under the regime of the applicable UNMIK regulations.[82] The UNMIK worked closely with the ICTY and was assumed complementary to the ICTY, while focusing on lower level offenders.[83]

Composition and Applicable Law

The criminal trials in Kosovo, according to the UNMIK Mandate, take place at the national level in the five District Courts, with a right to appeal to the Supreme Court in Pristina.

Under the UNMIK Mandate, several regulations were issued concerning the proceedings before these Courts. The District Courts are bound to follow these UNMIK regulations as well as the Kosovo Criminal Code; in the absence of a solution under either of these two frameworks, the criminal code of the Federal Republic of Yugoslavia is applicable.[84]

The appointment of the bench is governed by UNMIK Regulations 2000/6 and 2000/64, which stipulate the appointment of international judges and prosecutors. These authorities will be assigned by the Department of Justice to cases at the request of the prosecution or the defense. Pursuant to such a request, or *proprio motu*, this department may file a recommendation for this appointment to the Special Representative of the Secretary-General of the UN, who ultimately must decide. The Kosovo Internationalized Panels are therefore comprised of a mixture of Kosovar and international judges. This system became operative as of February 2002, and by the end of 2002 twelve international judges were already active on these panels.[85] Between 2002 and 2007

81 M. Cherif Bassiouni, *Introduction to International Criminal Law 2nd ed.* (Leiden: Martinus Nijhoff Publishers, 2012), 729.

82 Id.

83 "The UNMIK programme," *Trial* (Track Impunity Always, consultative status before the UN Economic and Social Council), March 19, 2014, accessed April 18, 2014, http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/programme-of-international-judges-in-kosovo/the-unmik-programme.html.

84 De Bertodano, "Current Developments in Internationalized Courts," 238.

85 *Ibid.*

only 23 procedures initiated by the Kosovo Panels were related to war crimes, genocide and crimes against humanity.[86]

In 2008, after Kosovo's secession and independence, the European Union Rule of Law Mission in Kosovo (EULEX) took over the mandate of UNMIK. It also operates within the framework of UN Security Council Resolution 1244. After EULEX became operative, the tasks of UNMIK primarily focused on promoting security, peace, stability and respect for human rights in Kosovo.[87] The EULEX mandate extends to 14 June 2014. [88] By 2014, EULEX initiated 51 new war crimes cases apart from five ongoing war crimes trials. In total, 15 judgments were rendered in cases related to war crimes.[89]

Distinction with other Internationalized Panels

As mentioned, the Kosovo Internationalized Panels operate within the local criminal law system. Its constitutional position is similar to the East Timor Special Panels, but distinct from the Cambodia and Sierra Leone Courts. Unlike the East Timor Special Panels, the Kosovo Panels do not have exclusive jurisdiction over serious crimes, nor are they primarily meant to prosecute international crimes as such. This prosecution involves only a modest part of the Kosovar legal system, which Criminal Code mainly focuses on common criminal offences such as drug offences and organized crime.[90]

Conclusion

Similar to the other internationalized panels, the Kosovo Panels face the problem of insufficient resources to deal more exclusively with international crimes. It may therefore be questioned whether these panels are an effective tool to see that justice will be done on the level of international criminal law (ICL).[91]

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86 "The UNMIK programme," *Trial* (Track Impunity Always, consultative status before the UN Economic and Social Council), March 19, 2014, accessed April 18, 2014, http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/programme-of-international-judges-in-kosovo/the-unmik-programme.html.

87 UNMIK, "Promoting security, stability and respect for human rights in Kosovo," *United Nations*, accessed April 18, 2014, http://www.un.org/en/peacekeeping/missions/unmik/.

88 Andrew Radin, "Analysis of current events: 'towards the rule of law in Kosovo: EULEX should go'," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 42/2 (2014): 181–194.

89 Bernd Borchardt, "EULEX and War Crimes," *eulex Kosovo*, accessed April 18, 2014, http://www.eulex-kosovo.eu/en/news/000427.php.

90 De Bertodano, "Current Developments in Internationalized Courts," 240.

91 Id., 241.

4.6 *Special Tribunal for Lebanon (STL)*

The Special Tribunal for Lebanon qualifies as a tribunal with an international character, and was established by United Nations Security Council Resolution 1757, pursuant to a request from the Lebanese government. The Special Tribunal applies provisions of the Lebanese Criminal Code, although it has to operate in conformity with the highest standards of international criminal procedure. Hence, one can say that the STL is an international tribunal mandated to try crimes under national law, related to the attack on the Lebanese Prime Minister Rafiq Hariri (see *infra*). The Special Tribunal is the first tribunal to deal with terrorism as a distinct crime, outside the context of an international or internal armed conflict.

Mandate

The primary mandate of the Special Tribunal is to hold trials against individuals accused of carrying out the attack of 14 February 2005 in Beirut which killed 22 people, including the former prime minister of Lebanon, Rafiq Hariri, and injured many others.[92] The Special Tribunal also has jurisdiction over: (i) attacks carried out in Lebanon between 1 October 2004 and 12 December 2005, if they are connected to the attack of the 14th of February 2005 and if the attack is of a similar nature and gravity; and (ii) crimes that are carried out on a later date, to be decided by the parties and with consent of the United Nations Security Council, as long as the crimes are connected to the attack on the 14th of February 2005.[93]

Unique features

The Special Tribunal became operative on 1 March 2009; the hearings in the first trial, against four suspects, only commenced in January 2014.[94] The Special Tribunal features some unique characteristics.

Firstly, as mentioned, the Special Tribunal is the first international tribunal that deals with terrorism as a distinct crime. In its first interlocutory ruling, the STL Appeals Chamber defined the "international" crime of terrorism, which is perceived as a landmark ruling.[95] Secondly, on the 1st of February 2012, the STL

92 Article 1 STLSt.

93 Id., see also Special Tribunal for Lebanon, "About the STL. Jurisdiction of the Tribunal," accessed April 18, 2014, http://www.stl-tsl.org/en/about-the-stl.

94 Special Tribunal for Lebanon, "Fifth Annual Report 2013–2014," March 1, 2014.

95 "Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative charging," STL Appeals Chamber, Case No. STL-11-01/I, February 16, 2011.

Trial Chamber issued a decision to try the four accused in absentia. Thirdly, an autonomous Pre-Trial Chamber was created, which is a new phenomenon in international criminal law. The Pre-Trial Chamber has a broad mandate and can investigate certain issues *proprio motu*.

Conclusion

While, the legacy of the Special Tribunal is yet to be determined, criticism has arisen regarding the use of trials *in absentia* in international criminal law and the extensive definition of terrorism of the Appeals Chamber.[96]

4.7 *Bangladesh War Crimes Tribunal*

The Bangladesh War Crimes Tribunal (also: International Crimes Tribunal) was established in 2009 to investigate and try suspects for war crimes committed in 1971 during the independence movement in Bangladesh.[97] The Bangladesh War Crimes Tribunal was set up by Parliament on the basis of the International Criminal Tribunal Act of 1973 as amended in 2009. The International Criminal Tribunals Act was unanimously passed by the government in 1973 and it authorizes the investigation and prosecution of the persons responsible for genocide, crimes against humanity, war crimes and other crimes under international law committed in 1971. The International Criminal Tribunal Act drew heavily from the International Military Tribunal Charter used at Nuremberg and the principles prepared by the International Law Commission.[98] Despite its name suggesting that the International Crimes Tribunal is a tribunal with an international character, this tribunal was established without support of the international community.

Criticisms

The practice of the Bangladesh War Crimes Tribunal exposes a lack of transparency, especially regarding the fairness of the proceedings. The functioning

96 For instance Marko Milanovic, "Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law," *Blog of the European Journal of International Law*, February 16, 2011.

97 Abdul Jalil, "War Crimes Trial in Bangladesh: A Real Political Vendetta," *Journal of Politics and Law* 3/2 (2010): 110–120; see also Kristine A. Huskey, "The International Crimes Tribunal in Bangladesh – Will Justice Prevail?" *Crimes of War*, June 14, 2011, accessed April 16, 2011, http://www.crimesofwar.org/commentary/the-international-crimes-tribunal-in-bangladesh-will-justice-prevail/.

98 Caitlin Reiger, "Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971," *International Center for Transitional Justice* (2010): 3.

of this tribunal generated criticism.[99] Firstly, individuals can be arrested and questioned before formal charges are pressed against them; they can only challenge their detention once and have no effective right of appeal. Secondly, defense counsel is not allowed to be present during interrogation and the police do not remind the accused of their rights. Thirdly, the accused are not allowed to challenge the jurisdiction of the Tribunal or bring any constitutional challenges. Fourthly, the Prosecution does not have the obligation to disclose exculpatory evidence, nor are the accused allowed to request discovery. Fifthly, internationally accepted rules of evidence and procedure do not apply to the procedures before the Tribunal, due to its sophisticated nature. Lastly, there is no effective right to the presumption of innocence.[100] Furthermore, in 2013 the International Criminal Tribunal Act was amended retroactively, to the detriment of the defendant, which resulted in a death sentence.[101]

5 Conclusions: The Legitimacy of ICTs: Selective Enforcement Mechanisms?

The establishment of ICTs, as surveyed in paragraphs 2–4 above, often encounter the criticism that it brings about only a form of selective justice,[102] an objection echoed from criticism of the 1945 Nuremberg and Tokyo International Military Tribunals. Yet, one should be aware that "[…] each war crimes trial is an exercise in selective justice to the extent that it reminds us that the majority of war crimes go unpunished."[103] As the Statutes of ICTs and their jurisprudence have a considerable impact on both national criminal law systems and customary international law,[104] it is important to determine how the

99 Huskey, "The International Crimes Tribunal in Bangladesh"; see also Suzannah Linton, "Completing the Circle: Accountability for the crimes of the 1971 Bangladesh War of Liberation," *Criminal Law Forum* 21 (2010).

100 Huskey, "The International Crimes Tribunal in Bangladesh."

101 "Bangladesh: Post-Trial Amendments Taint War Crimes Process," *Human Rights Watch*, February 14, 2013, accessed April 18, 2014, http://www.hrw.org/news/2013/02/14/bangladesh-post-trial-amendments-taint-war-crimes-process.

102 See, *inter alia*, Robert Cryer, The Boundaries of Liability of ICL, or Selectivity by Stealth, 1 *Journal of Conflict & Security Law* 3–10 (2001).

103 Gerry J. Simpson, "War Crimes: A Critical Introduction," in *The Law of War Crimes: National and International Approaches*, ed. Thimoty McCormack and Gerry Simpson (Leiden: Martinus Nijhoff Publishers, 1997), 8.

104 See also Leila Nadya Sadat, "Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute," De Paul Law Review 49 (2000): 909.

legitimacy of ICTs may be augmented so that their influence can be optimized. A closer look at the drafting processes of the ICTY, ICTR and ICC is beneficial to the overall legitimacy of ICTs.

ICTY

The drafting process for the ICTYSt. in 1993 was quite novel compared to that of the Nuremberg and Tokyo international military tribunals. The latter process was characterized by a complete division between those drafting the law and creating the tribunal (i.e., the Allied Powers), and its subjects. The creation of the ICTY was based on a Security Council Resolution, which was not a party to the Yugoslav conflict as such, nor were any of its members at that time. Moreover, the decisions about the content of the ICTYSt. was passed on by the Security Council to an entirely non-state entity, the Office of the Secretary-General in actuality, the UN Office of Legal Affairs (OLA).[105] Apparently, the reason for this step was that the Security Council as an organ could potentially be influenced by states, whereas this risk appears less concrete with regard to the Secretary-General.[106] It can be concluded that the Secretary-General was afforded an unprecedented power to vest the ICTY and its Statute.[107]

ICTR

Although the Statute of the ICTR was similarly enacted by the Security Council, its drafting process was approached in a different manner than that of the ICTYSt. The ICTRSt. was promulgated by the U.S. and New Zealand in conjunction with Rwanda, which, at that time, was a member of the Security Council. This drafting process was exceptional in two ways:

(i) certain parts of the membership of the Security Council retained, in themselves, the right to draft the ICTRSt.; and
(ii) the State which was to be subjected to the jurisdiction of the ICTR (Rwanda) was put in a position where it could not only contest any element of the provisions in the Statute, but also influence the formulation itself.[108]

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105 Robert Cryer, "The Boundaries of Liability in International Criminal Law, or 'Selectivity by Stealth'," *Journal of Conflict and Security Law* 6/1 (2001): 8; see also M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* (New York: Transnational Publishers, 1996), 221–225.

106 *Ibid.*

107 See Report of the Secretary-General pursuant to paragraph 2 of SC Resolution 808, UN Doc. S/25704.

108 Cryer, "The Boundaries of Liability," 9.

Therefore the ICTRSt. embodies, more than the ICTYSt., a negotiated outcome between just a few states. This may explain why Rwanda voted against Security Council Resolution 955, establishing the ICTR, which Statute included crimes that Rwanda did not endeavor to include.[109] As Rwanda was a non-permanent member of the Security Council, it was not empowered to veto the creation of the ICTR itself, although, as noted, it did vote against it. Importantly, the ICTR is therefore the first example of an international criminal tribunal where there is "…not a total separation between the authority creating the tribunal and the State (or nationals thereof) which was to be the subject of the tribunal."[110]

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109 Rwanda also disagreed with the ICTR's temporal jurisdiction (i.e., from 1 January 1994 to 31 December 1994), since Rwanda wished to include crimes committed from 1 October 1990 onwards; moreover, Rwanda vowed for a higher number of Trial Judges as well as a separate Appeals Chamber, instead of sharing one with the ICTY. See Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia, 2002), 226–228.

110 Cryer, "The Boundaries of Liability," 99.

CHAPTER 2

Defining International Crimes

1 Introduction

The crime of genocide, crimes against humanity, war crimes, and the crime of aggression are the main categories of crimes to be tried by international criminal tribunals. The International Criminal Court (ICC) has jurisdiction over these four categories of crimes and they are, according to the Preamble to the ICCSt., "the most serious crimes of concern to the international community as a whole." Notably, international terrorism was not included in the ICCSt. due to lack of agreement on the definition, whilst some states did not consider terrorism as serious as the four mentioned categories.[1] It is striking that the STL's mandate does embrace "international" terrorism, albeit within the ambit of a specific situation, namely only in relation to extending to crimes committed in Lebanon pertaining to the attack on President Rafik Hariri.

This chapter explores three of these categories of international crimes from the perspective of the ICC, ICTY and ICTR. Unlike the ICTY and ICTR, the ICCSt. includes the crime of aggression. As to the act of aggression, during the Rome Conference in 1998, consensus was reached that the ICC should have jurisdiction over this crime. Only in 2010, during the ICC Review Conference in Kampala (Uganda), the contents of this crime were stipulated. According to Article 5(2) ICCSt., the ICC shall exercise jurisdiction over this crime once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions for this exercise.[2] The amendment to the Rome Statute, enhancing the crime of aggression, is meant to enter into force in 2017.[3]

1 See William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 28.

2 Article 121 ICCSt. provides that after the expiry of seven years from the entry into force of the Statute, States parties may propose amendments to it; Article 123 ICCSt. provides that "seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions."

3 See Chapter 3.

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2 The Proliferation of the Crime of Genocide within the Law of the Tribunals

The ICTY, established upon a Security Council Resolution of May 1993, was the first international criminal tribunal to prosecute the crime of genocide.[4] The Charters of both the Nuremburg and Tokyo War Crimes Tribunals were, at that time, not equipped to deal with the crime of genocide and its judicial parameters. The first international instrument containing a more universal definition of the crime of genocide was the United Nations Convention for the Prevention and Punishment of the Crime of Genocide of 1948, also called the Genocide Convention.[5] Yet, the drafters of this Convention, were unable to attain consensus on adopting universal jurisdiction for this crime: during the Sixth Committee of the General Assembly of the United Nations in 1948, recognition of universal jurisdiction was rejected. Instead, the drafters reached a compromise on a minimal formula allowing for territorial jurisdiction, and referred to a possibility of establishing an International Criminal Court in the future which would be empowered to try this crime.[6] Notwithstanding the ICTY not being the international penal tribunal contemplated in the Genocide Convention, Article 4(1) ICTYSt. gave the ICTY explicit jurisdiction over the crime of genocide, albeit of course restricted to the territory of the former Yugoslavia. Significantly, the genocide definition in Article 4(1) and (2) ICTYSt. is almost identical to the text of Articles II and III of the 1948 Genocide Convention.[7] The ICTRSt. embodies in Article 5 the equivalent of the ICTY definition.[8] However, as the ICTY went ahead, its primary

4 William A. Schabas, "Was genocide committed in Bosnia and Herzegovina? First judgments of the ICTY," *Fordham International Law Journal* 1 (2001): 23.

5 "Convention on the Prevention and Punishment of the Crime of Genocide," 9 December 1948, G.A. Res. 260, UN Doc. A/810.

6 Schabas, *An Introduction to the International Criminal Court*, 2001, 23.

7 See for the elements of these definitions paragraphs 3–4 *infra*.

8 Genocide is defined as: "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group" (see Article 2 Genocide Convention; Article 4 ICTYSt., Article 5 ICTRSt., Article 6 ICCSt.); Article 3 Genocide Convention provides that "the following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

prosecutorial focus was upon the two other categories of crimes falling within its subject-matter jurisdiction, namely war crimes and crimes against humanity.[9] It took the ICTY until 19 October 1999 to make its first decision on the crime of genocide in *Prosecutor v. Jelisić*.[10] Mr Jelisić was charged with responsibility for the murder of several dozens of victims in concentration camps in the Brcko region of northwest Bosnia and Herzegovina. Although he pleaded guilty to war crimes and crimes against humanity counts, he entered a not-guilty plea with regard to genocide. Both the Trial Chamber and the Appeals Chamber of the ICTY came to an acquittal for genocide.[11] The case *Prosecutor v. Sikirica* resulted in a similar outcome, as the Trial Chamber dismissed the genocide charge.[12]

3 Proliferation of ICTY-ICTR Case Law on the Crime of Genocide

The first conviction for the crime of genocide was rendered in the *Krstić* case. In its ruling of 2 August 2001, the ICTY Trial Chamber held General-Major Krstić liable for committing genocide related to the killing of more than seven thousand Bosnian Muslim men in Srebrenica in July 1995, notwithstanding the fact that the accused had no direct physical part in the killings as such.[13] This first ICTY genocide conviction resulted in the imposition of a prison sentence of forty-six years.[14] Kristić's defense argued on appeal that the Trial Chamber misconstrued the genocide definition and erred in applying the definition to

9 Schabas, *An Introduction to the International Criminal Court*, 2001, 25.

10 *Prosecutor v. Jelisić*, Trial Chamber Judgment, Case No. IT-95-10-T, December 14, 1999; the Trial Chamber is obliged to pronounce the acquittal of the accused pursuant to Rule 98 *bis* ICTY RPE, when the evidence provided by the Prosecution is insufficient to sustain a conviction. On October 19, 1999, the Trial Chamber declared Mr Jelisić acquittal on the crime of genocide; see Trial Chamber Judgment, December 14, 1999, para. 16.

11 *Prosecutor v. Jelisić*, Appeals Chamber Judgment, Case No. IT-95-10-A, July 5, 2001.

12 *Prosecutor v. Sikirica, Došen and Kolundžija*, "Judgment on Defence Motions to Acquit," Trial Chamber, Case No. IT-95-8-T, September 3, 2001, para. 97.

13 *Prosecutor v. Krstić*, Trial Chamber Judgment, Case No. IT-98-33-A, August 2, 2001; the Trial Chamber also found Krstić, who was a General-Major in the VRS and commander of the Drina Corps at the time the crimes were committed, guilty of crimes against humanity (persecution, cruel and inhumane treatment, terrorizing the civilian population, destruction of personal property and forcible transfer) and war crimes (murder as a violation of the laws or customs of war), see also *Prosecutor v. Krstić*, Appeals Chamber Judgment, Case No. IT-98-33-A, April 19, 2004, para. 3.

14 *Prosecutor v. Krstić*, Trial Chamber Judgment, August 2, 2001, para. 726.

the circumstances of the case.[15] The Appeals Chamber granted Krstić's appeal in part, holding that his criminal responsibility was that of an aider and abettor, instead of a principal co-perpetrator.[16] The Appeals Chamber found that there was no adequate proof that Krstić himself possessed genocidal intent, but he was, according to the Appeals Chamber, aware of the VRS Main Staff's intent to commit genocide; therefore the conviction as principal perpetrator could not stand.[17] Krstić's sentence was reduced to 35 years imprisonment.[18]

Compared to the ICTY, the ICTR delivered its first genocide conviction much sooner after its establishment in 1994. On 4 September 1998, four years after its inception, the ICTR found Jean Paul Kambanda guilty of genocide.[19]

4 The ICTY-ICTR Statutory and Jurisprudential Elements of the Crime of Genocide

There are several important international legal aspects surrounding the crime of genocide and subsequent conviction by ICTs. The most important of these are:

(i) the international legal history of the concept of genocide and the requirements to prove genocide before an international criminal tribunal;
(ii) evidentiary obstacles; and
(iii) legal defenses against genocide charges before an international criminal tribunal.

Sub (i): The crime of Genocide

The international crime of genocide was first defined in an international instrument, namely the UN Genocide Convention, unanimously adopted by the General Assembly on 9 December 1948. Article II of this Convention promulgates a concise definition of this international crime.[20] Considering the

15 *Prosecutor v. Krstić*, "Appeals Chamber Judgment," April 19, 2004, para. 5.
16 Id., para. 137.
17 Id., para. 143.
18 Id., para. 275.
19 *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. ICTR-97-23-S, September 4, 1998.
20 The criminal trial against Adolf Eichmann before the Israeli District Court in 1961 took place on the basis of a domestic provision modelled after mentioned Article II of the Genocide Convention.

fact that Article 6 ICCSt. is an exact copy of the definition in the 1948 UN Convention, it seems important for both prosecution and defense, acting before the ICC and confronted with genocide charges, to pay appropriate attention to the elements of crime as enshrined in Article II of the mentioned 1948 UN Convention. Three major elements can be deduced from the latter provision, all of which must be fulfilled in order to prove this crime beyond a reasonable doubt:

1. Firstly, at least one of the following five limitative mentioned acts, subsumed in Article II a-e, must have been committed:
    a. the killing of group members;
    b. causing serious bodily or mental harm to these members;
    c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
    d. imposing measures to prevent births within the group; and/or
    e. forcibly transferring children of the group to another group
2. Secondly, Article II enumerates national, ethnic, racial and religious groups as those against whom the enumerated acts (see 1 above) must be committed in other to constitute genocide.

    The term "ethnic group" poses some definitional uncertainties. The drafting history of the Genocide Convention indicates a wide divergence in the scope of this term ascribed to the member states. Proposals to include political and social groups in the definition of genocide were rejected in 1948 and again during the drafting process of the ICCSt. The same controversy with regard to the apparent limited scope of the four groups addressed in Article II of the Genocide Convention reappeared in the first genocide conviction by the ICTR. In *Prosecutor v. Akayesu,*[21] the Trial Chamber of the ICTR held that the drafters of the UN Genocide Convention intended to include in the genocide definition "all permanent and stable groups." It may be doubted whether this interpretation indeed forms part of the definitional text in the UN Convention. As this interpretation was disputed in legal literature, the ICTR refrained from pursuing this extensive approach in the *Kayishema* and *Ruzindana* judgments,[22] as well as in the *Rutaganda* judgement.[23]

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21 *Prosecutor v. Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, September 2, 1998.

22 *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, May 21, 1999, para. 88.

23 *Prosecutor v. Rutaganda*, Trial Chamber Judgment, Case No. ICTR-96-3-T, December 6, 1999.

The mentioned four groups (national, ethnic, racial and religious) are difficult to define. The general meaning of a concept such as "racial groups" has changed considerably since 1948, particularly since, genetically speaking, there is no such thing as a race. Contemporary theory, influenced by human rights considerations, speaks only in terms of ethnic or national minorities. Note, however, that neither the Genocide Convention nor any other Statute requires that the targeted group represents an actual minority.

3. The third element to be fulfilled in order to prove the crime of genocide beyond reasonable doubt is the intention, in whole or in part, to destroy the particular group involved. The wording "in part" implies that Article II can also apply to particular acts against a specific group without the intention of completely extinguishing the group. The words "in whole or in part" indicate a quantitative dimension which is not only important for the Prosecutor, who carries the burden of proof; they also indicate that this quantity should be considerable, and that the intention to kill a few members of a group does not imply genocide. The jurisprudence of both *ad hoc* tribunals shows that when part of the group is killed this should be a "substantial part," as the ICTY phrased it in the *Jelisić* judgement.[24] Any contention that the number of actual victims should exceed a specific numerical threshold for the crime to qualify as genocide is thus unjust.

In fact any indirect reference to this quantitative dimension should be seen in the light of the mental element of the crime of genocide. This is what the third element is concerned with. What is essential is not the actual number of victims, but rather the *intention* of the person committing the crime was the deliberate destruction of a considerable number of members of one of the groups mentioned in Article II of the Genocide Convention (Article 6 ICCSt.). In other words, the actual number of victims only becomes relevant in light of the evidence for "genocidal intent" which the Prosecutor must provide. From this it logically follows that, the larger the number of actual victims, the more likely this will be considered as proof that the accused indeed intended to destroy the group in question "in whole or in part." The jurisprudence of the tribunals shows that the mental element of "specific intent" being the criterion distinguishing genocide from all other international crimes. Indeed, the ICCSt. mentions several international crimes, involving killing or murder of people as a punishable offence (for example, murder itself); yet, none of these crimes require the qualification of "specific intent." Thus this element constitutes the most important distinction between the crime of genocide on the one hand and crimes against

24 *Prosecutor v. Jelisić*, Trial Chamber Judgment, December 14, 1999, para. 100.

humanity on the other. One could argue that once this intentional element is not present, no act, regardless of how horrifying it is, can qualify as genocide.

Sub (ii): Evidentiary Obstacles

1. The first obstacle: The definition of genocide in both Article II of the Genocide Convention and Article 6 of the ICCSt. includes the obscure term "as such" at the end of the definition of the crime. This axiom may create an evidentiary issue for the Prosecutor at an international criminal tribunal. In 1948 this prerequisite was added to the definition as a compromise with those treaty-states that felt that genocide not only requires "specific intent" but also a particular motive. Of course, intent and motive are not synonymous: people can commit crimes on purpose (with intent) based on a whole range of motives such as greed, jealousy, hate, anger, etc. Thus to require proof of a motive creates an extra obstacle for the Prosecutor to effectively prosecute genocide, and as a result Article II of the Genocide Convention excludes "motive" as a requirement for proving genocide, to appease several states opposed to including the requirement of motive as part of genocide. Until this day, international tribunals have simply avoided this matter when confronted with prosecution regarding genocide. One could argue that, in the contemporary case law of the *ad hoc* tribunals, motive is not relevant as proof that genocide has occurred. Yet, in the practice of ICTs, there is no doubt that motive can serve as an important element in the chain of evidence as regards genocide. Once the accused is able to seriously question proof of any motive, this could hinder the prosecution in proving genocidal intent.[25] Therefore, it is not realistic to assume that motive as an indirect evidentiary element of the crime of genocide is completely outlawed.[26]
2. The second hurdle in terms of rules of evidence pertains to proving this mental element, for which no conclusive definition exists. The proof of intent is probably the most difficult element of genocide to prove. In practice the evidence is usually indirect or "circumstantial," such as evidence of written or verbal orders, or witness statements from which intent to destroy can be deduced; or the identification of a particular group as an "enemy of the state," or particular systematic and destructive patterns of acts against a certain group. The latter turned out to be an important evidentiary element

25 William A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), 254.

26 Ibid.

in the *Eichmann* case, namely Eichmann's own statements about the annihilation of Jewish people.

Other acts like "cultural genocide" and forced deportation, which by themselves do not qualify as genocide, can provide important indicators of intent. Therefore, it is not only the accused's own words and deeds but also a variety of contextual factors (in relation to the victims) that can provide the Prosecutor with the requisite evidence.[27]

3. In the light of this, it is interesting to note that ICTY and ICTR Trial Chambers have ruled in several judgments that the accused must have possessed 'specific intent' in order to be guilty of genocide, as a principal (co-)perpetrator. An accused who is aware of the intent of the principal perpetrator, but does not himself possess the specific intent to destroy a certain national, ethnic, racial or religious group, cannot be held accountable for committing genocide. He may, though, be held accountable for complicity in genocide on the basis of aiding and abetting.[28]
4. The earlier mentioned term "as such" carries a significant hurdle for the Prosecutor in seeking evidence, namely the proof that "the (protected) group itself (must be) the ultimate target or intended victim of this type of massive criminal conduct." For example, even if mass destruction results in the death of a large part of a protected group, this is not genocide when the acts were part of an arbitrary campaign of violence or when the acts were aimed at a larger but unprotected group. Subsequent jurisprudence has toned down this requirement: in the *Jelišić*-judgment, targeting of an important part of a particular group (such as leaders) can still be regarded as genocide "in light of its impact on the rest of the group."[29] Clearly, pressing charges is easier than proving genocide.

Sub (iii): Defenses

The implications of the above mentioned thresholds may lead to several defense arguments:

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27 *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998; *Prosecutor v. Rutaganda*, Trial Chamber Judgment, December 6, 1999.

28 *Prosecutor v. Krstić*, "Appeals Chamber Judgment," April 19, 2004, para. 143; *Prosecutor v. Blagojević and Jokić*, Appeals Chamber Judgment, Case No. IT-02-60-A, May 9, 2007, paras. 675–676; *Prosecutor v. Semanza*, Appeals Chamber Judgment, Case No. ICTR-97-20-A, May 20, 2005, para. 369.

29 *Prosecutor v. Jelisić*, "Trial Chamber Judgment," December 14, 1999, para. 82.

1. First of all, the elusive nature of the mental element, which the Prosecutor often can only prove via indirect or circumstantial evidence.[30]
2. Secondly, although manslaughter is one of the five described core acts in the definition of genocide and is clearly defined, the other four acts create potential defenses. For example, does rape fall under the second group of acts (causing severe bodily or mental harm)? This question was confirmed by the ICTR in the *Akayesu* judgment on 2 September 1998.[31] Genocidal rape could feature as part of an official policy of war in a genocidal campaign for political control, to be used to force people to leave their homes and to stop women from propagating, as women might be less likely to propagate after a traumatic sexual experience.

   Mindful of this ambiguity, the ICCSt. subsumed the second group of acts (acts of torture, rape, sexual violence and inhumane/degrading treatment) under Article 6 sub b of the elements of crimes. Yet, not all questions were resolved: Do the forced marches of the Armenian minority population of Turkey in 1915 fall under this heading? How is specific genocidal intent established? And how should one interpret "the imposition of living conditions with the aim to destroy a group?" On 3 February 2010, the ICC Appeals Chamber unanimously reversed the Pre-Trial Chamber's decision which rejected the issuance of an arrest warrant against Omar Al Bashir for the crime of genocide. The Prosecution had based its case on various types of evidence, among which the poor conditions of life in the IDP Camps.[32] According to the Pre-Trial Chamber, the evidence provided by the Prosecution did not amount to "reasonable grounds to believe" that the Government of Sudan acted with genocidal intent.[33] Even though "reasonable grounds to believe" was the appropriate standard at this stage of the

30 See Chapter 5.

31 *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998.

32 *Prosecutor v. Al Bashir*, "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'," Appeals Chamber, Case No. ICC-02/05-01/09-73, February 2, 2010, para. 36; *Prosecutor v. Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," Case No. ICC-02/05-01/09-2-Conf, March 4, 2009, para. 204; the Prosecution had argued that the conditions within the IDP camps in Darfur and the alleged hindrance of humanitarian assistance of the Government of Sudan, were a key component of existence of genocidal intent on part of the Government of Sudan, "Decision on Prosecution's Application for a Warrant of Arrest," March 4, 2009, para. 177 *et seq.*

33 *Prosecutor v. Al Bashir*, "Judgment on the appeal of the Prosecutor," February 2, 2010, para. 32; *Prosecutor v. Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest," March 4, 2009, para. 204.

proceedings, the Pre-Trial Chamber had applied it erroneously,[34] as it denied to issue an arrest warrant on the basis that "the *existence* of [...] genocidal intent is only one of several reasonable conclusions available to the materials provided by the Prosecution."[35] The Appeals Chamber held that this reasoning virtually amounted to the Prosecutor having to establish genocidal intent "beyond reasonable doubt" instead of merely "reasonable grounds to believe."[36] Accordingly, the ICC Appeals Chamber reversed this decision after which the Pre-Trial Chamber issued an arrest warrant against Al Bashir for genocide, as well as confirmed the previous arrest warrant based upon crimes against humanity and war crimes.

3. Thirdly, can a suspect of genocide invoke, for example, the legal defense of "superior orders" or "duress"? In Article IV, the UN Genocide Convention only mentions the exclusion of the state immunity defense. The ICTY Appeals Chamber held in its Judgment of 7 October 1997 (in the *Erdemović* case) that duress is never a complete defense to war crimes or crimes against humanity, when innocent life is taken.[37] The exclusion of duress as a defense equally applies to genocide. Yet, the dividedness (3–2) of the Appeals Chamber in the *Erdemović* case reflects the controversy pertaining to the scope of duress as a defense, particularly in light of the strong dissenting opinions of Judge Cassese and Judge Stephens. Judge Cassese disagreed with the Prosecution's and Majority's view that duress can never be admitted as a defense involving the killing of persons and arrived at the following conclusion:

> the customary rule of international law on duress, as evolved on the basis of case-law and the military regulations of some States, does not exclude the applicability of duress to war crimes and crimes against humanity whose underlying offence is murder or unlawful killing. However, as the right to life is the most fundamental human right, the rule demands that

34 *Prosecutor v. Al Bashir*, "Judgment on the appeal of the Prosecutor," February 2, 2010, para. 39.

35 *Prosecutor v. Al Bashir*, "Judgment on the appeal of the Prosecutor," February 2, 2010, paras. 1, 32; *Prosecutor v. Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest," March 4, 2009, para. 159.

36 *Prosecutor v. Al Bashir*, "Judgment on the appeal of the Prosecutor," February 2, 2010, para. 33; On 21 July 2010 the Pre-Trial Chamber issued a Second Warrant of Arrest for Al Bashir, considering that there were reasonable grounds to believe that he was criminally responsible as an indirect (co-)perpetrator for genocide, see *Prosecutor v. Al Bashir*, "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir," Case No. ICC-02/05-01/09-95, July 12, 2010.

37 *Prosecutor v. Erdemović*, Appeals Chamber Judgment, Case No. IT-96-22-A, October 7, 1997, para. 19.

> the general requirements for duress be applied particularly strictly in the case of killing of innocent persons.[38]

Judge Stephen, similarly argued that the majority applied an incorrect standard for the defense of duress:

> stringent conditions surrounding that defence will have to be met, including the requirement that the harm done is not disproportionate to the harm threatened. The case of an accused, forced to take innocent lives which he cannot save and who can only add to the toll by the sacrifice of his own life, is entirely consistent with that requirement.[39]

By contrast, the drafters of the Rome Statute codified duress, accepting it as a full defense to crimes within the ICC's jurisdiction.[40]

5 Crimes against Humanity before ICTs

5.1 *Introduction: The Characteristics of Crimes Against Humanity*

Under international criminal law (ICL), the distinguishing features that elevate a criminal act to the level of a crime against humanity have been thoroughly developed. This paragraph considers the various delictual elements of this elevation as endorsed by the law of contemporary ICTs. This overview will show that the concept of "crimes against humanity" derives from customary international law and relates to offences which may be committed either during armed conflict or in time of peace. The distinction between genocide and crimes against humanity can sometimes be blurred.[41]

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38 *Prosecutor v. Erdemović*, "Separate and Dissenting Opinion of Judge Cassese," Case No. IT-96-22-A, October 7, 1997, para. 44.

39 *Prosecutor v. Erdemović*, "Separate and Dissenting Opinion of Judge Stephens," Case No. IT-96-22-A, October 7, 1997, para. 67.

40 Article 31(1)(d) ICCSt. excludes criminal responsibility if, at the time of the person's conduct, "the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this thread, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control."

41 Schabas, *An Introduction to the International Criminal Court*, 2001, 30.

The elements that make crimes against humanity a distinct type of international crimes are as follows:

(i) first, the fact that they are committed for non-military purposes, meaning that neither are the aims closely related to a military campaign or battle nor are they part of a military operation plan;
(ii) secondly, they are committed against civilians, including those who have the same nationality as the offender(s);
(iii) thirdly, they are severely inhumane and cruel in that they infringe recognized values of mankind and humanity;
(iv) fourthly, they be committed on a widespread scale, or in an organized form, guided by political, religious or ethnic hostility and hatred; and
(v) fifthly, they are, like war crimes, territorial in time of war.[42]

It follows from these five features that there is a distinction between war crimes, i.e. the (premeditated or organized) attack on civilians, who have not taken any active part in the fighting without the requirement in sub (iv), and crimes against humanity. War crimes are primarily violations of the *jus in bello*, whereas crimes against humanity violate general principles of humanitarian law, not necessarily during a war. Crimes against humanity have no basis in an authoritative convention or treaty, however, on 30 July 2013, the UN International Law Commission, tasked with promoting the development of international law and its codification, added the elaboration of the "Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity" to its long-term work program.[43]

5.2 *ICTY and ICTR Requirements*

The ICTY and ICTR Statutes (Articles 5 and 3) respectively contain an enumeration of nine basic crimes which are qualified as crimes against humanity.

42 Bing Bing Jia, "The Differing Concepts of War Crimes and Crimes against Humanity in International Criminal Law," in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law* (Oxford: Oxford University Press, 1999), 270.

43 Jia, "The Differing Concepts of War Crimes and Crimes against Humanity," 263; see also "Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity," August 2010, accessed April 9, 2014, http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf; "Crimes Against Humanity Initiative Objectives Gain Support from UN International Law Commission," Washington University School of Law Whitney R. Harris World Law Institute Crimes Against Humanity Initiative, accessed 9 April 2014, http://law.wustl.edu/news/pages.aspx?id=9778; "Report of the International Law Commission," UN General Assembly, A/68/10, 2013, para. 170.

The requirement originates from various sources of international law on crimes against humanity (such as the 1945 International Military Tribunals (IMT) Charter), namely the need for a connection or nexus between the crimes and an armed conflict, surfaces in the ICTYSt. However, the jurisdictional limitations in the ICTYSt. probably explain why the Security Council (SC) was not challenged to formulate a broader and overall definition.[44] These interpretative limitations were clearly expressed to the United Nations by Mrs Madeleine Albright, the 1993 Permanent Representative of the U.S. On 25 May 1993, in the Security Council, after the adoption of Resolution 827 (establishing the ICTY), she remarked that "it is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict *in the territory of the former Yugoslavia* (emphasis added), as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender or religious grounds."[45] However, ICTY case law dictates the following approach as to the element of a potential nexus with an armed conflict:

(i) Firstly, in its "Decision on Defence Motion for Interlocutory Appeal on Jurisdiction" rendered in the *Tadić* case,[46] the Appeals Chamber (Judges Cassese, Li, Deschênes, Abi-Saab and Sidhwa) opined that crimes against humanity may be committed notwithstanding the absence of any connection with an armed conflict:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law....[47]

On this basis, the Appeals Chamber concluded in paragraph 142 that:

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44 See also Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2001), 55.

45 UN Doc. S/PV 3217, May 25, 1993, at 15.

46 *Prosecutor v. Tadić*, "Decision on Defense Motion for Interlocutory Appeal on Jurisdiction," ICTY Appeals Chamber, Case No. IT-94-1-T, October 2, 1995.

47 Id., para. 141.

> ...Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts.[48]

Therefore, from the outset the ICTY took the view that *stricto sensu* no nexus with an *international* armed conflict is required under the Statute, albeit that this crime within the Statute is conditional upon an armed conflict.

(ii) Secondly, in the Rule 61 proceedings in *Prosecutor v. Nikolić*, the ICTY Trial Chamber defined what it considered to be the most prominent features of crimes against humanity:

> First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.[49]

This approach of the ICTY was continued in *Prosecutor v. Mrkšić, Radić and Šljivančanin*[50] Interestingly, the Trial Chamber, in defining crimes against humanity, relied on, *inter alia*, the decision of the French Court of Cassation in the *Barbie* case, holding that "crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character."[51] This implies that the same fact can constitute both crimes, separated by a specific motive, i.e. the systematic and collective pattern of criminal conduct.[52]

One may conclude that Article 5 ICTYSt. refined the humanitarian law origins of the concept of crimes against humanity as follows:

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48 Id., para. 142.

49 *Prosecutor v. Dragan Nikolić*, "Review of the Indictment pursuant to Rule 61," Case No. IT-94-2-R61, October 20, 1995, para. 26.

50 *Prosecutor v. Mrkšić, Radić and Šljivančanin*, "Review of the Indictment pursuant to Rule 61," Case No. IT-95-13-R61, April 3, 1996, para. 30; see also ICTY Transcripts, "Decision on Prosecutor's Motions," April 3, 1996, accessed April 10, 2014, http://www.ictytranscripts.org/trials/mrksic/960403it.htm.

51 Id.

52 Jia, "The Differing Concepts of War Crimes and Crimes against Humanity," 266–271.

(i) it required for the first time since 1951 (i.e. since the 1951 Draft Code of Crimes Against the Peace and Security of Mankind) a new version of the mentioned nexus with an armed conflict (an armed conflict nexus); and
(ii) it reintroduced the requirement that the victims of crimes against humanity be civilians.

Contrary to the 1945 IMT Charter, Article 5 ICTYSt. does not limit this war nexus to the crimes against humanity enumerated in the Statute. The IMT Charter, however, was wider in scope in that it extended the nexus to mere preparation of an aggressive war.[53] As regards the nexus, the conclusion is justified that this element is not required under customary international law; but rather only under the ICTYSt. In two judgments, *Prosecutor v. Tadić* and *Prosecutor v. Kordić*, the respective ICTY Appeals Chamber and Trial Chamber held that the armed conflict requirement was to be seen as a jurisdictional element which is satisfied by proving that there was an armed conflict and "…in so doing, it [the Statute] requires more than does customary international law."[54] Supportive of this view is the absence of a specific armed conflict nexus in Article 3 ICTRSt. and Article 7 ICCSt.[55] It has been said that the absence of the armed conflict nexus in the Rome Statute illustrates the evolution in the definition of crimes against humanity, as the ICTY Appeals Chamber had already noted in 1995 that there was "no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity."[56] Furthermore, the Appeals Chamber called the nexus requirement 'obsolescent', as was evidenced "by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to an armed conflict."[57] The Rome Statute negotiators were, however, divided on the issue whether or not to include the armed conflict requirement in the Statute.[58] Schabas observed that "as with the definition of genocide, there is nothing specific in the text of

53 Kai Ambos and Steffen Wirth, "The Current Law of Crimes Against Humanity, An Analysis of UNTAET Regulation 15/2000," Criminal Law Forum 13 (2002): 11.

54 *Prosecutor v. Tadić*, Appeals Chamber Judgment, Case No. IT-94-1-A, July 15, 1999, paras. 249–251; *Prosecutor v. Kordić*, Trial Chamber Judgment, Case No. IT-95-14/2-T, February 26, 2001, para. 33.

55 See *infra*.

56 *Prosecutor v. Tadić*, "Decision on the defence motion for interlocutory appeal on jurisdiction," Case No. IT-94-1, October 2, 1995, para. 140.

57 Id., para. 140.

58 UN Doc. A/CONF.183/C.1/SR.3, para. 176; Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 101.

the Rome Statute to indicate that the crime can be committed in the absence of international armed conflict, but this is undoubtedly implicit."[59]

5.3 *The Context Element as a Requirement to Qualify Crimes Against Humanity before ICTs*

With respect to crimes against humanity, customary international law does require that the individual criminal act (such as rape or murder) be committed within a wider context of specified circumstances. This condition is called the 'context element'. For instance, Article 7(1) ICCSt. says that crimes against humanity must be committed "as part of a widespread or systematic attack directed against any civilian population"; paragraph 2(a) proscribes that the "attack against any civilian population" must involve multiple acts committed "pursuant to or in furtherance of a State or organizational policy to commit such attack."[60]

This 'context element' was for the first time codified in the ICTRSt., which explicitly mentions as a condition proof of a "widespread or systematic attack against any civilian population." It is now similarly adopted in Article 7(1) ICCSt., as well as in Section 5.1 of UNTAET Regulation 15/2000 regarding the East Timor Special Panels for Serious Crimes.[61] As will be seen in the ensuing paragraphs, both the ICTY and ICTR judges replace the war nexus with this context element, albeit that some link to an authority or power, be it a state, organization or group, is required by their case law.[62] The rationale for the inclusion of a context element in crimes against humanity is to distinguish common crimes under domestic law from international crimes, which amount to international criminality abstracted from national criminality concepts.[63] In this sense, the context element forms the international law dimension in crimes against humanity, elevating it to a matter of international concern.[64] It is quite evident that this international concern and qualification as an international crime stems from the extreme gravity of crimes against humanity.[65] Indirectly, the rationale of the context element within the crimes against humanity concept is thus the protection of human rights against atrocities. As observed by the ICTY Trial Chamber in *Prosecutor v. Kupreskić*, the prohibition of crimes against humanity is "intended to safeguard basic human values by

59 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 101.

60 Article 7(2)(a) ICCSt.

61 See Chapter 1.

62 Ambos and Wirth, "Current Law of Crimes Against Humanity," 12.

63 Ambos and Wirth, "Current Law of Crimes Against Humanity," 13.

64 See for this "international element" also *Prosecutor v. Tadic*, case No. IT-94-1-A and IT-94-1-A bis.

65 Ambos and Wirth, "Current Law of Crimes Against Humanity," 13–14.

banning atrocities directed against human dignity."[66] At the same time, this (indirect) rationale clarifies the distinction between rape as a crime against humanity and rape as a singular (domestic) crime.

5.4 *Requirements of the Context Element under ICT Statutes*

5.4.1 Widespread or Systematic Attack

As noted above, the requirement of a widespread or systematic attack was codified for the first time in the ICTRSt.; in 1998 it was adopted in Article 7 ICCSt. Although absent in the ICTYSt., ICTY case law did set forth this element within the ICTY ambit as well. Two ICTY Trial Chamber judgments, *Prosecutor v. Tadić*[67] and *Prosecutor v. Blaskić,*[68] construed this criterion in order to protect the civilian population. The requisite elements to be addressed for crimes against humanity are:

(i) The acts must be directed against a civilian population; *and*
(ii) The acts must be widespread (in terms of the number of victims); *or*
(iii) The acts must be committed in a systemic manner (i.e. pursuant to a preconceived plan or policy).[69]

Ad (i): The term 'Attack'

According to the Trial Chamber in *Prosecutor v. Kunarać* et al., in order to prove a crime against humanity was committed, there must be an attack.[70] The term 'attack', which does not necessarily mean a military attack, is interpreted extensively by the *ad hoc* Tribunals, as illustrated by the following case law. In *Prosecutor v. Akayesu*, the ICTR Trial Chamber held that:

> The concept of attack may be defined as an unlawful act of the kind enumerated in Article 3 (a) to (i) of the Statute, like murder, extermination, enslavement etc. An attack may also be non-violent in nature, like

66 *Prosecutor v. Kupreskić*, Trial Chamber Judgment, Case No. IT-95-16-T, January 24, 2000, para. 547.

67 *Prosecutor v. Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, May 7, 1997, para. 648.

68 *Prosecutor v. Blaskić*, Trial Chamber Judgment, Case No. IT-95-14-T, March 3, 2000, para. 202.

69 *Prosecutor v. Tadić*, "Trial Chamber Judgment," May 7, 1997, para. 648; see also the commentary to the International Law Commission Draft Code.

70 *Prosecutor v. Kunarać, Kovać and Vuković*, Trial Chamber Judgment, Case No. IT-96-23-T & IT-96-23/1-T, February 22, 2001, para. 410.

> imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.[71]

In *Prosecutor v. Kayishema* this definition was refined in that the Trial Chamber found that an attack in this sense can consist both of a multiplicity or accumulation of the *same* and of *different* crimes (for example murder, rape and persecution).[72]

Lastly, no requirement exists that the attack is executed by a multiplicity of perpetrators, or that a single perpetrator needs to act at different moments.[73] For instance, the use of a chemical weapon by a single commander in a large populated area can result in multiple killings through a single conduct within the meaning of an 'attack'.[74]

In conclusion, it may be said that the *ad hoc* tribunals define the term 'attack' as the multiple commission of acts which fulfil the requirements of the enumerated inhumane acts, orchestrated on a massive scale or in a systematic way.[75] The ICCSt., in Article 7(2)(a), follows the same approach, referring to "the multiple commission of acts" as mentioned in Article 7(1) ICCSt.

The ICC Appeals Chamber determined in the Gbagbo case that it is up to the Pre-Trial Chamber to determine how many of the incidents in the indictment would suffice to prove an 'attack'.[76] The Pre-Trial Chamber, whilst adjourning the confirmation of the charges, had held that:

> [w]hen alleging the existence of an 'attack against any civilian population' by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a *sufficient number of incidents*

71 *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, para. 581; other ICTR decisions have adopted this definition; see, *inter alia, Prosecutor v. Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-T, January 27, 2000.

72 *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, May 21, 1999, para. 122.

73 Ambos and Wirth, "Current Law of Crimes Against Humanity," 17.

74 *Prosecutor v. Kupreskić*, "Trial Chamber Judgment," January 24, 2000, para. 712.

75 Id., para. 544; Ambos and Wirth, "Current Law of Crimes Against Humanity," 16.

76 *Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'," Appeals Chamber, Case No. ICC-02/11-01/11 OA 5, December 16, 2013, para. 47.

> relevant to the establishment of the alleged 'attack' took place. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an 'attack'.[77]

According to the Appeals Chamber, the Prosecutor is tasked with pleading the relevant facts to establish the legal elements, while the Pre-Trial Chamber should satisfy itself that those facts, "if proven to the requisite threshold, establish the legal elements of the attack."[78] Thus, it must be demonstrated that there were multiple incidents, however, it is not necessary to prove each incident separatly.

Ad (ii): Systematic attack

A second element is the requirement that an attack needs to be either systematic or widespread in an alternative way.[79] The *ad hoc* tribunals consistently associate the term 'systematic attack' with the requirement of proving "a pattern or methodical plan"[80] or the existence of a preconceived policy or plan.[81] The ICTY-ICTR case law does not exhaustively indicate what "a methodical plan" is; rather it says what it is not, namely non-organized acts of violence and the improbability of their random occurrence.[82] Contrary to the ICTY decision in the *Blaskić* case,[83] it is tenable that the element of a systematic attack also extends to attacks on innocent persons committed with limited resources (for example without large financial resources or expensive weapons but with machetes or knives) or otherwise in a non-professional way.[84]

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77 Id. para. 47 [emphasis added by Appeals Chamber]; referring to *Prosecutor v. Laurent Koudou Gbagbo*, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," Pre-Trial Chamber I, Case No. ICC-02/11-01/11-432, June 3, 2013, para. 23.

78 *Prosecutor v. Gbagbo*, "Judgment on Appeal against Adjournment Decision," December 16, 2013, para. 47

79 See, *inter alia*, *Prosecutor v. Bagilishema*, Trial Chamber Judgment, Case No. ICTR-95-1A-T, June 7, 2001, para. 77.

80 See, *inter alia, Prosecutor v. Tadić*, "Trial Chamber Judgment," May 7, 1997, para. 648; *Prosecutor v. Bagilishema,* "Trial Chamber Judgment," June 7, 2001, para. 77.

81 *Prosecutor v. Kayishema and Ruzindana*, "Trial Chamber Judgment," May 21, 1999, para.123.

82 *Prosecutor v. Kunarać, Kovać and Vuković*, "Trial Chamber Judgment," February 22, 2001, para. 429.

83 *Prosecutor v. Blaskić,* "Trial Chamber Judgment," March 3, 2000, para. 203.

84 See for this opinion Ambos and Wirth, "Current Law of Crimes Against Humanity," 19.

In conclusion, the *ad hoc* tribunals jurisprudence dictate the essence of a systematic attack, being a combination of both a methodical element (preconceived policy or plan) and an *object*, namely the group of victims.

Ad (iii): Widespread attack

ICTY-ICTR case law portrays the large scale of the attack or the large number of victims (without specifying the number) as being the conclusive element of a "widespread attack."[85]

In the opinion of the ICTY this element may be fulfilled in two ways, namely:

(a) the cumulative effect of a series of inhumane acts results in a large-scale attack; or
(b) the singular effect of an inhumane act of extraordinary magnitude results in such an attack.[86]

5.4.2 The Element of 'Any Population'

A third main requisite for the existence of a crime against humanity is its direction against a population. Consistent with the first element (see 6.1 *supra*), the rationale of this requirement pertains to the exclusion of single or random crimes.[87] Unlike the crime of genocide (see paras. 2–4), the element of 'any population' in the context of crimes against humanity does *not* require that the victims (of the attack) were attacked *because* of their membership of a certain group. Thus, the Prosecutor does not have to prove specific intent akin to genocide.[88] However, according to ICTY-ICTR case law, the element of 'any population' implies that a multiplicity of victims must exist and that no part of the civilian population is excluded from this victimization.[89] The additional value of this element seems limited, as this multiplicity is already embedded in the first element of 'widespread or systematic attack'.[90]

85 See, *inter alia*, *Prosecutor v. Tadić*, "Trial Chamber Judgment," May 7, 1997, 648; *Prosecutor v. Kayishema and Ruzindana*, "Trial Chamber Judgment," May 21, 1999, para.123.

86 *Prosecutor v. Blaskić,* "Trial Chamber Judgment," March 3, 2000, para. 206.

87 *Prosecutor v. Kunarać, Kovać and Vuković*, "Trial Chamber Judgment," February 22, 2001, para. 422.

88 *Prosecutor v. Tadić*, "Decision on the defence motion for interlocutory appeal on jurisdiction," October 2, 1995.

89 *Prosecutor v. Blaskić,* "Trial Chamber Judgment," March 3, 2000, para. 208.

90 Ambos and Wirth, "Current Law of Crimes Against Humanity," 21–22.

5.4.3 The Element of Civilian Population

The fourth major condition for the existence of a crime against humanity is its direction against a *civilian* population. The definitional scope of this requirement is approached by the ICTY-ICTR in the following way:

(i) Firstly, these tribunals endorse a wide interpretation of this civilian element fully congruent with the definition of 'civilian' under international humanitarian law (IHL). At the same time, the *ad hoc* tribunals define it more broadly in that this element also covers all persons not protected by international humanitarian law, especially in a time of peace.[91]

(ii) Secondly, this extensive definition of 'civilian population', which goes beyond the range of its counterpart in international humanitarian law, was well formulated in the *Blaskić* case, where the ICTY Trial Chamber structured this term as follows:

> Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants – regardless of whether they wore a uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.[92]

Therefore, every individual, irrespective of his or her formal status as a member of an armed force, is considered a civilian unless the particular person directly participates in hostilities, i.e. is engaged in active hostilities with the perpetrator and the individual has not disarmed him or herself or been placed *hors de combat* by sickness, wounds or detention.[93]

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91 See *Prosecutor v. Kayishema, supra* note 119, para. 127; *Prosecutor v. Tadic, supra* nota 102, para. 643, 639.

92 *Prosecutor v. Blaskić,* "Trial Chamber Judgment," March 3, 2000, para. 214.

93 See, *inter alia, Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, para. 582; Ambos and Wirth, "Current Law of Crimes Against Humanity," 24–26; Nilz Melzer, "Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity," *Yearbook of Humanitatian International*

This means that, for instance, members of police forces are possible victims of crimes against humanity, as they are non-combatants and merely maintain civil order.[94] Likewise, the Israeli Supreme Court arrived at the conclusion that civilians are *not* protected from attacks (*in casu* targeted killings) "for such time as they take a direct part in hostilities," as follows from Article 51 section 3 of Additional Protocol I to the Geneva Conventions.[95] However, the burden lies on the attacker to prove that the civilian was taking part in the hostilities resulting in an 'unlawful combatant', forfeiting his or her right to protection under international humanitarian law, which civilians would enjoy.[96]

(iii) Thirdly, the *ad hoc* tribunals repeatedly have held that the character of a predominantly civilian population is not changed by "the presence of certain non-civilians [hostile combatants; GJK] in their midst."[97]

5.4.4 The Element of Policy

The fifth element of crimes against humanity, as introduced by ICTY-ICTR, is named the 'policy element'. It is explicitly embedded in Article 7(2)(a) ICCSt, providing that crimes against humanity must be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack." The State or organization must have actively promoted or encouraged an attack against the civilian population in order to meet the 'policy' requirement.[98] However, the State or organizational policy may also, in exceptional circumstances, be inferred from a "deliberate failure to take action, which is

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Law 9 (2006): 87–113. doi: 10.1017/S1389135906000870; *Public Committee v. Government of Israel*, Israeli Supreme Court Judgment, Case No. HCJ 769/02, December 13, 2006.

94 Ambos and Wirth, "Current Law of Crimes Against Humanity," 25. These authors refer to the ICTR *Kayishema* judgment on this point and find it erroneous.

95 Nilz Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008). or Less Harmfull Means."; see also Geert-Jan Knoops, "Legal, Political and Ethical Dimensions of Drone Warfare under International Law," *International Criminal Law Review* 12 (2012): 697–720.

96 *Public Committee v. Government of Israel*, "Israeli Supreme Court Judgment," December 13, 2006, paras. 26, 29–40; see also Melzer, *Targeted Killing in International Law*.

97 See, *inter alia, Prosecutor v. Kunarać, Kovać and Vuković*, "Trial Chamber Judgment," February 22, 2001, para. 325; *Prosecutor v. Krnojelac,* Trial Chamber Judgment, Case No. IT-97-25-T, March 15, 2002, para 56; *Public Committee v. Government of Israel*, "Israeli Supreme Court Judgment," December 13, 2006; Knoops, "Drone Warfare under International Law," 707–708.

98 Article 7(2) ICCSt.; see also the Elements of the Crimes for further clarification on Article 7 ICCSt., Introduction to Crimes against Humanity, ICC-ASP/1/3 (part II-B), September 9, 2002.

consciously aimed at encouraging such attack."[99] This provision codifies that the war nexus is no longer a decisive criterion as to the international character of crimes against humanity; instead, the particular single crime must to some extent be connected to state or organizational authority.[100] It is this policy element that primarily distinguishes crimes against humanity from common crimes. In absence of state authority, an organization which exercises the highest *de facto* power and control in a certain territory can fulfil this requirement.[101] This excludes certain groups: for example, crimes committed by a criminal organization in a state or committed by conspiring individuals do not qualify as crimes against humanity.[102] The element of policy was a central issue in the ICC's investigation relating to Kenya's 2008 electoral violence.[103]

On March 31, 2010, the ICC Pre-Trial Chamber authorized an investigation into the Kenyan situation, because of alleged crimes against humanity committed in the aftermath of the 2008-elections.[104] Judge Hans-Peter Kaul appended a compelling dissenting opinion, as he was not convinced that there existed an 'attack' committed "pursuant to or in furtherance of a State or organizational policy," nor "a State policy according to which the civilian population was attacked."[105] As to the first criterion (i.e. the existence of a 'State *or* organizational policy'), Judge Kaul argued that 'organizational policy' should be regarded as 'an organization' (an alleged policy of the State was not at issue here). Kaul sought guidance in the French, Spanish, Arabic, versions of the Rome Statute – all being equally authentic – which "clearly refer to the requirement that a policy be adopted by an 'organization'."[106] Consequently, three criteria to establish crimes against humanity can be derived from Article 7(2)(a) ICCSt.:

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99 Elements of the Crimes, Introduction to Crimes against Humanity, paragraph 3, footnote 6; see also Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," Pre-Trial Chamber II, Case No. ICC-01/09, March 31, 2010, para. 83.

100 Ambos and Wirth, "Current Law of Crimes Against Humanity," 26.

101 See also Article 7(2) ICCSt., mentioning a "State *or* organizational policy."

102 Ambos and Wirth, "Current Law of Crimes Against Humanity," 27.

103 "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," Pre-Trial Chamber II, Case No. ICC-01/09, March 31, 2010.

104 Id.

105 "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya. Dissenting Opinion of Judge Hans-Peter Kaul," Pre-Trial Chamber II, Case No. ICC-01/09, March 31, 2010, paras. 82–83.

106 Id., paras. 37–38;

(1) the existence of a State or an 'organization';
(2) a policy to commit such attack [widespread or systematic, against any civilian population]; and
(3) a link between the multiple commission of acts referred to in article 7(1) of the Statute and the policy of such State or 'organization', as emphasized by terms "pursuant to or in furtherance of."[107]

Thus, the 'attack' must be attributable to a State or organization, having or endorsing a policy to commit an attack against any civilian population.[108] According to Judge Kaul, the organization must be of such a nature that it possesses State or quasi-State abilities.[109] Kaul found that the election violence in Kenya, which was at issue before the ICC, did not meet the criteria of sub (1) and (2), as there was no organization, nor a policy.[110] Consequently, the requisite link in sub (3) could not be established either.

With respect to the question of whether the policy element implies active conduct or mere tolerance from the entity behind the policy, the ICTY-ICTR case law presents a diffuse picture.[111] The following parameters as regards the policy element may be derived from it:

(i) It is neither required that the policy element in question is formally adopted as part of a plan or policy of a state, nor that it is declared expressly as such.[112] Evidence of such a plan or policy may, however, be relevant in proving elements that the attacks were directed at 'any population' and at a 'civilian population'.

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107 Id., para. 40.

108 Id., para. 40.

109 Id., para. 51; Judge Kaul views the juxtaposition of the notions "State" and 'organization' in Article 7(2) ICCSt. as "an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State." Such characteristics may include: "(a) a collectivity of persons; (b) which was established for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale."

110 Id., para. 82–83

111 See for a detailed analysis of this jurisprudence Ambos and Wirth, "Current Law of Crimes Against Humanity," 28–34.

112 See, *inter alia*, *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, para. 580; *Prosecutor v. Blaskić,* "Trial Chamber Judgment," March 3, 2000, para. 204; see also

(ii) Mere negligence on part of the particular entity, in that this entity does not oppose the crimes, is not sufficient to qualify an accumulation of crimes as a widespread attack.
(iii) Both 'systematic' and 'widespread' attacks require a policy connection to the particular state or *de facto* power.
(iv) As to the policy connection in the event of a *systematic* attack, it is required that some guidance is given concerning the targeted victims, i.e. to coordinate the conduct of the perpetrators.
(v) Unlike the situation regarding a widespread attack (see below), the policy element underlying a *systematic* attack requires *active* conduct on the part of the entity in question in that it activates and monitors the attack, for instance, by overtly targeting the potential victims (repetition of the latter conduct is not an absolute condition).
(vi) As to the policy element underlying a *widespread* attack, active behavior is not a prerequisite. Mere tolerance, lack of guidance on the part of the entity, or deliberate denial of protection against a widespread attack, i.e., inaction on part of the responsible state or organization, will qualify. However, the state or organization must be *able* and legally bound to provide protection against the attack, for instance due to International Humanitarian Law (IHL) or human rights norms.[113]

It is noteworthy that there has been discussion whether the policy element is an independent contextual requirement, instead of an element which is part of the 'systematic' or 'widespread' attack.[114] In the Decision on the Confirmation of the Charges in case of Katanga and Chui, the ICC Pre-Trial Chamber I held that:

> [I]n the context of a widespread attack, the requirement of an organizational policy pursuant to article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organized and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources.... The policy need not be explicitly defined by the organizational group. Indeed, an attack

Prosecutor v. Kunarać, Kovać and Vuković, Appeals Chamber Judgment, Case No. IT-96-23 & IT-96-23/1-A, June 12, 2002, para. 98.

113 Ambos and Wirth, "Current Law of Crimes Against Humanity," 28–34.

114 Thomas Obel Hansen, "The Policy Requirement in Crimes against Humanity: Lessons from and for the case of Kenya," *George Washington International Law Review* 43 (2011).

> which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[115]

Likewise, in the Decision on the Confirmation of the Charges in the of Jean-Pierre Bemba Gombo, the Pre-Trial Chamber held that:

> [t]he requirement of 'a State or organizational policy' implies that the attack follows a regular pattern... The policy need not be formalized. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[116]

In conclusion, it can be said that the policy element is a separate requirement; yet, as the policy need not be formalized, it may – at least in part – follow from the attack itself, as long as it is being conducted in a planned, directed or organized manner.

5.4.5 The Individual Act and the Element of Knowledge of the Attack

The sixth and seventh conditions for the existence of a crime against humanity are:

(i) The presence of a connection between the individual act and the context element. This link is expressed in Article 5 ICTYSt, Article 3 ICTRSt and Article 7 (1) ICCSt. by means of the words "committed *as part* of [...]." ICTY-ICTR case law has set forth this condition of proof of a link between the single crime and the widespread or systematic attack against any civilian population.[117] As regards the nature of this link, one can say that the individual act would have been less grave or dangerous for the victim if the systematic or widespread attack and the underlying policy had not existed.[118]

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115 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Confirmation of the Charges," Pre-Trial Chamber I, Case No. ICC-01/04-01/07, September 30, 2008, para. 396.

116 *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," Pre-Trial Chamber II, Case No. ICC-01/05-01/08, June 15, 2009, para. 81, cited in "Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya," March 31, 2010, para. 85.

117 See, *inter alia, Prosecutor v. Tadić*, "Trial Chamber Judgment," May 7, 1997, para. 649, *Prosecutor v. Kayishema and Ruzindana*, "Trial Chamber Judgment," May 21, 1999, para. 135.

118 Ambos and Wirth, "Current Law of Crimes Against Humanity," 36.

(ii) Proof of knowledge of the attack on the part of the perpetrator. According to ICTY-ICTR case law, this requirement is met if the perpetrator is aware of the risk that an attack exists (the link ad (i)), and of the risk that certain elements of the attack elevate it to a more dangerous level. In addition, the ICTY in the *Kunarać* case held that this knowledge element does not require knowledge of the details of the attack; mere awareness of the risk that an attack exists suffices.[119] However, the perpetrator, in order to incur liability for crimes against humanity, must be aware of a *risk* that the policy element (para. 6.4 above) exists, albeit not in an absolute way and without knowing all policy details.[120] The ICTY Appeals Chamber has held that neither the attack nor the acts of the accused need to be supported by any form of policy or plan; at the most, the knowledge of such a policy or plan may strengthen the evidence; yet, it is not a legal element of the crime.[121] Article 7(1) ICCSt., which requires only "knowledge of the attack," seems to exclude knowledge of the policy element.

Remarkably, with regard to the crime of persecution as a crime against humanity, the requisite mental element seems to carry a higher evidentiary threshold. The ICTY Trial Chamber repeatedly held that this crime consists of an act or omission that:

(i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
(ii) is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[122] With regard to the *mens rea* requirement of a specific discriminatory intent, the ICTY Trial Chamber held that the accused must consciously intend to discriminate; that it is insufficient that he or she merely was aware that he or she was acting in a discriminatory fashion.[123]

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119 *Prosecutor v. Kunarać, Kovać and Vuković*, "Trial Chamber Judgment," February 22, 2001, para. 434.

120 *Prosecutor v. Kayishema and Ruzindana*, "Trial Chamber Judgment," May 21, 1999, para. 134; *Prosecutor v. Kordic, supra* note 108, para. 185.

121 *Prosecutor v. Kunarać, Kovać and Vuković*, "Appeals Chamber Judgment," June 12, 2002, para. 98.

122 *Prosecutor v. Krnojelac,* "Trial Chamber Judgment," March 15, 2002, para. 431.

123 Id., para. 435.

5.5 *Conclusion: Comparison of ICTY/ICTR and ICC*

Unlike the ICTY and ICTR Statutes, the ICCSt., in Article 7(1), identifies eleven specific crimes with some precision, as being acts constituting crimes against humanity. These are elaborated in more detail in the appended text of the Elements of Crime of 7 July 2000.[124] The specific crimes are:

a. murder;
b. extermination;
c. enslavement;
d. deportation;
e. severe deprivation of physical liberty;
f. torture;
g. rape, sexual slavery, enforced prostitution, forced pregnancy and sterilization;
h. persecution (see para. 6.5);
i. enforced disappearance of persons; and
j. apartheid
k. other inhuman acts of a similar nature causing great suffering or serious mental or physical injury.

6 The Concept of War Crimes before ICTs

6.1 *Introduction*

One of the prominent categories of crimes incorporated in the Statutes of ICTs are war crimes, a category which originates from the development of international humanitarian law. Unlike genocide, crimes against humanity and aggression, this category does not apply during times of peace, but in principle only in times of armed conflict.[125] Three historical moments were especially supportive for the emergence of war crimes as a category in IHL. The first of these occurred with the formulation of the four Geneva Conventions of 1949. These Conventions are:

– First Convention: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of August 12, 1949.
– Second Convention: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949.

124 UN Doc. PNICC/2000/INF/3/Add. 2.

125 See for the history of war crimes Ratner and Abrams, *Accountability for Human Rights Atrocities*, 2001, 80–83.

– Third Convention (Prisoners): Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
– Fourth Convention (Civilians): Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

A common provision, Article 3, embedded in all four of these Conventions, protected, for the first time in international law, victims of non-international armed conflicts. In 1977, two additional Protocols supplemented and developed these four Conventions of 1949:

– Protocol I (international conflicts): Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts.
– Protocol II (non-international conflicts): Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.

These protocols were negotiated in Geneva between 1974 and 1977 at a Diplomatic Conference convened by the Swiss government, entering into force on December 7, 1978. They reaffirmed and considerably developed the rules for the protection of war victims, and especially of civilians. While, for example, the fourth Geneva Convention protected civilians against the arbitrary power of the enemy or of the occupying authority, Protocol I extended the rules of humanitarian law to the protection of civilians against the effects of hostilities such as attacks and bombardments. It also extended the category of prisoners of war to include, under certain conditions, guerrillas, even from a liberation movement. Protocol II also extended the protection, which had been outlined in common Article 3 of the 1949 Conventions, to the victims of civil wars.

As to the proliferation of war crimes, these Conventions imply a progression in three ways:

(i) the applicability of their provisions in all international armed conflicts irrespective of any formal state of war;
(ii) extension of the basic principles of the Conventions to non-international armed conflict; and
(iii) the implementation of a list of grave breaches and the principle of *aut dedere aut judicare* for these crimes.[126]

126 Ratner and Abrams, *Accountability for Human Rights Atrocities*, 2001, 82.

This transgression of the violations of International Humanitarian Law into "war crimes" accelerated by the enactment of two 1977 Additional Protocols:

(i) Additional Protocol I pertaining to the Protection of Victims of Non-International Armed Conflict of 8 June 1977, which explicitly uses the form "war crimes" and qualifies them as grave breaches of both the Conventions and Protocol; and
(ii) Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflict of 8 June 1977, which introduces new rules and protections for civil conflicts of a certain level.

The Statutes of the ICTY and ICTR define the concept of war crimes in Articles 2 and 3 respectively. These provisions include a list of enumerated crimes. The main difference between the ICTY/ICTR Statutes and the ICCSt. regarding the war crimes category pertains to its more extensive enumeration of the latter Statute.[127]

6.2 *War Crimes and Armed Conflict under the ICTY and ICTR Statutes*

ICTY

Under the ICTY Statute, the concept of war crimes was laid down in two provisions, namely Articles 2 and 3.

a. Article 2 vests jurisdictional power to prosecute for eight grave breaches of the Geneva Conventions as a separate subcategory. As jurisdictional precondition to the application of Article 2, a state of armed conflict must exist of the nature as set forth by the ICTY Appeals Chamber in *Prosecutor v. Tadić*. The judges of the Appeals Chamber found:

> ...that 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. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of international

127 See also Schabas, *An Introduction to the International Criminal Court 3rd ed.,* p. 116.

> conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[128]

Notably, this Interlocutory Decision of the Appeals Chamber, left untouched the perennial question as to whether the events in the indictment were committed in an international or non-international armed conflict. Hence, as to the definition of "armed conflict," the ICTY merely applied the standard of "a resort to armed force between states," so that international humanitarian law is applicable "from the initiation of the conflict." Faced with the question whether an armed conflict is (non) international, the ICTY Appeals Chamber, in its judgment of 15 July 1999, held that the Bosnia-Herzegovina conflict was of international character at the time of acts of the accused.

The definition of 'armed conflict' was further articulated in the ICTY *Aleksovski* case, which held that "an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[129]

In conclusion, the ICTY interprets the term 'armed conflict' rather broadly. In addition, one should not forget that some war crimes can be committed even *after* the termination of an armed conflict, for example with respect to the treatment and repatriation of prisoners of war.[130]

Three additional parameters of importance under Article 2 ICTYSt are:

(i) The Appeals Chamber applied the test of 'overall control' by the outside state of the armed forces of one side of the internal conflict; in this case, Serbia's control of the Bosnian Serb Army.
(ii) The Chamber defined this control as "going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations"; the ICTY, however, rejected the argument that such control extends to the

128 See *Prosecutor v. Tadić*, "Decision on Defense Motion for Interlocutory Appeal on Jurisdiction," ICTY Appeals Chamber, Case No. IT-94-1-T, October 2, 1995, para. 70; in this particular case, the Appeals Chamber concluded that, for the purposes of applying international humanitarian law, the crimes at stake were committed in the context of an armed conflict.

129 *Prosecutor v. Aleksovski,* Trial Chamber Judgment, Case No. 95-14/1-T, June 25, 1999, para. 43.

130 Schabas, *An Introduction to the International Criminal Court,* 117.

issuance of specific orders or instructions with respect to individual military conduct or actions.[131]

(iii) Lastly, the ICTY Appeals Chamber ruled that if individuals within civil war (non-international armed conflict) become engaged in foreign states (military) operations, the war will rise to the level of an international conflict.[132]

(b) When it concerns Article 3 ICTYSt., its focus revolves around violations of the laws or customs of war. There are two general conditions for the applicability of Article 3:
   (i) there must be an armed conflict; and
   (ii) the acts of the accused must be closely related to the armed conflict.[133] The latter condition, does not require that the offence be committed whilst fighting is actually taking place, or at the scene of the combat. As stated by the ICTY Appeals Chamber in *Kunarać*, the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.[134] This means that this condition is met when the crime is committed either during or in the aftermath of the fighting, provided that it is committed in furtherance of, or at least under the guise of, the situation created by the fighting.

In summary, there are four conditions to be met before an offense may be prosecuted under Article 3 ICTYSt:

- the violation must constitute an infringement of a rule of international humanitarian law;
- the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

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131 *Prosecutor v. Tadić*, "Appeals Chamber Judgment," July 15, 1999, para. 145; *Prosecutor v. Blaskić*, "Trial Chamber Judgment," March 3, 2000, paras. 75–123 with respect to the Croatian intervention in Bosnia.

132 *Prosecutor v. Tadić*, "Appeals Chamber Judgment," July 15, 1999, paras. 141–144.

133 *Prosecutor v. Vasiljević*, Trial Chamber Judgment, Case No. IT-98-32-T, November 29, 2002, para. 24.

134 *Prosecutor v. Kunarać, Kovać and Vuković*, "Appeals Chamber Judgment," June 12, 2002, para. 58.

- the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

By way of example: According to the ICTY, Common Article 3 of the 1949 Geneva Conventions is now part of customary international law, and a serious violation thereof would at once satisfy the four requirements mentioned above.[135]

Article 3 ICTYSt. enumerates five categories in a non-exhaustive way. Article 3 is thus of a "residual nature." Relying on the concept of customary international law, the ICTY Trial Chamber, in *Prosecutor v. Strugar*, ruled that violations of Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II, prohibiting attacks on civilians and civilian objects, fall within the jurisdictional purview of Article 3 ICTYSt., as such violations relate to infringements of international humanitarian law norms.[136]

With respect to criteria upon which Article 3 ICTYSt. may be triggered, the ICTY Appeals Chamber in the *Tadić* case promulgated the following five conditions:

(i) First, the violation must constitute an infringement of a rule of international humanitarian law.
(ii) Secondly, the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met.
(iii) Thirdly, the violation must be 'serious', i.e., it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim.
(iv) Fourthly, the violation of the rule must entail, under customary or convention law, individual criminal responsibility for the person breaching the rule.

135 *Prosecutor v. Vasiljević*, "Trial Chamber Judgment," November 29, 2002, para. 27; see also *Prosecutor v. Kunarać, Kovać and Vuković*, "Appeals Chamber Judgment," June 12, 2002, para. 68.

136 See *Prosecutor v. Strugar, Jokić & Others,* "Decision on Defense Preliminary Motion Challenging Jurisdiction," Case No. IT-01-42-PT, June 7, 2002, paras. 15, 21, 23; referring to the *Tadić* Jurisdiction Decision, see *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," Case No. IT-94-1-AR72, October 2, 1995.

(v) Fifth, the ICTY held that it is irrelevant whether the 'serious violation' took place within the context of an international or internal armed conflict.[137]

The ICTY Appeals Chamber in the *Tadić* Jurisdiction Decision applied Article 3 to internal armed conflicts by referring to the development of rules of customary international law, which are meant to protect civilians and civilian objects in internal conflicts.[138] The Appeals Chamber held that:

> All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.[139]

Accordingly, the Appeals Chamber found that, in view of "the logical and systematic interpretation of Article 3" ICTYSt., this provision vests jurisdiction over the acts alleged in the indictment, "regardless of whether they occurred within an internal or international conflict."[140]

ICTR

The ICTRSt. is silent on the distinction between international and internal conflict, notwithstanding that its Article 4 accrues jurisdictional powers to the ICTR over violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II to these Conventions, both instruments aiming at internal armed conflicts. This may explain why in the *Akayesu* case, the ICTR did not convict local officials of war crimes, despite acknowledging the presence of an internal armed conflict within Rwanda in 1994.[141]

6.3 *War Crimes and Armed Conflict under the Rome Statute*

Unlike the ICTY and ICTR Statutes, the Rome Statute, in Article 8, provides for an extensive description of the concept of war crimes. It defines four categories of war crimes, two pertaining to international armed conflict and two

137 *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," para. 94.

138 Id., para. 127–130.

139 Id., para. 134.

140 Id., para. 137.

141 *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, paras. 640–643.

related to non-international armed conflict. These four categories of war crimes can be summarized as follows:

(i) The first war crimes category is that of grave breaches of the Geneva Conventions, Article 8(2)(a) ICCSt. The ICTY had already found that the concept of grave breaches is applicable only to international armed conflict.[142]
(ii) The second category of war crimes is that enumerated in Article 8 (2)(b) ICCSt., namely the "other serious violations of the laws and customs applicable in international armed conflict." This category, related only to the situation of international armed conflict, comprises 26 crimes derived from the Convention concerning the Laws and Customs of War on Land (the 1907 Hague Convention IV). Contrary to Article 8(2)(a) the victims of these crimes need not be 'protected persons'.
(iii) The third category of war crimes is that envisioned by Article 8 (2)(c) and (d), namely serious violations of common Article 3 of the Geneva Conventions. It mentions four specific crimes including the taking of hostages. These crimes arise in non-international armed conflicts. However, Article 8(2)(d) ICCSt. excludes internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.
(iv) The fourth category of war crimes is referred to in Article 8(2)(e) ICCSt. as "other serious violations of the laws and customs applicable in armed conflicts, not of an international character…." Here, the Rome Statute aims mainly at violations of Additional Protocol II to the Geneva Conventions (although not all serious violations of this Protocol are implemented in Article 8 ICCSt.). As in category (iii), this last war crimes category excludes, pursuant to Article 8(2)(f), "situations of internal disturbances and tensions…."

It can be said that, on the one hand, the Rome Statute provides the judges with detailed guidance on the definitional scope of war crimes; yet, on the other hand it may restrain their interpretative judicial activity when determining potential new forms of war crimes.[143]

It may be concluded that, compared to genocide and crimes against humanity, war crimes are confined to fewer legal prerequisites, and even extend to isolated acts committed by individual soldiers without any 'policy element'.

142 *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," para. 80.

143 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 113–114.

CHAPTER 3

The ICC-Crime of Aggression

Proliferation or Politicization of International Criminal Law?[1]

1 Introduction

Daily life is entrenched with all kinds of acts of aggression; murder, rape, arson, burglary, assault, but also less physical acts such as insult, intimidation, reckless driving. Yet, aggression as such has not been elevated into a separate crime within most of the domestic criminal codes. It is likely that, as of 1 January 2017, aggression features as an international crime within the prosecutorial ambit of the International Criminal Court (ICC) system. Furthermore, it is not unlikely that, as ICC States Parties are to transform the ICC crimes into their domestic criminal law systems, the crime of aggression may give rise to national prosecutions. The cardinal question is whether this prosecutorial expansion is to be seen as beneficial to international criminal justice. This article delves into several questions which are still left open by the drafters of the Rome Statute. First, is the ICC prosecutor still at liberty to proceed with an investigation into the crime of aggression, once the United Nations (UN) Security Council – a political organization – has not determined beforehand that a particular incident qualifies as a 'manifest violation of the UN Charter'? And what about the ICC judges; are they bound to such determination by the Security Council? Secondly, this article discerns the question as to the impact of the crime of aggression – being a leadership crime – on the liability forms of article 25 of the Rome Statute. And thirdly, it addresses the question whether it is preferable for States to domestically investigate the crime of aggression pursuant to the principle of complementarity? Prior to examining these questions, definitional issues related to the crime of aggression will be discussed.

2 Defining the Crime of Aggression

The inclusion of the crime of aggression in the Rome Statute was already debated during the 1988 Rome Diplomatic Conference and the Diplomatic

1 This chapter is an excerpt of an article of the author that has been published in 2014 in the International Studies Journal, see G.G.J. Knoops, "The ICC Crime of Aggression: Proliferation or Politicization of International Criminal Law?" *International Studies Journal* 41/1 (2014): 1–30.

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Conference in 1998; yet no agreement on the definition of this crime and related jurisdictional issues could be reached.[2] The negotiation process resulted in the inclusion of the crime of aggression in the Rome Statute as one of its core crimes, yet, with the clause that jurisdiction could only be exercised after agreement on its definition and the conditions under which the Court could exercise jurisdiction.[3] Only in 2010, during the ICC Review Conference in Kampala (Uganda), agreement was reached on the crime of aggression.

The extensive negotiation process preceding the adoption of the crime of aggression into the amendments of the Rome Statute is noteworthy when taking into account that 'crimes against peace' – the predecessor of the crime of aggression – were said to be the 'most important' crime prosecuted before the first international criminal tribunal, the Nuremberg tribunal.[4] In 1950 the International Law Commission adopted the so-called Nuremberg principles, in which 'crimes against peace' were defined as the:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
(ii) Participation in a common plan or conspiracy for the accomplishment of the acts mentioned under (i).

During the ICC Review Conference in Kampala (Uganda) in 2010, the Assembly of States Parties adopted an amendment to the Rome Statute, defining the crime of aggression and the conditions under which the ICC could exercise jurisdiction. The amendment to the Rome Statute on the crime of aggression would enter into force no sooner than January 1, 2017 and only after 2/3 of the ICC Member States had ratified the amendments. During this conference, the Assembly of States Parties enacted the following definition of the crime of aggression:

> The planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character,

2 Michael Scharf and Philip Hadji, "Forward and Dedication: The International Criminal Court and the Crime of Aggression," *Case Western Reserve Journal of International Law* 41 (2009): 267.

3 Article 5(2) ICCSt.

4 Robert Jackson, "Report to the President by Mr. Justice Jackson," October 7, 1946, accessed December 31, 2013, http://avalon.law.yale.edu/imt/jack63.asp; see also Michael P. Scharf, "Universal Jurisdiction and the Crime of Aggression," *Harvard International Law Journal* 53/2 (2012): 360.

> gravity and scale, constitutes a manifest violation of the Charter of the United Nations' [emphasis added, GJK].[5]

For the crime of aggression to be prosecuted, three constitutive elements arise:

(i) First, in order to be prosecuted for the crime of aggression it must be proven that the individual was in a leadership position; and,
(ii) Secondly, for an individual to be prosecuted for the 'crime of aggression' an 'act of aggression' by the State must be established, which act is defined by article 8*bis* (2) of the Rome Statute as follows:

> the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

(iii) Thirdly, a 'manifest violation of the UN Charter' must be stipulated; the word 'manifest' being susceptible to arbitrariness.

As to the contours of what an 'act of aggression' may constitute, sub (a) to (g) of Article 8*bis* (2) enumerate – not exhaustively – specific acts that may qualify as an act of aggression, such as the blockade of ports or coasts of a State by the armed forces of another State, the bombardment or use of weapons by a State against the territory of another State or an armed attack by one State on the sea or air forces, or marine and air fleets of another State.

As noted, a distinction has been made between the 'crime of aggression' (article 8*bis* section 1 of the Rome Statute) and the 'act of aggression' (article 8*bis* section 2 of the Rome Statute). While the crime of aggression is a crime perpetrated by an individual, the act of aggression is an act to be performed by a State. This differentiation is pivotal since 'aggression' requires State action and cannot be committed by an individual as such.[6] One of the constitutive elements of the crime of aggression before the ICC is the legality of an act of the state. Legality in this context is to be determined on the *jus ad bellum* principle, addressing the legality of the war. The other core crimes within the ambit of the ICC – war crimes, crimes against humanity and genocide – are based on the *jus in bello* principle, aiming at the legality of the conduct of war.[7] From this

5 Article 8*bis* (1) ICCSt., inserted by resolution RC/Res.6 of 11 June 2010.

6 Appendix A to the "Recommendations to the Administration regarding its approach to aggression negotiations," *American Branch of the International Law Association*, March 19, 2010.

7 Scharf, "Universal Jurisdiction and the Crime of Aggression," 361.

perspective, the crime of aggression constitutes a *sui generis* crime compared to the other ICC crimes. Since State criminal responsibility is a highly disputed concept within international criminal law,[8] an act of aggression seems contradictory to this notion.

3 Pitfalls of the Jurisdictional Mechanism on the Crime of Aggression

3.1 *The Prospective System*

The newly established and complex system on the crime of aggression should operate as follows. Firstly, the ICC may exercise jurisdiction over the crime of aggression, after a UN Security Council referral.[9] The Security Council will determine on a case-by-case basis, which specific acts constitute a "manifest violation of the Charter." The Prosecutor must await the decision of the UN Security Council before initiating an investigation. Secondly, if the Prosecutor intends to initiate an investigation *proprio motu* or in case of a State party referral, the UN Security Council will be called upon to establish whether an act of aggression occurred.[10] Once the Security Council determines that such an act took place, the Prosecutor may proceed with the investigation; if the Security Council has not reached a decision within six months after the Prosecutor's notification, a Pre-Trial Chamber should authorize the commencement of an investigation *vis-à-vis* a crime of aggression.[11]

As to Security Council referrals, a sensitive issue is that five permanent UN Security Council members must have consensus on what exactly constitutes a 'manifest violation of the Charter'. Obviously, the five permanent members being Russia, China, France, the United Kingdom and the United States, will not likely qualify possible acts of aggression of their own forces (or their allies)

8 Nina H.B. Jørgensen, *Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2003).

9 The UN Security Council shall, pursuant to article 39 of the UN Charter, 'determine the existence of any threat to the peace, breach of the peace, or an *act of aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' [emphasis added]; General Assembly Resolution 3314 (XXIX) of 14 December 1974, accessed December 20, 2013, http://unispal.un.org/UNISPAL.NSF/0/023B908017CFB94385256EF4006EBB2A; Article 15*bis* ICCSt.

10 See Article 15*bis* ICCSt.

11 See article *15bis* (8) ICCSt.; see also Johan Van der Vyver, "Prosecuting the Crime of Aggression in the International Criminal Court," *University of Miami National Security & Armed Conflict Law Review* 1 (2011): 2.

as an 'act of aggression' against another State. They might be keen to evade criminal responsibility of their political or military leaders.

In contrast to Security Council referrals, *proprio motu* and State Party referrals are faced with complex jurisdictional obstacles. In case of *proprio motu* investigations or State Party referrals, the crime of aggression cannot be prosecuted before the ICC if:

(a) the State guilty of the act of aggression is not a State Party to the Rome Statute, in which event the ICC cannot exercise its jurisdiction over the crime of aggression committed by a national or on the territory of the non-party State; or
(b) if the State concerned [i.e. the aggressor State, GJK], being a State Party, has submitted a prior declaration to the Registrar of the ICC that it does not accept the jurisdiction of the ICC over the crime of aggression.[12]

All of these conditions to activate the ICC's jurisdiction are created to secure that were the Security Council not to refer an act of aggression to the ICC, the Court is only to pursue such an act based on full consensus of the presumed aggressor and victim state. This empowers States Parties ('presumed aggressors') to 'opt out' of the Court's jurisdiction for the crime of aggression.[13]

The introduction of the UN Security Council within this jurisdictional system was mainly due to the involvement of the United States (US). The US fulfilled a major role during the deliberations on the crime of aggression, while not having ratified the Rome Statute. The US sought the UN Security Council to assume the sole responsibility in deciding whether an act constitutes an act of aggression. The underlying idea is that it could evade being prosecuted for the crime of aggression in the future. The US feared that, being a major military power, it would be more exposed to ICC prosecutions than other States and that the legitimate use of force by US military would be challenged before the ICC.[14] This was precisely the decisive motive for the US from abstaining to

12 Van der Vyver, "Prosecuting the Crime of Aggression," 2.

13 See "Conditions for action by the ICC," The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, accessed February 14, 2014, http://crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc/.

14 Gergana Halpern and Lucy Betteridge, "Questions & Answers on the Crime of Aggression and the United States: Negotiations of the ICC," *amicc*, August 19, 2008, accessed December 12, 2013, <http://www.amicc.org/docs/Crime%20of%20Aggression%20and%20the%20US%20Q&A.pdf.

ratify the Rome Statute. The US Administration was actively involved in the process of drafting the Rome Statute and even though in 1998 both the Clinton Administration and the US Congress indicated that it favored the ICC, in the end the US did not ratify the Rome Statute. During the Rome Diplomatic conference from the 15th of June until the 17th of July 1998, the US sought – contrary to the majority of the participating States – a UN Security Council-controlled Court. When this incentive failed, the US denounced the Rome Statute.[15] Hence, the crime of aggression was not exclusively put into the hands of the Security Council for purposes of commencing prosecutions. In the current system, the prosecutor can – after approval of three ICC judges – initiate an investigation, once the UN Security Council fails to reach a decision within six months on whether 'a manifest violation of the UN Charter' occurred.

3.2 *Practical Problems*

The jurisdictional ICC system on the crime of aggression is complex.[16] Three examples are illustrative for its complexity. First, it has been remarked that:

> a Security Council determination of aggression is not a legal assessment but is based on political considerations.[17]

Suppose that two Iranian fighter jets shoot down an American drone east of Kuwait and this case is discussed within the UN Security Council because of a potential act of aggression from Iran towards the US. The UN Security Council – the US being one of the permanent members – decides to refer the case to the ICC under article 8*bis* (2)(d) which provision may qualify as an attack by the armed forces of a State on the air forces of another State, as an act of aggression. At this juncture, a double political factor arises. First, the transformation of such a military act as being 'aggression' is imbued with a political

15 Michael P. Scharf, "The Case for Supporting the International Criminal Court," Washington University School of Law, 2002; see also Fred Borch, "The Law and Policy in U.S. Military Operations: Some Thoughts on the Impact of Decisions by the International Court of Justice, International criminal Tribunal for the former Yugoslavia, and the International Criminal Court," *Justice* 53 (2013): 16–22 at p. 20–21.

16 See also Geert-Jan Knoops, "The International Criminal Court in 2010 Pitfalls and Progress of the ICC," in *The Global Community Yearbook of International Law and Jurisprudence* 2011 (I), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2012), 461–468.

17 William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 137, referring to a statement made by Judge Schwebel of the ICC.

connotation. One State might qualify a certain act as an act of aggression, while another State might qualify the exact same act as an act of self-defense. Secondly, the UN Security Council, inherently a political organ, makes the call whether or not to prosecute. This political factor is more pertinent when one of the permanent UN Security Council members is involved in the alleged conflict. As the ICC system advances with the introduction of the crime of aggression, it could create its own vulnerability for political influences. On the other hand, Article 15*ter* section 4 (similar to Article 15*bis* section 9) provides that "a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings…."[18]

Thirdly, the practical implications of the system can be quite radical for another reason. Also non-States Parties to the Rome Statute as well as States Parties who did not ratify the amendments on the crime of aggression, may be subjected to prosecution for the crime of aggression once the UN Security Council refers the case to the ICC.[19] A Security Council referral invokes the Court's jurisdiction irrespective the existence of an 'opt out' declaration of a State Party with the Registrar, declaring not to accept the ICC's jurisdiction for the crime of aggression arising from an act of aggression.[20] The effects of these implications might be attenuated by a compromise which was entered into during the Kampala-conference of June 12, 2010. At that time, due to the US, the following amendment was agreed upon, namely that the crime of aggression "shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State."[21] The US apparently holds the view that customary international law does not empower States to exercise universal jurisdiction over the crime of aggression.[22] However, the issue of exercising jurisdiction remains a matter of national sovereignty whereby a State cannot be sanctioned for exercising universal jurisdiction. Therefore it is questionable what the binding effect of this amendment will be.

Fourthly, Article 15*bis* section 8 reads: "Where no such determination is made within six months . . ." Does it say that the prosecutor may also proceed with an investigation when the Security Council arrives at a negative determination on whether a certain act qualifies as an act of aggression? The text of the Statute is silent on this issue. It seems not likely that a Prosecutor will

18 Article 15*ter* (4) ICCSt.

19 Scharf, "Universal Jurisdiction and the Crime of Aggression," 364.

20 Article 15*bis* (4) ICCSt., Resolution RC/Res. 6.

21 Res. RC/Res. 6 Annex III, see also Scharf, "Universal Jurisdiction and the Crime of Aggression," 365.

22 Scharf, "Universal Jurisdiction and the Crime of Aggression," 365.

proceed once the Security Council finds that a certain act does not fall within the ambit of aggression.

4 The Crime of Aggression and its Impact on Liability Modes

4.1 *Individual Liabilities*

Article 25 of the Rome Statute outlines the different liability modes for the crimes within the ICC's jurisdiction among which (in section 3 sub c) liability of accessories. While Article 25(3)(a) aims at principal/direct liability, section 3 (b-d) advances accessorial liability.[23] Since the crime of aggression is by definition a leadership crime, the liability of accessories endorsed by Article 25(3) (b-d), such as committing, ordering, aiding and abetting, contributing and inciting,[24] do not apply to this crime.[25] By confining the crime of aggression to persons 'in a position effectively to exercise control over or to direct the political or military action of a State', possible accomplices are excluded from prosecution before the ICC.[26] Prosecution for the crime of aggression is thus limited to 'presidents, prime ministers, and top military leaders such as ministers of defense and commanding generals'.[27] Consequently, individual soldiers who executed 'orders of aggression' are apparently immune from criminal prosecution before the ICC.[28] The question is left open, however, whether States could nonetheless domestically prosecute such individuals.

Article 25 will be amended with a new section as soon as the crime of aggression enters into force. After paragraph 3 of Article 25, the following paragraph (3*bis*) will be inserted:

> In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.[29]

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23 See for this differentiation, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, Case No. ICC-01/04-01/06-2842, March 14, 2012, paras. 996–999.

24 According to Article 25(3)(e) ICCSt. incitement is only punishable in respect of the crime of genocide.

25 Article 25(3) ICCSt.

26 See also Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 139.

27 Scharf, "Universal Jurisdiction and the Crime of Aggression," 363; referring to Keith A. Petty, "Sixty Years in the Making: The Definition of Aggression for the International Criminal Court," *Hastings International & Comparative Law Review* 31 (2008): 531, 547.

28 Van der Vyver, "Prosecuting the Crime of Aggression," 19–20.

29 See Resolution RC/Res.6, The crime of aggression, adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

It is also not clear whether attempting to commit a crime within the jurisdiction of the ICC, which is punishable under Article 25(3)(f) ICCSt., could apply to the crime of aggression since an *act of aggression* must first be established before a prosecution for the crime of aggression can be initiated.[30]

Furthermore, the 'leadership' nature of the crime of aggression seems to make Article 28 ICCSt., under which superiors or military commanders may be held responsible for the crimes committed by subordinates, redundant.[31] However, in the new definition of Article 25 (3*bis*) the criterion is "effective control"; for the interpretation of this criterion guidance could be sought from case law of the ICTY and ICTR regarding superior responsibility.[32] After all, this doctrine revolves around the notion of effective control on the part of the superior. A superior or military commander may be held criminally responsible for crimes committed by subordinates under his effective authority and control, including the situation where the superior fails to "prevent or punish" crimes committed by his subordinates.[33] Such liability can be incurred when a military commander knew or *should have known* that his forces were committing or about to commit crimes within the ICC's jurisdiction;[34] knowledge encompasses the element of consciously disregarding information indicating

30 See also Roger Clark, yet he considers that "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"; Roger S. Clark, "The Crime of Aggression," in *The Emerging Practice of the International Criminal Court*, ed. Carsten Stahn and Göran Sluiter (Leiden: Martinus Nijhoff Publishers, 2009), 720.

31 See also Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 139.

32 See for example *Prosecutor v. Gotovina,* Appeals Chamber Judgment, Case No. IT-06-90-A, November 16, 2012.

33 Article 28(a) ICCSt. reads that: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

34 Article 28(a)(i) ICCSt.

that such crimes were committed or about to be committed by his subordinates.[35] Both Article 8*bis* and 25 (3*bis*) do not embrace negligence standards such as a failure to prevent or punish, the disregard of information or the situation where the person in a leadership position should have known that crimes within the jurisdiction of the ICC were committed or about to be committed. Yet, the interpretation of the Articles 8*bis* and 25 (3*bis*) could be fuelled by the before mentioned ICTY-case law on superior responsibility. A flaw in these new provisions is the question whether the person is in effective control, in terms of the crime of aggression, can rely on a defense averring that he or she had insufficient knowledge or information that his or her subordinates committed or were about to commit actions amounting to aggression; the new provisions of article 8*bis* and 25 (3*bis*) are seemingly silent on such scenarios.[36]

4.2 *Third States*

Limiting the crime of aggression to leaders seems consistent with the policy of the Office of the Prosecutor and is reflected by the gravity threshold applied by the Pre-Trial Chambers when judging on the admissibility of a case.[37] However, a (third) State inciting another State to commit an act of aggression or a (third) State aiding and abetting in the commission of such a crime, fall outside the ambit of ICC prosecution.[38] Such a scenario could imply that political or military leaders of the 'aiding' (third) State – even if they deliberately fail to prevent or punish potential illegal acts amounting to aggression – would (also) be immune from prosecution. Yet, it is tenable that the criterion 'in a position to effectively exercise control' also encompasses potential liabilities of the third 'aiding' State. The effective legal-political rationale underpinning the crime of aggression would otherwise be rendered moot.

5 Implementation of the Crime of Aggression at Domestic Level

5.1 *The Scope of National Prosecutions for Aggression*

One of the main procedural obstacles pertaining to the crime of aggression revolves around the discretionary powers of national States to expand jurisdiction for the crime of aggression with the doctrine of universal jurisdiction.

35 Article 28(b)(i) ICCSt.

36 See also Van der Vyver, "Prosecuting the Crime of Aggression," 10.

37 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 139.

38 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 139.

According to the Preamble to the Rome Statute, States Parties have a duty to prosecute individuals responsible for international crimes in their national courts.[39] Under the principle of complementarity – enshrined by both Article 1 and Article 17 of the Rome Statute – it is envisaged that the ICC is a court of last resort, meaning that the ICC will only act if national courts are unwilling or unable to prosecute or carry out an investigation. Several national systems have implemented legislation that authorizes them to prosecute international crimes under the principle of universal jurisdiction, which is defined as

> the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.[40]

As soon as the Kampala amendments on the crime of aggression enter into force, States Parties could be at liberty to exert universal jurisdiction over this crime.[41] Exercising universal jurisdiction over this crime carries several problems.

The UN Security Council is endowed with the possibility to refer a situation to the ICC in case of an alleged act of aggression, as agreed upon during the Kampala conference. The UN Security Council can even refer situations of non-States Parties or parties who have not ratified the amendments on the crime of aggression. States who endeavor to frustrate an ICC prosecution for the crime of aggression could simply create universal jurisdiction over this crime in order to initiate domestic prosecutions to this end. If a (non-ratifying) State aims to prevent its residents from being prosecuted before the ICC, that State could, pursuant to the complementarity principle, request to execute the

39 In the preamble to the Rome Statute it is 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 and by enhancing international cooperation" and it is recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," accessed December 13, 2013, http://www.oas.org/dil/Rome_Statute_of_the_International_Criminal_Court.pdf.

40 "Universal Jurisdiction, A preliminary survey of legislation around the world," *Amnesty International*, October 2011, accessed December 13, 2013, https://www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf.

41 Scharf, "Universal Jurisdiction and the Crime of Aggression," 364.

investigation itself. The prospects of a (non) State Party to have a case of aggression domestically investigated and prosecuted could increase if such State relies on universal jurisdiction.[42] An illustrative example in this regard is the case where Belgium sought to prosecute the former president of Chad, Mr. Habré, for crimes of torture and crimes against humanity.[43] Mr. Habré had sought residence in Senegal and Senegal did not intend to extradite Mr. Habré to Belgium. The judges in Dakar, the capital of Senegal, responded to Belgium's extradition request and held that the Senegalese court could not "adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State."[44] The judges opined that head of state immunity should 'survive the cessation' of a (former) president's duties.[45] A day after this judgment, Senegal referred the case to the African Union. The assembly of heads of state of the African Union mandated Senegal to prosecute and try Mr. Habré. Subsequently, Senegal started implementing legislative reforms in order to bring its national laws in conformity with the Convention against Torture while incorporating several international crimes in its Penal Code.[46] According to Belgium, Senegal was obliged to extradite Mr. Habré because it proved unable to prosecute him. Belgium lodged an application at the ICJ based on the principle of *aut dedere aut judicare* ('to prosecute or extradite'). In 2012, the ICJ found that Senegal had failed to submit the case of Mr. Habré to the competent national authorities for prosecution, yet it endowed Senegal – if it would not extradite Mr. Habré – with the opportunity to submit the case to its competent judicial authorities.[47] Similar situations could occur before the ICC, as to (non-)States Parties assuming universal jurisdiction over the crime of aggression.[48]

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42 Scharf, "Universal Jurisdiction and the Crime of Aggression," 365; see for example *Belgium v. Senegal* (*infra*).

43 Mr. Habré has been accused of torture of more than 20,000 people and responsibility for the deaths of more than 40,000 people during his eight year rule in Chad (1982–1990), "Extraordinary African Chambers: Hybrid Court to Try Former Chad Dictator Hissène Habré," *International Justice Resource Center*, February 13, 2013, accessed April 10, 2014, http://www.ijrcenter.org/2013/02/13/extraordinary-african-chambers-hybrid-court-to-try-former-chad-dictator-hissene-habre/.

44 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Summary of the Judgment of July 20, 2012, accessed December 20, 2013, http://www.icj-cij.org/docket/files/144/17086.pdf.

45 Id.

46 Id.

47 Id.

48 Id.

On February 8, 2013, Senegal opened the Extraordinary African Chambers in the Senegalese Courts (EAC, Chambres Africaines Extraordinaires), a special criminal court to prosecute Mr. Habré. Despite the EAC being part of the Senegalese legal system, it does have an international dimension.[49] Mr. Habré claimed that his prosecution, which would be based on the legislative changes in Senegal between 2007–2008, were in violation of the principle of non-retroactivity. For this reason, the Court of Justice of the Economic Community of West-African States (ECOWAS) dictated that the EAC should be created, in order to prosecute Mr. Habré on the basis of customary international law. As torture, war crimes and crimes against humanity were deemed to be crimes under customary international law when they were allegedly committed by Mr. Habré, this circumvented the problem of non-retroactivity. Yet, the case against Mr. Habré was delayed even further, due to the inauguration of a new Senegalese President.[50] The Senegalese government, however, expressed its intention to prosecute Mr. Habré.

5.2 *Admissibility Problems*

Apart from jurisdictional obstacles, the admissibility stage could reveal other flaws in the ICC system. Suppose, State A unilaterally decides to launch an 'on the spot' military attack against State B for reasons of State B having violated a UN weapons embargo which endangers the security of State A. The UN Security Council condemns the attack and decides to refer the case to the ICC. It is established that an alleged 'act of aggression' took place under Article *8bis* (d) of the Rome Statute by the armed attack of State A on the land of State B. The president of State A was in a position to effectively exercise control over the military and thus the investigation launched by the ICC focusses on the 'crime of aggression' committed by the president of State A. While investigating this fictitious case, the ICC is confronted with an application lodged by State B, challenging the admissibility of the case under the complementarity principle of Article 1 and 17 of the Rome Statute in conjunction with Article 19(2)(b).[51]

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49 "Chambres Africaines Extraordinaires. Contexte de Création," June 12, 2013, accessed April 3, 2014, http://www.chambresafricaines.org/index.php/presentation-des-chambres/contexte-de-creation.html.

50 Id., in April 2012, Mr. Macky Sall sworn in as president of Senegal.

51 Article 19(2) ICCSt. proscribes who may challenge the jurisdiction of the Court or the admissibility of a case on the grounds referred to in Article 17. Article 19(2)(b) ICCSt. dictates that such a challenge may 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."

On the basis of Article 17, the ICC must declare a case inadmissible, if the case is already being prosecuted by a State that has jurisdiction over it, unless the State proves unwilling or unable to genuinely carry out the proceedings.[52] The ICC is aware of the fact that the concept of complementarity goes to "the heart of States' sovereign rights," that States have a right to exercise jurisdiction over crimes that fall within the ambit of the ICC and are even compelled to do so under the preamble to the Rome Statute.[53] Suppose the ICC was left with no other option than to hold the case inadmissible, thus leaving the prosecution of the President of State A up to State B? It is debatable whether this would result in a fair trial; one party to the conflict would be allowed to prosecute and judge the other party to the conflict. It is imaginable that such prosecutions might be detrimental to international and diplomatic relations between States.[54]

6 Conclusion

The 'new' crime of aggression, as agreed upon by the ICC Assembly of States parties during the 2010 Review Conference in Kampala, creates several legitimacy obstacles. First and foremost, a political organ being at the basis of a potential ICC prosecution; the UN Security Council is endowed with the task to either determine whether the ICC may proceed with investigating a crime of aggression or to refer a crime of aggression to the ICC arena. Before a crime of aggression can be investigated, an 'act of aggression' must be established. Will the determination of a 'manifest violation of the UN Charter' be legally binding to the ICC? Is the ICC bench at liberty to defy such assessment once the UN Security Council determines that an act of aggression took place? Will the ICC be compelled to prosecute upon such a political referral?

A second difficulty relates to the ambivalent nature of aggression as a 'leadership crime'; restricting the scope of liability modes pursuant to Article 25 ICCSt. Since the crime of aggression is by definition a leadership crime, it appears to exclude the liability of accessories as provided for in Article 25(3)

52 Article 17(1)(a) Rome Statute.

53 *Prosecutor v. Muthaura, Kenyatta and Ali*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," Pre-Trial Chamber II, Case No. ICC-01/09-02/11, May 30, 2011, para. 40; paragraph 6 of the preamble to the ICC Statute reads that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

54 See also Scharf, "Universal Jurisdiction and the Crime of Aggression," 381.

(b-d) ICCSt. Defying liability modes, such as aiding and abetting, inducing, soliciting, inciting (e.g. a third State encourages another State to commit an act of aggression) and contributing, might lead to the immunity for third-States supporting the aggressor States.

A third difficulty pertains to the effects of the complementarity principle in that States themselves could be empowered to domestically prosecute potential aggression crimes against leaders of 'hostile' States. It might result in the situation where one side of a conflict is imbued with the power to prosecute the other side of the conflict and to actually scrutinize another State's policy. This could turn into a form of victor's justice, which has been one of the main criticisms of the Nuremberg tribunals.

At the end of the day, political, economic, religious and ethnic – and not purely judicial – motives within the UN Security Council could determine the fate of a military operation conducted by a State; a State which avers to have acted within the boundaries of, for example, anticipatory self-defense could be subjected to criminal prosecution by the adversary State. Overviewing all the theoretical and practical obstacles, it is not unlikely that the introduction of the crime of aggression within the Rome Statute could undermine the legitimacy of international criminal law. It could strengthen States such as the US, China and Russia in their position to denounce the Rome Statute. At the same time, relying on the veto-system in the UN Security Council, these super powers are accrued with the instrument to initiate 'prosecutions' of other (non-friendly) States for the crime of aggression. Introducing international crimes within the system of international tribunals, through the creation of jurisdictional mechanisms underpinned by geopolitical processes, seems a dubious operation within the ICC's objectives of achieving peace through justice.

CHAPTER 4

Jurisdiction and Complementarity

1 Introduction

The *ad hoc* tribunals were established by the UN Security Council to adjudicate human atrocities, within a pre-determined geographical area and a limited timeframe. The ICTY has jurisdiction to "prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."[1] Likewise, the ICTR has jurisdiction to "prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighboring States, between 1 January 1994 and 31 December 1994."[2] The ICC, on the other hand, is accrued with jurisdiction over crimes committed by nationals of States Parties or crimes committed on the territory of States Parties, after the entry into force of the Rome Statute (i.e. since July 2002).[3] Unlike the ICC, the ICTY and ICTR have primacy over national courts.[4] By contrast, the ICC has only complementary jurisdiction, meaning that the ICC shall be complementary to national criminal jurisdictions, which, in principle, retain jurisdiction over the crime.[5] This chapter will first discuss several types of jurisdiction, before delving into jurisdictional challenges that evolved within the case law of ICTs.

2 Jurisdiction

Jurisdiction pertains to the question whether a crime within a Court's jurisdiction has been or is being committed.[6] Jurisdiction in criminal cases actually confers authority to submit certain individuals or situations within the realm of a criminal process. Four different types of jurisdiction arise in determining whether an ICT may exercise jurisdiction, namely:

1 Article 9 ICTYSt.

2 Article 8 ICTRSt.

3 Article 11 ICCSt.

4 Article 9(2) ICTYSt.; Article 8(2) ICTRSt.

5 See preamble ICCSt.

6 Office of the Prosecutor, "Report on Preliminary Activities," December 13, 2011, accessed March 18, 2014, http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf.

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1. *Ratione temporis* or temporal jurisdiction;
2. *Ratione personae* or personal jurisdiction;
3. *Ratione loci* or territorial jurisdiction;
4. *Ratione materiae* or subject-matter jurisdiction.

Temporal jurisdiction relates to the question *when* a certain crime within the jurisdiction of the court has been committed. Article 11 ICCSt. proscribes that the ICC may only exercise jurisdiction "with respect to crimes committed after the entry into force of this Statute," which is 1 July 2002. If the State party has acceded to the ICCSt. after 1 July 2002, then the date of accession is the date after which the ICC may exercise jurisdiction,[7] unless the State party has lodged a declaration under Article 12(3) ICCSt. in which it accepts jurisdiction prior to the date of accession, but no sooner than 1 July 2002.[8] Even though the text of Article 12(3) ICCSt. (i.e. a State may accept the exercise of jurisdiction "with respect to the crime in question") seems to imply that the declaration must be lodged with respect to a specific crime, this is not how this provision has been interpreted by the Chambers of the ICC. On 12 July 2004, Uganda lodged a 'Declaration on Temporal Jurisdiction' in which it requested the ICC to assume jurisdiction for the period from 1 July 2002 till 1 September 2002.[9] This Declaration was tacitly approved by the ICC Pre-Trial Chamber, when it assumed jurisdiction in the case against Joseph Kony.[10] Laurent Gbagbo, who stands trial before the ICC on charges of crimes against humanity committed in Ivory Coast, challenged the ICC's temporal jurisdiction, arguing that Ivory Coast had lodged a declaration with the ICC pursuant to Article 12(3) ICCSt. on 18 April 2003, in which it accepted jurisdiction for crimes committed on the Ivorian territory since the conflict and attempted *coup d'état*, only commenced on 19 September 2002.[11] Yet, the ICC assumed jurisdiction on the basis of this

7 Article 11(2) ICCSt. reads: "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

8 Article 12(3) ICCSt. reads: "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."

9 Uganda ratified the ICCSt. on September 1, 2002.

10 "Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005," Pre-Trial Chamber I, Case No. ICC-02/04-01/05-83, September 27, 2005.

11 *Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the

Declaration of 2003. However, this was challenged by the defense arguing that the declaration did not extend to crimes committed *after* 18 April 2003 (when Gbagbo allegedly committed crimes). The Pre-Trial Chamber, in assuming jurisdiction, argued:

> [T]hat while States may indeed seek to define the scope of its acceptance, such definition cannot establish arbitrary parameters to a given situation as it must encompass all crimes that are relevant to it. Contrary to the Defence submission, the Chamber is of the view that it will be ultimately for the Court to determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation at hand.[12]

Moreover, the Pre-Trial Chamber argued that said declaration "did not seek to define the scope of the situation in relation to which it accepted jurisdiction."[13] The Appeals Chamber confirmed the ICC's jurisdiction, yet it noted that Ivory Coast was not a Party to the Rome Statute when the alleged crimes were committed.[14] The Appeals Chamber elaborated upon the meaning of the "crime in question" as promulgated in Article 12(3) ICCSt. and referred to Article 44(2) RPE, which reads that:

> When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction *with respect to the crimes referred to in article 5* of relevance to the situation…[Emphasis added.].[15]

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proceedings," Appeals Chamber, Case No. ICC-02/11-01/11 OA 2, December 12, 2012, para. 49.

12 *Prosecutor v. Gbagbo*, "Judgment on appeal on jurisdiction and stay of the proceedings," December 12, 2012, para. 59; *Prosecutor v. Laurent Koudou Gbagbo*, "Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo'," Pre-Trial Chamber, Case No. ICC-02/11-01/129, August 15, 2012, ("Impugned Decision"), para. 60.

13 *Prosecutor v. Gbagbo*, "Decision on the Corrigendum of the challenge to the jurisdiction," August 15, 2012, para. 61.

14 *Prosecutor v. Gbagbo*, "Judgment on appeal on jurisdiction and stay of the proceedings," December 12, 2012, para. 73; Ivory Coast ratified the Rome Statute on February 15, 2013.

15 *Prosecutor v. Gbagbo*, "Judgment on appeal on jurisdiction and stay of the proceedings," December 12, 2012, para. 79.

On the basis of this provision, the Appeals Chamber argued that:

> The use of the words 'crimes referred to in article 5' indicates that the term 'crime in question' in article 12 (3) of the Statute refers to the categories of crimes in article 5 of the Statute, i.e. genocide, crimes against humanity, war crimes and the crime of aggression, and not to specific events in the past, in the course of which such crimes were committed.[16]

The Appeals Chamber held that the interpretation of Article 12 (3) ICCSt. does not withhold a State from accepting jurisdiction prospectively, as happened in the Gbagbo case.[17] Acceptance of jurisdiction may only be restricted if a State explicitly stipulates the jurisdictional limits (e.g. with respect to crimes that pre-date the declaration or to specific "situations").[18]

Ratione temporis jurisdiction in the ICC system does not embrace the principle of *nullum crimen sine lege*, which means that no crime is punishable without a pre-existing penal law, as the entry into force of the ICCSt. may be predated. However, all *ad hoc* tribunals were established after the crimes had been committed and, as the Nuremberg precedent proscribes, certain acts are so inherently criminal in nature, that it would be unjust to let the perpetrators go unpunished.[19] The Nuremberg Tribunal was heavily criticized for applying *ex post facto* laws, since individuals could be held responsible for crimes against peace and crimes against humanity for the first time in history. However, as the Chief Prosecutor of the Nuremberg Tribunal, Mr. Robert Jackson, noted:

> what we propose is to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.[20]

Personal jurisdiction relates to whether jurisdiction may be exercised over a certain person and territorial jurisdiction relates to jurisdiction over crimes committed on a certain territory. The ICC may exercise jurisdiction in the following four situations, which encompass personal and territorial jurisdiction:

16 Id., para. 80.

17 Id., para. 83.

18 Id., para. 84.

19 See also William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 69.

20 Douglas Linder, "The Nuremberg Trials," 2000, accessed March 18, 2014, http://jurist.law.pitt.edu/trials12.htm.

(1) if the crime is committed on the territory of a State Party,[21] (2) on the basis of a Security Council referral,[22] (3) over nationals of its States Parties, irrespective of where the crime has been committed,[23] (4) over nationals of non-States Parties who have accepted the Court's jurisdiction on an *ad hoc* basis pursuant to a Declaration under Article 12 (3) ICCSt.[24] The ICC requires an assessment of either territorial or personal jurisdiction.[25]

Personal jurisdiction may become particularly important if the accused is endowed with immunity as a consequence of his or her position. Article 98 ICCSt. provides that:

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

21 Article 12(2)(a) ICCSt.

22 Article 13(b) ICCSt.

23 Article 12(2)(b) ICCSt.

24 Personal jurisdiction is dealt with in Articles 12 and 26 ICCSt., while territorial jurisdiction is dealt with by in Articles 12 and 13(b) ICCSt.; *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," Appeals Chamber, Case No. ICC-01/04-01/06 OA 4, December 14, 2006, para. 22.

25 The Office of the Prosecutor noted in its Report on Preliminary Examination activities of 13 December 2011, that: "Jurisdiction relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)); (ii) either territorial or personal jurisdiction, which entails that the crime has been or is being committed on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or arises from a situation referred by the Security Council; and (iii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression)," para. 4, accessed March 18, 2014, http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf.

> Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

However, this provision only protects individuals from non-States Parties, as it implies that States Parties do not have to cooperate with the ICC if this would infringe with the States Parties' (other) obligations under international law *vis-à-vis* non-States parties. Individuals from States Parties are not protected by this provision, since Article 27 ICCSt. waives immunity for Heads of State or other government officials. Personal jurisdiction is also covered by Article 26 ICCSt., which proscribes that the ICC may not exercise jurisdiction over persons under the age of 18 at the time the alleged crime was committed.

Territorial jurisdiction may become problematic if territorial boundaries are disputed.[26] In 2009, the Palestinian National Authority lodged a declaration pursuant to article 12(3) ICCSt., which allows States, not being a Party to the ICC, to confer jurisdiction to the ICC.[27] Following this declaration, it had to be assessed whether or not the ICC could exercise jurisdiction over alleged crimes committed on the territory falling under the auspices of the Palestinian Authority. Crimes committed in Israel, a non-State Party, would not fall within the jurisdiction of the Court. The question that arose after the Palestinian declaration was: "who defines what is a 'State' for the purpose of article 12 of the Statute?."[28] The Office of the Prosecutor contemplated that, in case of doubt whether the applicant constitutes a "State," the relevant bodies at the United Nations General Assembly should legally determine if the applicant (*in casu* Palestine) qualifies as a State for the purpose of acceding to the ICCSt.; the ICCSt. itself provides no authority to make such a determination.[29] On 3 April 2012, the Office of the Prosecutor concluded that it could not assume jurisdiction to investigate alleged crimes committed on the Palestinian territories, since

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26 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 77.

27 "Declaration recognizing the Jurisdiction of the International Criminal Court," by Ali Khashan, Minister of Justice for the Government of Palestine, January 21, 2009, accessed March 18, 2014, http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf; see also letter of the registrar Mrs. Silvana Arbia to Mr. Ali Khashan of the Palestinian National Autority confirming the receipt of the declaration lodged on 22 January 2009 under article 12(3) ICCSt., accessed March 18, 2014, http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf.

28 The Office of the Prosecutor, "Situation in Palestine," 3 April 2012, accessed March 18, 2014, http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf.

29 OTP, "Situation in Palestine," para. 6.

the Palestinian authority merely possessed the "observer" Status at the United Nations General Assembly and not the "non-member State" status.[30] This status changed on 29 November 2012 when an overwhelming majority of the UN General Assembly voted in favor of a resolution according to Palestine the "non-member observer State" status.[31] However, it remains questionable whether the ICC may exercise territorial jurisdiction over the "territory" of the Palestinian Authority as its borders remain unclear.[32] The Israeli settlements in the Westbank and Gaza, for example, are on territory that is claimed by Palestine, but this is not the equivalent of "on the Palestinian territory." As noted by one author, if the ICC would assume jurisdiction, it would create inherent dangers to the legitimacy of the Court, as "non-member nations would be vulnerable to ICC suits simply by neighbours convincing the Court that a certain territory is theirs."[33]

The final assessment relates to material jurisdiction, as defined by Article 5 ICCSt. reading that:

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression.[34]

30 Id., paras. 7–8.

31 138 members of the Assembly voted in favor of the Resolution, nine members voted against the Resolution and 41 members abstained from voting; see "General Assembly grants Palestine non-member observer State status at UN," *United Nations*, November 29, 2012, accessed March 18, 2014, http://www.un.org/apps/news/story.asp/story.asp?NewsID=43640&Cr=palestin&Cr1=; see also A/RES/67/19, December 4, 2012.

32 Eugene Kontorovich, "Israel/Palestine – The ICC's Uncharted Territory," *Journal of International Criminal Justice* 11 (2013): 980.

33 Eugene Kontorovich, "Israel/Palestine – The ICC's Uncharted Territory," *Journal of International Criminal Justice* 11 (2013): 984.

34 Article 5(1) ICCSt.; Article 5(2) ICCSt. reads that the ICC "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 this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

Jurisdiction over the crime of aggression may only be assumed after 2/3 of ICC member States have ratified the amendments on the crime of aggression (see Chapter 3). Jurisdiction over alleged war crimes committed in an international armed conflict is broader than the jurisdiction over alleged war crimes committed in a non-international armed conflict, as follows from Article 8 ICCSt.[35] Situations of internal disturbances and tensions, such as riots, do not fall within the ICC's jurisdiction.[36]

3 Admissibility

3.1 *Introduction*

After the jurisdictional assessment, the ICC is bound to discern whether a case is *admissible*, which entails both complementarity and gravity. Admissibility issues are covered by Article 17 ICCSt., which provides that the ICC shall declare a case 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 to genuinely carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.[37]

Admissibility challenges must, in principle, be made prior to the commencement of the trial and can be made by either the accused or person against whom an arrest warrant or summons to appear has been issued, a State that has jurisdiction over the case, or a State from which acceptance of jurisdiction is required under Article 12 ICCSt.[38] The ICC has been confronted with

35 See also *Prosecutor v. Lubanga*, "Decision on the confirmation of Charges," Pre-Trial Chamber I, Case No. ICC-01/04-01/06, January 29, 2007, para. 284.

36 See Article 8 ICCSt.

37 Article 17(1) ICCSt.

38 See Article 19(2) and 19(4) ICCSt.; Article 19(4) provides that admissibility challenges must be made prior to the commencement of the trial, yet, exceptions to are possible.

several admissibility challenges under Article 17(a) ICCSt., which reflects the complementarity principle. According to ICC case law as well as the Statute, the complementarity principle endorses a preference for national investigations and prosecutions.[39] The following paragraphs will elaborate upon the admissibility-test under this principle.

3.2 *The Admissibility-test under the Complementarity Principle*

Article 17(a) and (b) ICCSt. proscribe that the ICC must declare a case inadmissible if the case is already being prosecuted or has been prosecuted, *unless* the prosecuting State proves "unwilling or unable" to genuinely carry out the investigation or prosecution. The burden of proof in determining the admissibility of a case before the ICC lies with the "challenger" (i.e. the State conducting a domestic prosecution). The State must: "provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case."[40] Paragraph 2 and 3 of Article 17 ICCSt. determine "unwillingness" and "inability." Unwillingness may arise if one or more of the following circumstances exist:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[41]

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39 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the admissibility of the case against Abdullah Al-Senussi," Pre-Trial Chamber I, Case No. ICC-01/11-01/11, October 11, 2013, para. 26 (hereinafter: "Al Senussi Admissibility Decision"); *Prosecutor v. Gaddafi and Al-Senussi*, "Decision on the admissibility of the case against Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No. ICC-Ol/ll-Ol/ll-344-Red, May 31, 2013, para. 52 (hereinafter: "Gaddafi Admissibility Decision").

40 *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'," Appeals Chamber, Case No. ICC-01/09-02/11 OA, August 30, 2011, para. 61.

41 Article 17(2) ICCSt.

Inability, on the other hand, arises if "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."[42]

In examining admissibility challenges under article 17(a) ICCSt., the ICC pursues the following two-prong test:

(i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative,
(ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.[43]

In order to have the first prong fulfilled, a comparison must be drawn between the conduct attributed to the defendant in the proceedings before the ICC and the conduct that forms the subject-matter of the proceedings allegedly carried out at a national level.[44] The ICC will only proceed with examining unwillingness and inability after the questions in sub (i) and (ii) have been answered in the affirmative. Inaction on part of the State having jurisdiction, automatically renders a case admissible before the ICC.[45] A State cannot successfully argue that a case should be declared inadmissible because it *will* open an investigation or prosecution, if that State has been inactive so far. This would result in the ICC being unable to exercise jurisdiction over a case "as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so."[46] Moreover, such a practice would run contrary to the ICC's objective of putting "an end to impunity" and

42 Article 17(3) ICCSt.

43 *Prosecutor v. Gaddafi and Al-Senussi*, "Al Senussi Admissibility Decision," October 11, 2013, para. 26; referring to the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case," Appeals Chamber, Case No. ICC-01/04-01/07-1497, September 25, 2009, paras. 1 and 75–79; *Prosecutor v. Gaddafi and Senussi*, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No. ICC-01/11-01/11-239, December 7, 2012, para. 6.

44 *Prosecutor v. Gaddafi and Al-Senussi*, "Al Senussi Admissibility Decision," para. 67.

45 *Prosecutor v. Katanga and Chui*, "Judgment on the Appeal of Katanga against Decision on the Admissibility," September 25, 2009, para. 78.

46 Id., para. 79.

ensuring that "the most serious crimes of concern to the international community as whole must not go unpunished."[47]

3.3 *ICC Case Law on Admissibility Challenges*

The ICC was confronted with an admissibility challenge for the first time in the case of *Lubanga*. Lubanga held that the ICC should refrain from exercising jurisdiction, as doing so would amount to abuse of process due to grave violations of Lubanga's rights embedded in the ICCSt.[48] The ICC Appeals Chamber rejected Lubanga's challenge, as "abuse of process or gross violations of fundamental rights of the suspect or the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of jurisdiction."[49] The Appeals Chamber recalled the possible barriers to exercise jurisdiction, as provided for in the ICCSt., namely:

> 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 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.[50]

To the contrary, abuse of process may only result in *a stay of the proceedings* if "the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defense within the framework of his rights, no fair trial can take place."[51]

The Congo militia leader Germain Katanga also challenged the admissibility of his case before the ICC himself. Central in his admissibility challenge was the prosecution's non-disclosure of relevant documents to the Pre-Trial Chamber at the time of the issuance of the arrest warrant. Katanga argued that if the prosecutor had disclosed the documents in question, the Pre-Trial

47 See paragraph 4 and 5 of the Preamble to the ICCSt., cited in: *Prosecutor v. Katanga and Chui*, "Judgment on the Appeal of Katanga against Decision on the Admissibility," September 25, 2009, para. 79.

48 *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," Appeals Chamber, Case No. ICC-01/04-01/06 OA4, December 14, 2006, para. 20.

49 Id., para. 24.

50 Id., para. 23.

51 Id., para. 39; the Appeals Chamber found no flaws in the process of bringing Lubanga to justice, para. 42.

Chamber would have declared the case inadmissible. The Appeals Chamber opined that it only has to be determined if a case *is* admissible, and not whether a case *was* admissible.[52] Moreover, the Appeals Chamber was unwilling to consider this issue, as it would lead to an assessment of the correctness of the arrest warrant, while the admissibility of the case was subject of the appeal.[53]

In the Kenyan situation, the admissibility challenge, for the first time, pertained to the "same person/same conduct" test, in which Kenya (a State with jurisdiction over the crime) argued that the case was already being investigated at a national level. Importantly, the Appeals Chamber held in this case that a national investigation must *always* concern the same persons as before the ICC.[54]

In 2013, Libya challenged the admissibility of two cases before the ICC. Libya insisted on prosecuting both Saif Al-Islam Gaddafi, the son of the late leader Muammar Gaddafi, and Abdullah Al-Senussi, the former head of intelligence under the Gaddafi-regime, domestically, while the ICC was already investigating the cases upon a UN Security Council referral.[55] In the case of Mr. Al-Senussi, the ICC Pre-Trial Chamber required the consecutive identification of the following two aspects in order to establish that the 'same case' was being investigated at a national level as put before the ICC:

(i) the conduct of Mr Al-Senussi that is allegedly subject of the proceedings before the Court; and
(ii) the conduct of Mr Al-Senussi that is allegedly subject to Libya's national proceedings, as emerging from the evidence presented by Libya in support of its claim.[56]

The Pre-Trial Chamber analyzed the arrest warrant that was issued against Mr. Al-Senussi on the basis of Article 58 of the Rome Statute to assess whether the 'same case' requirement was met. The arrest warrant identified specific incidents subject to investigation, which incidents were compared with the

52 *Prosecutor v. Katanga and Chui*, "Judgment on the Appeal of Katanga against Decision on the Admissibility," September 25, 2009, para. 56

53 Id., para. 57.

54 *Prosecutor v. Muthaura, Kenyatta and Ali*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'," Appeals Chamber, Case No. ICC-01/09-02/11 OA, August 30, 2011, para. 34.

55 See UN SC Resolution 1970, S/RES/1970 (2011).

56 *Prosecutor v. Gaddafi and Al-Senussi*, "Al Senussi Admissibility Decision," para. 67.

domestic investigations conducted by Libya.[57] The criterion "unwilling or unable" within the second prong is clarified in Article 17(2) and (3) ICCSt. Although a case may be declared admissible before the ICC on the basis of either unwillingness or inability of the national State, it has been noted that in practice "the same factual circumstances may often have a bearing on both aspects."[58]

The national State, endeavoring a domestic prosecution, must substantiate the requirements set forth by law when challenging the admissibility of the case before the ICC.[59] A discussion on unwillingness or inability is only meaningful when the genuineness of the national proceedings or investigations is at stake.[60] In order to determine willingness and ability of the national State, the Pre-Trial Chamber will assess significant features of the national laws. While examining these national laws, the Pre-Trial Chamber accrues weight to the following factors: the relevant laws and procedures applicable to the case on a domestic level, rights accorded to the accused, the ratification of human rights instruments, the right to legal representation, different trial phases, the right to appeal, independency between the judiciary and the prosecutor, recording of all proceedings in relation to the accused's case at the investigative stage.[61] Noteworthy is that weight is attached to independency between the judiciary and the Prosecutor. Yet, independency is the potential flaw within the ICC system on the crime of aggression. As illustrated in Chapter 3, the Security Council has the power to refer an "act of aggression" to the ICC. A prior determination by the Security Council as to a "manifest violation of the UN Charter" may give rise to the perception of a politically influenced prosecution.

Noticeably, until now nearly all admissibility challenges of national states have triggered the "same conduct test" and were declared admissible before the ICC, except for the case of Mr. Al-Senussi, which case was declared inadmissible on 11 October 2013 by the ICC Pre-Trial Chamber.[62] Issues of unwilling-

57 Id., para. 165.

58 Id., para. 169.

59 Id.

60 Id.; *Prosecutor v. Gaddafi and Al-Senussi*, "Gaddafi Admissibility Decision," para. 53.

61 See for example *Prosecutor v. Gaddafi and Al-Senussi*, "Al Senussi Admissibility Decision," paras. 203–206.

62 See footnote 125 of the "Al Senussi Admissbility Decision," referring to admissibility challenges in *inter alia*: *the Prosecutor v. Katanga, the Prosecutor v. Lubanga, The Prosecutor v. Saif al Islam Gaddafi, the Prosecutor v. Abdullah Al-Senussi, the Prosecutor v. Muthaura, Kenyatta and Ali*; on 24 July 2014 the ICC Appeals Chamber confirmed the decision of the

ness have thus been scarcely addressed. In the case of Saif al-Islam Gaddafi, for example, issues of impartiality on part of the Libyan judiciary were not discussed at length, because Libya's admissibility challenge was rejected by the Pre-Trial Chamber due to the Chamber not being persuaded that the investigation in Libya covered the same conduct as the investigation before the ICC. Additionally, the Chamber was not persuaded that Libya was able to genuinely carry out an investigation against Mr. Gaddafi since the Libyan government had failed to "secure legal representation for Mr. Gaddafi"[63] and since he was not within the powers of the government; rather he was in custody of the Zintan militia.[64] The Chamber opined that it did not need to address "the implications of the alleged impossibility of a fair trial for Mr Gaddafi on Libya's willingness genuinely to carry out the investigation or prosecution," since the case was already admissible before the ICC for this reason.[65] Besides, fair trial considerations had already been addressed by the Chamber in relation to Libya's inability to carry out the proceedings.[66] In conclusion, the Pre-Trial Chamber rejected Libya's admissibility challenge, saying that Gaddafi should be tried by the ICC.[67]

The admissibility challenge of Mr. Al-Senussi delved into Libya's alleged unwillingness and inability to investigate the case, since the 'same case test' had been met. The defense of Al-Senussi averred that Libya was unwilling to prosecute Mr. Al-Senussi, because of a lack of independence and impartiality in the national system, while advocating that Libya was unable to prosecute Mr. Al-Senussi because of the unavailability of the national judicial system. The defense raised the precarious security situation in Libya as a ground that would impact the proceedings against Mr. Al-Senussi.[68] Libya itself did not dispute the

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Pre-Trial Chamber to declare the case of Abdullah al Senussi inadmissible before the ICC, see *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi,* "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'," Appeals Chamber, Case No. ICC-01/11-01/11-565, July 24, 2014.

63 *Prosecutor v. Gaddafi and Al-Senussi*, "Gaddafi Admissibility Decision," para. 213.

64 Id., paras. 206–208, 219.

65 Id., para. 218.

66 Id., para. 217.

67 *Prosecutor v. Gaddafi and Al-Senussi*, "Gaddafi Admissibility Decision"; this decision was confirmed by the Appeals Chamber, see *Prosecutor v. Gaddafi and Al-Senussi*, "Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'," Appeals Chamber, Case No. ICC-01/11-01/11-547-Red OA4, May 21, 2014.

68 *Prosecutor v. Gaddafi and Al-Senussi*, "Al Senussi Admissibility Decision," para. 260.

precarious security situation. Yet, the Chamber opined that in order to establish 'inability' under Article 17(3) ICCSt., "not simply any 'security challenge' would amount to the unavailability or to a total or substantial collapse of the national judicial system rendering a State unable to obtain the necessary evidence or testimony in relation to a specific case or otherwise unable to carry out genuine proceedings."[69] The defense argued that Libya had not sufficiently demonstrated that Mr. Al-Senussi's fair trial rights were not violated during the national proceedings. It was, for example, unclear under what circumstances Mr. Al Senussi had been arraigned before a judge, it was unclear whether he had been tortured and it was unclear whether his rights had been respected.[70] In this regard the Pre-Trial Chamber held that the 'uncertainties' identified by the defense could not be regarded as 'issues properly raised before the Chamber such that Libya would be under the duty to disprove them in order for the Admissibility Challenge to be upheld'.[71] The national State's burden of proof could not merely be equated with 'an obligation to disprove any possible "doubts" raised by the opposing participants in the admissibility proceedings'.[72]

Furthermore, the defense, as well as the Office of Public Counsel for Victims (OPCV), contended that the criminal proceedings in Libya could not be conducted independently and impartially. This was exemplified by the fact that the presiding judges in cases against former officials of the Gaddafi-regime appeared to have taken part in the so-called 'special courts' of the Gaddafi-era: By not excluding them from the current trials, the integrity of the process could not be ensured.[73] Additionally, the recent entry into force of the 'Political Isolation Law' was invoked by the defense in order to demonstrate the absence of impartiality and independence in the Libyan judicial system. This law 'has widely been condemned as being discriminatory against former Gaddafi-era officials and a gross breach of their human rights'.[74]

The Chamber elucidated that:

> submissions of a general nature indicating significant defects of Libya's national judicial system may be relevant as "contextual information", information of this kind can be considered only to the extent that such systemic difficulties have a bearing on the domestic proceedings against

69 Id., para. 261.
70 Id., para. 238.
71 Id., para. 239.
72 Id., para. 239.
73 Id., para. 246.
74 Id., para. 246.

> Mr Al-Senussi, such that it would warrant a finding of one of the scenarios envisaged under article 17(2) or (3) of the Statute.[75]

The Chamber was not persuaded that the information provided by the defense and OPCV amounted to:

> a systemic lack of independence and impartiality of the judiciary such that would demonstrate, alone or in combination with other relevant circumstances, that the proceedings against Mr Al-Senussi "are not being conducted independently or impartially and they…are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring [Mr Al-Senussi] to justice", within the meaning of article 17(2)(c) of the Statute.[76]

As a result, the admissibility challenge by Al-Senussi's defense was denied, implying that Libya's former head of intelligence could be tried in Tripoli under the auspices of the Libyan authorities.[77]

The Libyan trials of Gaddafi and Al-Senussi have been heavily criticized by human rights movements, as, by the end of April 2014, many procedural irregularities emerged.[78] For instance, defense counsels were not provided with full access to case files, while the evidence submitted by the prosecution entails thousands of pages of evidence; Saif Al Islam could not attend his trial in person, but only via video link; Al-Senussi's lawyer withdrew from the case, while Al-Senussi found himself unable to find proper legal counsel in Libya.[79] The decision of the ICC Pre-Trial Chamber to declare the case of Abdullah Al-Senussi inadmissible, which was confirmed on appeal, might have been presumptuous, when taking into account the disturbing situation in Libya.[80]

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75 Id., para. 245.

76 Id., para. 258.

77 The defense appealed on behalf of Mr. Al-Senussi against the Pre-Trial Chamber's Admissibility Decision on 17 October 2013.

78 "Qaddafi Son Appears on Screen at his Trial," *New York Times*, April 28, 2014, page A4.

79 *Ibid.*

80 *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi,* "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'," Appeals Chamber, Case No. ICC-01/11-01/11-565, July 24, 2014.

3.4 *Conclusion: Prosecuting at a National Level?*

In conclusion, it can be said that the burden of proof predominantly lies with the State challenging the admissibility of the case before the ICC under the complementarity principle (i.e. the State must demonstrate the existence and adequacy of national proceedings). Mere doubts relating to the impartiality of the national system raised by a party is not sufficient to sustain an admissibility challenge; likewise, not 'any security challenge' amounts to unwillingness or inability. At the same time the standard set by the ICC with regard to the unwillingness or inability of a State does not seem very burdensome.[81] Once the State is able to meet the tests set forth by the ICC it is likely that a case will be prosecuted at a national level, especially since this has the preference over international proceedings. In this way, the sovereignty of national States can be respected, as well as possible rights of victims, witnesses and defendants who are in the vicinity of the trial. It is questionable, however, whether States will be capable of investigating a crime of aggression on a national level under the principle of complementarity. Once a State successfully challenges the admissibility of a potential ICC prosecution for aggression, a situation will arise where one side of the conflict will be permitted to domestically prosecute the other side of the conflict with the increased risk of having a politically based prosecution. It is uncertain whether this will result in a fair trial for the accused and how this will impact upon international relations.

81 Although it may be unsafe to draw inferences from a single case – the case of Mr. Al-Senussi, where the alleged unwillingness and inability of Libya was discussed at length. The appeal against the Pre-Trial Chamber decision of 11 October 2013 is still pending.

CHAPTER 5

Criminal Liability Principles Envisioned by ICTs

1 Introduction: Emergence of General Principles

The Rome Statute is, unlike the Statutes of the ICTY, the ICTR and the SCSL, enhanced with a section called "General Principles of Criminal Law." It is important to note that the "general principles" form a synthesis of common and civil law systems, as well as Sharia law and other criminal law systems.[1] From the viewpoint of legal certainty, the initiative by the drafters of the Rome Statute to codify "general principles" is preferable to leaving such issues to the discretion of ICTs' judges. Considering that the ICTs' underlying purpose is to restore peace and security in the areas of the former Yugoslavia and Rwanda, one could argue that the urgency to establish the ICTY and ICTR *ad hoc* tribunals prevented the drafting of a thorough general part in the Statutes on international criminal law principles. Indeed, the 34 Articles in these statutes compared to the 128 Articles in the Rome Statute (of which 12 relate to its General Principles) seems to indicate that the importance of such a General Part was outweighed by the urgent need to draft the ICTY and ICTR Statutes in order to restore peace and security quickly (see Chapter 1). This chapter will examine the most important rules of substantive international criminal law that have obtained the status of "general principles."

2 *Actus Reus* and *Mens Rea*

Actus reus and *mens rea* are the two components that constitute international criminal liability in all legal systems. *Actus reus* is the "criminal act" (i.e. "physical"), while *mens rea* is the "criminal intent" (i.e. the "mental element"). If criminal intent cannot be established, a perpetrator cannot be held liable for the criminal act. This paragraph will outline how *mens rea* is determined in ICL and what it encompasses (from full intent to recklessness and negligence).

The Rome Statute specifies *mens rea* for each offense. To reach a guilty verdict for the crime of genocide, for example, it must be established that the

1 William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 194; the author refers to "a fascinating experiment in comparative criminal law."

 | DOI 10.1163/9789047429012_006

perpetrator had the "intent to destroy,"[2] in case of crimes against humanity the perpetrator must have had "knowledge of the attack"[3] and in case of war crimes the it must be established that the perpetrator engaged in "wilful killing."[4] Article 30(1) ICCSt. defines the mental element of a crime as follows:

> 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.[5]

The two elements of "intent" and "knowledge" are defined in paragraph 2 and 3 of Article 30 respectively:

> 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.
>
> 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.

Accordingly, Article 30 ICCSt. reflects the evolution of *mens rea* within the jurisprudence of the *ad hoc* tribunals, requiring that both a volitional component (intent) and a cognitive component (knowledge) are established in order to impose criminal responsibility for serious violations of international humanitarian law.[6] According to Article 30 ICCSt., deviations from the general requirement of intent and knowledge are allowed, "unless otherwise provided."[7]

2 Article 6 ICCSt.

3 Article 7 ICCSt.

4 Article 8 ICCSt.

5 Article 30(1) ICCSt.

6 Mohamed Elewa Badar, "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective," *Criminal Law Forum* 19/3 (2008): 473–518; referring to: *Prosecutor v. Tihomir Blaškić*, Appeals Chamber Judgment, Case No. IT-95-14-A, July 29, 2004, para 41. See also *Prosecutor v. Naser Orić*, Trial Chamber Judgment, Case No. IT-03-68-T, June 30, 2006, para. 279.

7 See also Johan Van der Vyver, "The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law," *University of Miami International & Comparative Law Review* 12 (2004): 66.

This phrase is, however, restricted to "unless the Statute or the Elements of Crimes require a different standard of fault," which also follows from paragraph 2 of the General Introduction to the Elements of Crimes reading that:

> [w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element…intent, knowledge or both, set out in article 30, applies.[8]

An example of a different standard provided for in the Rome Statute, can be found in Article 28(a), which imposes a lower fault element on military commanders, since "should have known" may result in criminal liability, instead of mere knowledge.[9] Likewise, pursuant to Article 28(b) superiors – not being military commanders – may be held criminally responsible for the acts of their subordinates if they "consciously disregarded information" indicating that these crimes were committed or about to be committed.[10]

Several levels of *mens rea* can be identified within international criminal law:

1. Intent (*dolus*), defined as the will to bring about a result and requires the existence of both a volitional and a cognitive element. Generally, there are three "levels" of *dolus*, which depend on the strength of the volitional element *vis-à-vis* the cognitive element
   (a) *Dolus directus in the first degree* or direct intent (i.e. "the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime"; the volitional element is prevalent);[11]
   (b) *Dolus directus in the second degree* or *dolus indirectus* (i.e. oblique intention; the suspect is aware that the material elements of the crime "will be the most inevitable outcome of his acts or omissions"; the volitional element is overridden by the cognitive element);[12]

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8 *Prosecutor v. Jean-Pierre Bemba Gombo,* "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," Case No. ICC-01/05-01/08-424, June 15, 2009, para. 353.

9 *Prosecutor v. Bemba,* "Decision on the Charges," June 15, 2009, para. 354.

10 Article 28 Rome Statute; Van der Vyver, "Concept of *Mens Rea* in International Criminal Law," 66.

11 *Prosecutor v. Bemba,* "Decision on the Charges," June 15, 2009, para. 358.

12 *Prosecutor v. Bemba,* "Decision on the Charges," June 15, 2009, para. 359.

(c) *Dolus eventualis* or recklessness, which is the awareness that conduct carries along an unjustifiable risk;

2. Culpable negligence, which is the failure to pay sufficient attention (e.g. believing that harm exists, but that it will not come about);
3. Inadvertent negligence, which is the belief that no harm exists at all.

Thus, fault can either consist of intent (*dolus*) or negligence (*culpa*). The person acting intentionally "foresees the illegality and harmful consequences of his or her action"; the person acting negligently "does not appreciate the illegality or harmful consequences of his or her action, while a reasonable person would in the prevailing circumstances have foreseen and avoided acting illegally or bringing about the harmful consequences of the act."[13] Article 30 ICCSt. only encompasses the first and second degree of *dolus* as is reflected in the express language of the phrase "will occur in the ordinary course of events," which does not provide for a lower standard than the requisite standard for *dolus directus in the second degree*.[14] *Dolus eventualis* or recklessness, is not found in Article 30 ICCSt., indicating that only crimes committed with the highest degree of *dolus* are prosecuted before the ICC. This view has been promulgated by the ICC Pre-Trial Chamber in its Decision on the Confirmation of the Charges in the case of Jean-Pierre Bemba, the former leader of the Mouvement Liberation du Congo (MLC).[15] The Pre-Trial Chamber opined that this specific phrase did not provide for "a lower standard than the one required by the *dolus directus in the second degree* (oblique intention)."[16] The Pre-Trial Chamber explained its view, considering that:

> by way of a literal (textual) interpretation, the words '[a consequence] will occur serve as an expression for an event that is 'inevitably' expected. Nonetheless, the words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty....[17]

In the decision on the confirmation of the charges in the case of *the Prosecutor v. Katanga*, the ICC Pre-Trial Chamber found that the *dolus* of the attempt to commit a crime is commensurate to the *dolus* of the consummated crime,

13 Van der Vyver, "Concept of *Mens Rea* in International Criminal Law," 61.

14 *Prosecutor v. Bemba,* "Decision on the Charges," June 15, 2009, para. 360.

15 Id.

16 Id., para. 360.

17 Id., para. 362.

since "the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete."[18] It follows that "in order for an attempt to commit a crime to be punished, it is necessary to infer the intent to further an action that would cause the result intended by the perpetrator, and the commencement of the execution of the act."[19]

Different requisite standards of *actus reus* and *mens rea* have been developed for different liability modes, alongside the general notions of *actus reus* and *mens rea* just described, as follows from the case law of international criminal tribunals. This will be discussed in the following section.

3 Liability Modes in International Criminal Law

3.1 *Introduction: Individual Criminal Responsibility*

The ICTs aim is to prosecute individuals, not states or organizations. The ICTR and ICTY Statutes provide that the tribunal shall have "jurisdiction over natural persons pursuant to the provisions of the present Statute."[20] The Rome Statute contains a similar provision.[21] International criminal courts and tribunals have committed themselves only to bring to justice perpetrators of the most serious crimes or those who bear the "greatest responsibility" for serious violations of international humanitarian law. The practice of *ad hoc* tribunals portrayed, in the final years, a trend towards prosecuting the "major leaders" (people in senior positions, whether civilian or military) and, in line with this trend, the ICC outlined in its prosecutorial policy paper:

> 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 organization allegedly responsible for those crimes*.[22]

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18 *Prosecutor v. Germain Katanga*, "Decision on the Confirmation of the Charges," Pre-Trial Chamber I, Case No. ICC-01/04-01/07-717, September 30, 2008, para. 460.

19 Id.

20 Article 5 ICTRSt., Article 6 ICTYSt.; see also *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," Case No. IT-94-1, October 2, 1995.

21 Article 25(1) ICCSt.

22 ICC-OTP, "Paper on some policy issues before the Office of the Prosecutor," September 2003, 7, accessed April 3, 2014, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

Yet, many times, the "major leaders" are not the principle perpetrators of the crime, but rather the "intellectual perpetrators". Therefore – as is also the case in most domestic jurisdictions – international criminal courts and tribunals apply different liability modes.[23] As international crimes are mainly committed by groups of people who take on different roles, they require "special" liability modes. The Rome Statute embodies a codification of different liability modes that may apply in international criminal law. Article 25(3) ICCSt. lists the situations that may incur individual criminal responsibility for crimes within the ICC's jurisdiction, namely:

(a) Committing;
(b) Ordering, soliciting or inducing the commission or attempted commission;
(c) Aiding, abetting or otherwise assisting in the commission or attempted commission, including the provision of means for such commission;
(d) In any other way contributing in the commission or attempted commission of a crime by a group of persons acting with a common purpose. The contribution must be intentional and either:
    (i) 'Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    (ii) Be made in the knowledge of the intention of the group to commit the crime';
(e) Directly and publicly inciting others to commit genocide;
(f) Attempting.

The ICTY and ICTR Statutes set forth a similar, though concise, provision. According to Article 7(1) ICTYSt. and 6(1) ICTRSt.:

> a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime…shall be held individually responsible for the crime.[24]

In addition to these types of criminal responsibility, commanders and other superiors may be held responsible for crimes within the jurisdiction of the Court

23 Elies van Sliedrecht, "De zaak Basebya" [annotation Basebya case, District Court of The Hague, March 1, 2013, Case No. ECLI:NL:RBDHA:2013:BZ4292], *Ars Aequi* 62 (2013): 938–943.

24 Article 7(1) ICTYSt./Article 6(1) ICTRSt.

committed by their subordinates.[25] The following sections will describe the different liability modes applied by international criminal courts and tribunals.

3.2 *The ICC System*

The ICC system of criminal liability modes is set up as follows:

- The essential distinction between Article 25(3)(a) and (d) is that concept (a) embraces a co-perpetrator committing the crime, whilst Article 25(3)(d) aims at the person contributing in any other way to the commission of a crime by a group of individuals acting with a common purpose.[26]
- The contribution of the co-perpetrator who "commits" an international crime, must be of greater significance compared to that of an individual who contributes to the commission of a crime.[27]
- Article 25(3)(c) vests accessory liability (aiding, abetting, otherwise assisting in the commission of the – attempted – crime). Principal liability requires "a greater contribution than accessory liability."[28] As the ICC observes:

  > If accessories must have had "a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had…more than a substantial effect".[29]

- A co-perpetrator, as part of principal liability, is that person who

  > …along with others, has control over the offense by reason of the essential tasks assigned to them.[30]

  In other words, co-perpetration demands a joint plan or agreement between one or two individuals aiming at the commission of crimes.[31] The essential

25 Article 28 ICCSt.; Article 6 ICTRSt. and Article 7 ICTYSt. contain similar – albeit less extensive – provisions.

26 *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber Judgment, Case No. ICC-01/04-01/06, March 14, 2012, paras. 996–999.

27 Id.

28 Id.

29 Id.

30 *Prosecutor v. Lubanga*, "Trial Judgment," March 14, 2012, para. 984; see also *Prosecutor v. Lubanga*, "Decision on the Confirmation of the Charges," Case No. ICC-01/04-01/06-803tEN, January 29, 2007, para. 332.

31 Elies van Sliedrecht, "Veroordeling en Vrijspraak bij het ICC. Lubanga, Ngudjolo en Controversiële Aansprakelijkheidsconstructies," *Ars Aequi* (2013): 302–309 at 306.

criterion is whether there was a "joint control" in that the co-perpetrator fulfilled an essential role within the common plan.
- For such a plan to be criminal, its "implementation [should, GJK] embody a sufficient risk that, if events follow the ordinary course, a crime will be committed."[32]
- As to what "joint control" enhances, the ICC held in the Lubanga case that:

> ...only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.[33]

- It follows from the a foregoing that co-perpetration does not demand physical presence at the crime scene (akin to aiding and abetting) nor the fulfillment of the co-perpetrator of all elements of the crime, as long as the accused exerted control.[34]
- 'Control' as legal mechanism to attribute criminal liability for crimes committed by (other) persons, can be exerted over individuals as well as organizations.[35] For this type of control it is required that the organization was completely controlled by the defendant, in that:
  (i) Its members were replaceable;
  (ii) Orders were automatically complied with.

This analysis illustrates the emphasis on the "control of the crime" doctrine within the case law of the ICC. This theory has been introduced to provide a criterion to make "a normative distinction between principles under article 25(3)(a) and accessories under articles 25(3)(b-d) of the Statute".[36] As ICC Judge Christine Van den Wyngaert observed in her dissenting opinion to the Ngudjolo Judgment: "The perceived need for making such a distinction is premised on the assumption that there exists a hierarchy in article 25(3) according to which principles are considered to be more blameworthy than accessories,"[37] opining

32 Id.

33 *Prosecutor v. Lubanga*, "Trial Judgment," March 14, 2012, paras. 925, 1000.

34 Van Sliedrecht, "Veroordeling en Vrijspraak bij het ICC," 306.

35 *Prosecutor v. Katanga and Ngudjolo,* "Decision on the Confirmation of Charges," September 30, 2008, Case No.ICC-01/04-01/07, para. 480 *et. sec.*

36 See *Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment pursuant to Article 74 of the Statute. Concurring Opinion of Judge Christine Van den Wyngaert," Trial Chamber II, Case No. ICC-01/04-02/12-4, December 18, 2012, paras. 22–23.

37 Id.; Judge Van den Wyngeart challenges the validity of qualifying principal perpetrators as more blameworthy than accessories; although she acknowledges that there is a conceptual difference between principal perpetrators and accessories (i.e. a direct and derivative

that there is no proper foundation for concluding that acting under article 25(3)(b) of the Statute would be less serious than acting under Article 25(3)(a). In terms of "moral reprehensibility" direct and derivative criminal responsibility are deemed to be equal.[38] In this regard it should be observed that the Rome Statute does not attach specific maximum penalties to the various liability modes enshrined in Article 25(3).[39]

3.3 *Accessory Liability*

One of the pivotal questions is whether international criminal law allows for combined forms of criminal liability. The issue arose in the ICC cases of Katanga and Ngudjolo. The prosecution of the accused Mathieu Ngudjolo Chui (Ngudjolo) for war crimes and crimes against humanity allegedly committed in the DRC (consisting of jointly – with Katanga – conducting an attack on the village of Bogoro) was based on a combination of two modes of liability: indirect perpetration and co-perpetration pursuant to Article 25(3)(a) of the Rome Statute, leading to the liability form of "indirect co-perpetration."[40]

Prior to the acquittal of Ngudjolo on December 18, 2012, the ICC Pre-Trial Chamber (on November 21, 2012) severed the *Katanga* case from the *Ngudjolo* case, whilst amending Katanga's indictment in participation in "a group of persons acting with a common purpose (pursuant to article 25(3)(d))".[41]

The initial basis for the prosecution of Ngudjolo and Katanga,[42] "indirect co-perpetration", is not explicitly included in the Rome Statute. An indirect perpetrator is an individual who exercises control over the person who physically commits the crime, while a co-perpetrator is an individual who exercises control over the person who had an essential role in setting up a common plan to commit a crime.[43] This combined charge in the Katanga/Ngudjolo case was meant to cover the following situation:

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contribution to the crime), this does not necessarily mean that "the former should be regarded as *inherently* more blameworthy" than the latter, para. 22.

38 Id.

39 Rule 145(1)(e) ICC RPE.

40 *Prosecutor v. Mathieu Ngudjolo Chui,* Judgment rendu en application de l'article 74 du Statut, Trial Chamber II, Case No. ICC-01/04-02/12, December 18, 2012.

41 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons," Trial Chamber II, Case No. ICC-01/04-01/07, November 21, 2012; see also Van Sliedrecht, "Veroordeling en Vrijspraak bij het ICC," 304.

42 See also *Prosecutor v. Katanga,* Judgment, Trial Chamber II, Case No. ICC-01/04-01/07, March 7, 2014.

43 Van Sliedrecht, "Veroordeling en Vrijspraak bij het ICC," 307.

– The subordinates of one group are not inclined, due to ethnicity, to comply with the orders issued by another group (military);
– Both groups or militias are to be held responsible for an unlawful attack (i.e. on the village of Bogoro);
– The leaders of both groups did exert joint control over the members of both groups, which makes the actions of one group attributable to the other group.

The protraction of criminal liability forms is not prohibited under the Rome Statute as long as all elements of each form are proven.[44] Yet, judicial activism could culminate in an unforeseen expansion of Article 25(3) ICCSt., virtually resulting in a "totally new mode of liability."[45] In the words of Judge Van den Wyngaert, such combined forms of liability make it possible:

> …to hold the accused responsible for the conduct of the physical perpetrator of a crime, even though he/she neither exercised any direct influence or authority over this person, nor shared any intent with him or her.[46]

Both the principle of *lex certa* as well as the notion underlying Article 22(2) ICCSt. – the definition of a crime shall be strictly construed and shall not be extended by analogy – challenges the legitimacy of "new", combined, liability forms as "indirect co-perpetration".

Accessory liability is defined in Article 25(3)(d) ICCSt. providing that an individual may be held criminally responsible if he or she contributes "[i]n any other way…to the commission…of a crime by a group of persons acting with a common purpose." This liability mode was at issue in the case of Germain Katanga before the ICC Trial Chamber.[47] First, it must be noted that the liability mode had been re-characterized during the proceedings, when it became apparent that criminal responsibility under Article 25(3)(a) ICCSt. could not be incurred for Katanga.[48] The following constituent elements of accessory liability had to be proven beyond a reasonable doubt:

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44 *Prosecutor v. Ngudjolo Chui*, "Concurring Opinion of Judge Christine Van den Wyngaert," December 18, 2012, paras. 61–64.

45 Id.

46 Id.

47 At the time of writing, the Judgment was not published yet, therefore, our information was based on the (non-authoritative) summary of the ICC (hereinafter: "Judgment Summary"). However, see also*: Prosecutor v. Germain Katanga*, Judgment, Trial Chamber II, Case No. ICC-01/04-01/07, March 7, 2014.

48 *Prosecutor v. Katanga*, "Judgment Summary," March 7, 2014, para. 61.

1. That a crime had been committed within the jurisdiction of the Court;
2. That the persons committing the crime were part of a group acting with a common purpose;
3. That the accused made a significant contribution to the commission of the crimes;
4. That the contribution of the accused was intentional; and
5. That the contribution was made in knowledge of the intention of the group to commit the crimes.[49]

Only if all the aforementioned constituent elements are proven beyond reasonable doubt can the accused be convicted on the basis of Article 25(3)(d) ICCSt. for accessory liability. On 7 March 2014 the Trial Chamber found Katanga guilty, as an accessory, on charges of war crimes and crimes against humanity.[50] On 23 May 2014 he was sentenced to 12 years imprisonment.[51]

3.4 *Aiding and Abetting*

3.4.1 Parameters for Aiding and Abetting Liability

The basic parameters for the liability mode of aiding and abetting were set out in *Prosecutor v. Tadić*, the first case tried before the ICTY, in which the Trial Chamber held that aiding and abetting encompasses "all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present."[52] This view was confirmed on appeal and in several subsequent ICTY judgments. Aiding and abetting has been defined as providing "practical assistance, encouragement, or moral support" to the principal perpetrator.[53] This act of assistance does not have to have caused the act of the principal offender; it is sufficient that it had a "substantial effect" on that principal commission.[54] The ICTY Appeals Chamber introduced a 'new' element to

49 Id., para. 73.

50 *Prosecutor v. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, Case No. ICC-01/04-01/07, March 7, 2014.

51 'Germain Katanga sentenced to 12 years' imprisonment', *icc Press Release*, ICC-CPI-20140523-PR1008, May 23, 2014, accessed May 23, 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1008.aspx.

52 *Prosecutor v. Duško Tadić*, Trial Chamber Judgment, Case No. IT-94-2-T, May 7, 1997, para. 689.

53 *Prosecutor v. Delalić, Mucić, Delić, Landžo* (Čelebići), Appeals Chamber Judgment, Case No. IT-96-21-A, February 20, 2001, para. 352; *Prosecutor v. Tadić*, Appeals Chamber Judgment, Case No. IT-94-1-A, July 15, 1999, para. 229.

54 *Prosecutor v. Mitar Vasiljević*, Trial Chamber Judgment, Case No. IT-98-32-T, November 29, 2002, para. 70.

the doctrine of aiding and abetting in 2013 in the *Perišić* case, when it held that "specific direction" was a necessary element of the *actus reus* of aiding and abetting.[55] This standard was, however, not upheld in subsequent Appeals Chamber judgments of ICTs.[56] The *mens rea* of aiding and abetting consists of "knowledge that assistance aids the commission of criminal acts, along with awareness of the essential elements of these crimes."[57]

The contours of aiding and abetting, a liability form regularly used before the ICTY, became subject to legal debate in 2013 when the ICTY Appeals Chamber acquitted General Momčilo Perišić.[58] The jurisprudence of the ICTs did promulgate that the *actus reus* of aiding and abetting, as an international criminal liability form, embodied, until the Appeals Chamber judgment in the *Perišić* case:

> …an accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime for which he is to be hold responsible.[59]

This is contrasted by the conviction rendered by the Appeals Chamber of the SCSL of Charles Taylor in its judgment of 26 September 2013 on the basis of aiding and abetting. Similar to General Perišić, Charles Taylor – at that time President of Liberia – was not proximate to the battlefield (i.e. Sierra Leone). As the Appeals Chamber of the SCSL held in the *Taylor* case:

> this requirement ensures that there is a sufficient causal, a 'culpable', link between the accused and the commission of the crime before an accused's acts and conduct may be adjudged criminal.[60]

In other words, the principle developed by international criminal tribunals was that the *actus reus* of aiding and abetting revolves around assistance

55 *Prosecutor v. Momčilo Perišić*, Appeals Chamber Judgment, Case No. IT-04-81-A, February 28, 2013.

56 *Prosecutor v. Charles Ghanakay Taylor,* Appeals Chamber Judgment, Case No. SCSL-03-Ol-A, September 26, 2013; *Prosecutor v. Sainović* et al., Appeals Chamber Judgment, Case No. IT-05-87-A, February 26, 2009.

57 *Prosecutor v. Perišić*, "Appeals Judgment," February 28, 2013, para. 48; *Mrkšić and Šljivančanin,* Appeal Judgment, para. 159; see also *Orić* Appeal Judgment, para. 43; *Blaškić* Appeal Judgment, para. 49.

58 *Prosecutor v. Perišić*, "Appeals Judgment," February 28, 2013, para. 36.

59 *Prosecutor v. Taylor*, "Appeals Judgment," September 26, 2013, para. 475.

60 Ibid.

having had a substantial effect on the crimes, rather than the particular manner in which such assistance is provided.[61] An important question that had to be addressed in the *Perišić* case was whether the accused, while being remote from the crimes of the principle perpetrators, could be held liable for aiding and abetting. The Appeals Chamber recalled the standard for the *actus reus* of criminal liability for aiding and abetting, which was set in 1999 by the Appeals Chamber in the *Tadić* case:

> The aidor and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, torture, wanton destruction of civilian property, etc.), and this support has had a substantial effect upon the perpetration of the crime.[62]

The ICTY Appeals Chamber in *Perišić* did not cite the full paragraph of the *Tadić* judgment, which continues saying:

> By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of a *common plan or purpose*.[63]

A "common plan or purpose" aims at JCE liability – which will be discussed in subsequent paragraphs – and this was exactly what was being discussed in the *Tadić* case; the aiding and abetting liability was merely addressed in order to demonstrate the difference between the two liability modes. This was acknowledged by the *Perišić* Appeals Chamber, outlining that the *Tadić* judgment indicated that "specific direction" is meant to secure a closer link between the alleged aidor and abettor and the crimes of the principal perpetrator(s) as opposed to the necessary link that must be established to support convictions under a Joint Criminal Enterprise (JCE).[64] Nonetheless, the *Tadić* "standard" was applied, even though it was used in the different "*Perišić*" context (i.e. a

61 Ibid.

62 *Prosecutor v. Tadić*, Appeals Chamber Judgment, Case No. IT-94-1-A, July 15, 1999, para. 229 (emphasis added); *Prosecutor v. Momčilo Perišić*, Appeals Chamber Judgment, IT-04-81-A, 28 February 2013, para. 26.

63 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 229 (iii), emphasis added.

64 *Prosecutor v. Momčilo Perišić*, Appeals Chamber Judgment, IT-04-81-A, 28 February 2013, para. 27, 44.

commander not proximate to the crime scene). According to critics, the *Perišić* judgment did not reflect customary international law, nor was the *Tadić* judgment supported by an authoritative source.[65]

In the *Perišić* case it was beyond dispute that from September 1992 to November 1995, the VRS conducted an intense campaign of shelling and sniping in the Croatian town of Sarajevo. This resulted in numerous civilian casualties. Furthermore, in the summer of 1995, the VRS invaded the town of Srebrenica, previously labelled as a "UN safe area" for civilians. After taking over this town, the VRS was held responsible for removing and killing, a few thousand muslim civilians and persons "*hors de combat*."

Moreover, the facts underlying the *Perišić* charges relate to the Army of the Serbian Krajina ('SVK') having fired rockets on the city of Zagreb on 2 and 3 May 1995, leading to the death of civilians. The ICTY Trial Chamber qualified these acts as, *inter alia*, war crimes.

From about 26 August 1993 until 24 November 1998, Perišić was Chief of the General Staff of the Yugoslav Army ('VJ'). In this capacity, the Trial Chamber in its judgment of 6 September 2011 found that Perišić oversaw the VJ's provision of extensive logistical support to the VRS and SVK, such as infantry, artillery ammunition, fuel, training and technical assistance. The following peculiar details arose in this case:

- The Supreme Defense Council of the Federal Republic of Yugoslavia gave Perišić and the VJ the power to provide such logistical assistance. Mr. Perišić was said to have urged this Supreme Defense Council to deliver this logistic assistance to the VRS and SVK in order to win the war;
- A large number of VRS and SVK officers were retained from the VJ ranks, yet they fought – whilst remaining part of the VJ – in Bosnia and Croatia under the banners of the VRS and SVK. The payment of their salaries was perceived as support to the VRS;
- The Trial Chamber found that Perišić received information from various sources to the extent that VRS forces were engaged in criminal acts and discriminating intent against Muslims, including the VRS operation of sniping and shelling during the siege of Sarajevo.

65 See also Manuel J. Ventura, "Guest Post: Specific direction à la Perišić, the Taylor Appeal Judgment and what it could mean for the ICTY Appeals Chamber in Šainović et al. – Part II," January 9, 2014, accessed March 12, 2014, http://dovjacobs.com/2014/01/09/guest-post-specific-direction-a-la-perisic-the-taylor-appeal-judgment-and-what-it-could-mean-for-the-icty-appeals-chamber-in-sainovic-et-al-part-ii/.

As a result, the Trial Chamber held Perišić to have exercised effective control over VJ officers serving in the SVK through specific "personnel centers" created by Perišić, since he was empowered to impose binding orders to senior SVK officers. While Perišić failed to take any action to punish the responsible servicemen for the SVK's rocket attacks on Zagreb, Perišić incurred superior responsibility pursuant to Article 7(3) of the Statute.

It is quite intriguing to observe the argumentation which led the Appeals Chamber to acquit Perišić for both liability forms:

- Contrary to the Trial Chamber, the Appeals Chamber explicitly held that the doctrine of "specific direction" is an essential element of the *actus reus* of aiding and abetting, affirming that no conviction for aiding and abetting a criminal act may be entered if specific direction has not been proven.[66]
- Accordingly, the Appeals Chamber, reviewing the evidence *de novo*, did not find that Perišić's military aid to the VRS was specifically directed to aid and abet the charged VRS crimes.
- First and foremost, the Appeals Chamber observes that the trial judges did not find all VRS actions to be criminal in nature; rather only certain actions of the VRS were deemed criminal.
- Hence, the providence of military aid to the VRS's general war effort, did not in itself constitute the requisite criterion of "specific direction" in that such aid – *eo ipso* – was specifically directed at aiding the VRS crimes.
- After all, assistance from one army to another army's war actions are in itself not sufficient to vest criminal liability for military commanders who provide such aid, absent proof of 'specific direction' to criminal acts.[67]
- Yet, this notion, as the Appeals Chamber reasons, may not be interpreted as to empower military officers to evade criminal responsibility through simply subcontracting the commission of criminal acts.
- The core issue is that the Prosecutor must establish a sufficient and clear link between the alleged aider and abettor and the particular crime, whereby the proximity of the accused (the alleged aider and abettor) to the crime scene is a decisive factor.

The alleged assistance of Mr. Perišić, as Chief of the General Staff of the Yugoslav Army (VJ), to the Army Republika Srpska ("VRS"), was remote from the crimes of the principal perpetrators. The Appeals Chamber argued that this remoteness required an explicit analysis of specific direction.[68] The rationale

66 *Prosecutor v. Perišić*, "Appeals Judgment," February 28, 2013, para. 73.

67 Ibid.

68 Id., para. 42.

for "temporal distance," which implies that a link between the aidor and abettor's actions and the principal perpetrator's actions decreases if there is a significant temporal distance between the two actions, could, according to the Appeals Chamber, be applied by analogy to other separating factors, such as geographic distance.[69] After reviewing the evidence, the Majority opined that it had not been established beyond reasonable doubt that Perišić carried out "acts specifically directed to assist, encourage or lend moral support to the perpetration of [the] certain specific crime[s] committed by the VRS," and accordingly reversed his conviction for aiding and abetting.[70] Judge Lui strongly dissented with the Majority's view, arguing that specific direction has not been consistently applied in past cases.[71] Moreover, the Majority simply restated the language of the *Tadić* Appeal Judgment, without expressly applying the specific direction requirement to the facts of the case.[72] Raising the threshold of aiding and abetting liability, Judge Lui argued, risks undermining the very purpose of this liability mode as "those responsible for *knowingly* facilitating the most grievous crimes" may now evade responsibility.[73]

The acquittal of General Perišić was contrasted by the conviction rendered by the Appeals Chamber of the SCSL of Charles Taylor in its judgment of 26 September 2013 on the basis of aiding and abetting. Similar to General Perišić, Charles Taylor – at that time President of Liberia – was not proximate to the battlefield (i.e. Sierra Leone).[74] The SCSL did not follow the ICTY Appeals Chamber's line of reasoning in *Perišić* in that the acts of the aidor and abettor must be specifically directed at the crime of the principal perpetrator. The SCSL Appeals Chamber defined the *actus reus* condition of aiding and abetting liability under Article 6(1) SCSLSt., based upon customary international law, as constituting: "assistance, encouragement or moral support that has a substantial effect on the crimes, not the particular manner in which such assistance is provided."[75] The reasons for rejecting the element of specific direction as part of the *actus reus* of aiding and abetting liability, were contemplated as follows:

– The post-Second World War jurisprudence nor State practice did not dictate an *actus reus* element of "specific direction," in addition to prove that the

69 Id., para. 40.

70 Id., para. 73.

71 Id., partially dissenting opinion Judge Lui, para.3.

72 Id., para.2.

73 Id., para. 3, emphasis added.

74 *Prosecutor v. Taylor*, "Appeals Judgment," September 26, 2013; *Prosecutor v. Taylor*, Trial Judgment, SCSL-03-01-A, 26 April 2012.

75 *Prosecutor v. Taylor*, "Appeals Judgment," September 26, 2013, para. 368, 481.

accused's acts and conduct had a substantial effect on the commission of the crimes.

- The Appeals Chamber in *Perišić* did not find that "specific direction" was an element under customary international law.[76]
- The Appeals Chamber in *Perišić* abstained from a "clear, detailed analysis of the authorities supporting the conclusion that 'specific direction' *is* an element of the *actus reus* of aiding and abetting liability under customary international law".[77]
- The SCSL Appeals Chamber observed that the *Perišić* Appeals Chamber judgment was not persuasive in this regard since a previous ICTY Appeals Chamber judgment in the *Mrkšić* and *Sljivančanin* cases held that "specific direction" was "not an essential ingredient of the *actus reus* of aiding and abetting".[78]
- As observed, the ICTY Appeals Chamber, assessing the culpability of General Perišić, took into account the non-proximity of him to the crime scene. The SCSL Appeals Chamber does not believe physical proximity to be a decisive element which could differentiate between culpable and innocent conduct. Rather, it emphasizes that acts of aiding and abetting can be made at a time and place removed from the actual crime, whilst an accused being physically distant from the commission of the crime, can in fact be "…in proximity to and interact with those ordering and directing the commission of crimes."[79]

The SCSL furthermore explicitly outlined why the *Perišić* Appeal's Chamber erred in its interpretation of the *Tadić* judgment:

> The ultimate precedent identified by the *Perišić* Appeals Chamber was the *Tadić* Appeal Judgment. That Judgment did not, however, canvas customary international law regarding the elements for aiding and abetting liability, and its discussion of aiding and abetting was limited to explaining the differences between aiding and abetting liability and joint criminal enterprise liability. The Appeals Chamber is further not persuaded by the *Perišić* Appeal Chamber's analysis of the ICTY Appeals Chamber's jurisprudence on 'specific direction'. The *Mrkšić and Sljivančanin* Appeals Chamber held that 'the Appeals Chamber has confirmed that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and

76 Id., para. 476.
77 Id., para. 477.
78 Id., para. 478.
79 Id., para. 480.

> abetting'. The *Lukić and Lukić* Appeals Chamber then held that there were no cogent reasons to deviate from the holding of the *Mrkšić and Sljivančanin* Appeal Judgement that specific direction is not essential to the *actus reus* of aiding and abetting liability.[80]

As to the *mens rea* criterion of aiding and abetting international crimes, the Appeals Chamber in the Charles Taylor case stressed:

> …an accused's knowledge of the consequence of his acts or conduct – that is, an accused's "knowing participation" in the crimes – is a culpable *mens rea* standard for individual criminal liability.[81]

On 23 January 2014, the ICTY Appeals Chamber returned to the "old" standard when it issued its judgment in *Šainović et al.*,[82] in which the Majority argued:

> '[S]pecific direction' is not an element of aiding and abetting liability under customary international law. Rather, as correctly stated in the *Furundžija* Trial Judgement and confirmed by the *Blaškić* Appeal Judgement, under customary international law, the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." The required *mens rea* is "the knowledge that these acts assist the commission of the offense." The Appeals Chamber reaffirms the position taken by the *Blaškić* Appeal Judgement in this regard.
>
> Accordingly, the Appeals Chamber confirms that the *Mrkšić and Šlivančanin* and *Lukić and Lukić* Appeal Judgements stated the prevailing law in holding that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting," accurately reflecting customary international law and the legal standard that has been constantly and consistently applied in determining aiding and abetting liability. Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.[83]

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80 Id., para. 478.

81 Id., para. 483.

82 *Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Appeals Chamber Judgment, IT-05-87-A, January 23, 2014.

83 Id., para. 1650.

Following this decision, the ICTY Prosecutor submitted a motion for reconsideration of the *Perišić* Appeal Judgment, requesting the Appeals Chamber to:

> take the next necessary step to remedy the confirmed error by reconsidering the *Perišić* Appeal Judgment and deciding on *Perišić* criminal responsibility for aiding and abetting the crimes in Sarajevo and Srebrenica on the basis of the correct legal standard.[84]

Judge Tuzmukhamedov appended a dissenting opinion to the *Šainović et al.* judgment, arguing that the Appeals Chamber should not have taken a stance on the "specific direction" criterion, as "remoteness" was not at issue in this case and thus a discussion would have better been left for "cases where this matter is clearly relevant to the conviction of an accused and the parties have reason and opportunity to focus their full attention on it."[85] Full attention will surely be given to this issue on appeal – which is currently pending – in the case of *Stanišić and Simatović* who were acquitted by the ICTY Trial Chamber because – pursuant to the *Perišić* Appeals Chamber Judgment – specific direction could not be proven.[86]

The standing jurisprudence on the *actus reus* of aiding and abetting liability thus seems to dictate the essential element to be "…whether the acts and conduct of an accused can be said to have had a substantial effect on the commission of the crime charged."[87] Standing jurisprudence further dictates that this criterion equally applies to personal culpability for:

- Ordering
- Planning
- Instigating.[88]

3.4.2 The Nature of Aiding and Abetting

An overview of the international criminal tribunals' jurisprudence shows that convictions have been rendered for aiding and abetting liability for:

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84 Statement of Prosecutor Serge Brammertz in relation to the motion for reconsideration submitted by the Prosecution in the *Perišić* case, February 3, 2014, accessed March 11, 2014, http://www.icty.org/sid/11447.

85 *Prosecutor v. Šainović* et al., "Appeals Judgment," January 23, 2014, dissenting opinion of judge Tuzmakhamedov, para. 46.

86 *Prosecutor v. Jovica Stanišić and Franko Simatović*, Judgment, Trial Chamber I, Case No. IT-03-69-T, May 30, 2013, para. 1264.

87 *Prosecutor v. Taylor*, "Appeals Judgment," Case No. SCSL-03-01-A, September 26, 2013, para. 468.

88 Ibid.

– The rape of a single victim;
– Attacks on peacekeepers;
– Detention, ill-treatment and forcible transfer throughout a municipality;
– Killings, torture, destruction of homes and religious institutions;
– Persecution in a region;
– Persecution throughout a state;
– Genocide.[89]

The nature of acts and conduct potentially incurring aiding and abetting liability encompasses a wide variety of types:

– Providing weapons and ammunition, vehicles, fuel or personnel;
– Standing guard, transporting perpetrators to the crime site;
– Establishing roadblocks;
– Escorting victims to crime sites or falsely encouraging victims to seek refuge at an execution site;[90]
– Providing financial support to an organization committing crimes;
– Expelling tenants;
– Dismissing employees;
– Denying victims to refuge or identifying a victim as a member of the targeted group.[91]

The seniority of the defendant may have a decisive effect on whether to qualify an act as having substantial effect on the commission of crimes. Case law indicates that this may be the case in the following situations:

– Signing decrees;
– Attending meetings and issuing reports;
– Allowing troops to be used to assist and commit crimes;
– Demanding slave labor to satisfy the needs of industries;
– Issuing directives and drafting laws;
– Endorsing official decisions to disarm victim groups;
– Working together with police, army and paramilitaries to maintain a system of unlawful arrests and detention;
– Deliberately not providing adequate medical care to detention facilities;[92]

89 Id., para. 369.
90 Ibid.
91 Ibid.
92 Ibid.

– Making a speech to a crowd of listeners encouraging them to commit crimes and implementing a media campaign to incite hatred against a group.[93]

The jurisprudence of the tribunals also lends support to the notion that performing a certain profession can have a substantial effect on the commission of crimes when acts have been conducted in the particular professional role, for example, as can be the case of prosecutors, judges, religious leaders.[94] One striking example is to be found in the *Fofana and Kondewa* SCSL Trial Chamber judgment of 2 August 2007 in which the SCSL accepted that the actions of Kondewa (addressing rebel fighters and giving his blessings for their criminal acts as being the High Priest) amounted to aiding and abetting.[95] The Trial Chamber observed that no rebel fighter would go to war without Kondewa's blessings due to Kondewa's "mystical powers that made them immune to bullets…"[96]

The foregoing analysis underscores the extensive nature of aiding and abetting as a liability form. This is further reinforced by two other elements:

– A defendant can be convicted for aiding and abetting even if the principal perpetrator is not convicted or even identified;[97]
– For aiding and abetting liability it is not required that the principal perpetrator knew of the aider and abettor's assistance to him or her.[98]

3.5 *Superior Responsibility*

Under the doctrine of superior responsibility, superiors may be held accountable for acts committed by their subordinates. Superior responsibility arises when a superior fails to act upon crimes committed by subordinates, while he or she knew or should have known that crimes were being committed. It thus entails the omission to act, the superior is not necessarily complicit in the act. In 1615, Hugo Grotius captured the essence of this concept when he wrote: "we

93 Ibid.
94 Ibid.
95 *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Trial Chamber Judgment, Case No. SCSL-04-14-T, August 2, 2007.
96 *Prosecutor v. Taylor*, "Appeals Judgment," September 26, 2013, see in particular footnote 1154.
97 Id., para. 370.
98 Ibid.

must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime."[99]

The concept of superior responsibility extends to both military and non-military (political, civilian) superiors, whereas command responsibility embraces military superiors and *de facto* commanders. The criteria outlined in the jurisprudence of the ICTs are nearly the same for both military and non-military superiors.[100] The Rome Statute, in Article 28, distinguishes between military commanders and non-military superiors. A military commander may be held responsible for crimes committed by forces under his effective command and control, as a result of his or her failure to exercise control. Criminal liability arises where:

(i) That military commander or person knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(ii) That military commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[101]

Likewise, a non-military superior incurs criminal responsibility for acts committed by his subordinates under his or her effective authority and control, if:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[102]

Unlike superior responsibility under Article 28(a) ICCSt., the "should have known" standard does not apply to non-military superiors.

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99 Hugo Grotius, *De Jure Belli ac Pacis* (1615), Book II, ed. F.W. Kelsey c.s. (New York/London: Oceana Publications Wildy & Son, 1964), 523.

100 For this reason, "command responsibility" and "superior responsibility" are used as interchangeable concepts in this chapter.

101 Article 28(a) ICCSt.

102 Article 28(b) ICCSt.

The ICCSt. provisions reflect established case law of ICTs, according to which superior responsibility arises when the following three criteria are met:

i. The existence of a superior-subordinate relationship;
ii. The superior knew or had reason to know that the criminal act was about to be or had been committed; and
iii. The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[103]

These three elements were first enacted in the *Čelebići* case in 1998. Since then they have been firmly established in the case law of the ICTs.[104] A fourth element developed in the *Orić* judgment; the ICTY Appeals Chamber held that an international crime committed by the subordinate (i.e. the principal perpetrator) must be established.[105]

With respect to the first element, the ICTY Appeals Chamber determined that in order to establish a superior-subordinate relationship, effective control over a subordinate has to be proven beyond reasonable doubt. In this regard, a finding of "effective control" does not require a direct or formal subordination in order to establish superior responsibility. As the Appeals Chamber of the ICTY discerned: "rather, the Accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator."[106] The ability to exercise effective control in that material power on part of a superior to prevent or to punish can be proven, cannot easily be established without the existence of a (formal) relationship of subordination.[107] In other words, superior responsibility can be accepted, both in the event of a formal *de jure* but also in the event of *de facto* power. Superior responsibility extending to "civilian" superiors – thus without a formal subordination – was confirmed by the ICTR in the case of Alfred Musema who, as the owner of a tea factory, was held criminally responsible as a superior for Hutu killings committed by his subordinates.[108] Article 6(3) ICTRSt provides:

103 *Prosecutor v. Halilović*, Appeals Chamber Judgment, Case No. IT-01-48-A, October 16, 2007, para. 59.

104 *Prosecutor v. Delalić* et al. (Čelebići case), Trial Chamber Judgment, Case No. IT-96-21-T, November 16, 1998, para. 346.

105 *Prosecutor v. Naser Orić*, Trial Chamber Judgment, Case No. IT-03-68-T, June 30, 2006, para. 294; *Prosecutor v. Naser Orić*, Appeals Chamber Judgment, Case No. IT-03-68-A, July 3, 2008, para. 48.

106 *Prosecutor v. Halilović*, "Appeals Judgment," October 16, 2007, para. 59.

107 Ibid.

108 *Prosecutor v. Alfred Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A, January 27, 2000.

> The fact that any of the acts…was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[109]

The Trial Chamber considered that "the influence at issue in a superior-subordinate relationship often appears in the form of psychological pressure," which was particularly relevant in the case of Mr Musema, who was a prominent person, both politically and socially, in the Gisovu Commune.[110] The question to be determined in the case of Mr. Musema was the extent of his power of control over persons who were not *a priori* under his authority or, in other words "to determine the extent to which the superior – notably Alfred Musema – exercised power, whether *de jure* or *de facto*, over the actions of his indirect subordinates."[111]

The second element (i.e. knew or had reason to know) entails the *mens rea* of superior responsibility. In its Statute, the ICC added the element of "consciously disregarding information" for non-military superiors, whilst, in case of military superiors, a lower threshold applies, namely that of "owing to the circumstances at the time, should have known," that underlying crimes were being committed. "Knew" requires proof of actual knowledge; "reason to know" requires proof of some grounds through which the superior could have become aware of the subordinate's crimes.[112] As superior responsibility for military commanders embraces a negligence standard, the requisite mental element implies that "an accused must have been aware of his position as a superior and of the reason that should have alerted him to relevant crimes of his subordinates."[113] Actual knowledge of the accused may be inferred from circumstantial evidence, such as a superior's position, but status alone will not suffice (i.e. knowledge must be supported by additional factors).[114] Additional factors may include: the type and scope of the illegal acts, time frame of the illegal acts, the logistics involved, the *modus operandi* of similar illegal acts, the officers and staff involved, the location of the commander, the tactical

109 See also Article 7(3) ICTYSt.

110 *Prosecutor v. Musema*, "Trial Judgment," January 27, 2000, para. 140.

111 Id., paras. 144, 148.

112 *Prosecutor v. Orić*, "Trial Judgment," June 30, 2006, para. 317.

113 Id., para. 318.

114 Id., para. 319.

tempo of operations, the geographical location and widespread occurrence of the acts.[115]

The requisite level of knowledge is – as the ICCSt. dictates – not equal for both military and non-military superiors. Also, in practice, the evidentiary threshold turns out to be higher for superiors who exercise more informal types of authority than superiors who operate within a highly disciplined and formal chain of command, since the various indications must be assessed in light of the accused's position of command.[116] Yet, in the SCSL-case of *Brima et al.*, the judges did not differentiate between a "jungle army" and a "traditional army."[117] Besides actual knowledge, which may be inferred from either direct or circumstantial evidence, a superior may also incur responsibility if he had "reason to know" (also referred to as "imputed knowledge") that his subordinates committed or were about to commit crimes.[118] "Reason to know" ought to be demonstrated through information in the superior's possession, which put him on notice of possible criminal acts by his subordinates.[119] The information must have been available to the superior and must have indicated the need for additional investigation to ascertain whether crimes were being committed or were about to be committed.[120] The criterion of "reason to know" does not require intent, let alone malicious intent, but it goes beyond solely negligent ignorance, as it requires "the superior's factual awareness of information which, due to his position, should have provided a reason to avail himself or herself of further knowledge."[121]

As to the third element (i.e. failure to prevent or punish), what matters is the existence of a material ability to prevent and punish. This ability can

115 Indicia listed in the Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, p. 17, cited from: *Prosecutor v. Orić*, "Trial Judgment," June 30, 2006, para. 319.

116 *Prosecutor v. Orić*, "Trial Judgment," June 30, 2006, para. 320, referring to *Kordić* Trial Judgement, para. 428; *Naletilić* Trial Judgement, para. 73; *Galić* Trial Judgement, para. 174; *Halilović* Trial Judgement, para. 66.

117 *Prosecutor v. Brima, Kamara and Kanu* (AFRC Case), Appeals Chamber Judgment, Case No. SCSL-2004-16-A, February 22, 2008.

118 *Prosecutor v. Orić*, "Trial Judgment," June 30, 2006, para. 320, referring to *Prosecutor v. Delalić* et al. (Čelebići), "Trial Judgement," November 16, 1998, paras. 387 *et seq*., 393; *Blaškić* Trial Judgement, para. 332; *Bagilishema* Trial Judgement, para. 46.

119 This information may be written or oral or may be inferred from the circumstances, see *Prosecutor v. Orić*, "Trial Judgment," June 30, 2006, para. 323.

120 Id., para. 320, referring to *Prosecutor v. Delalić* et al. (Čelebići), "Trial Judgement," November 16, 1998, para. 393.

121 *Prosecutor v. Orić*, "Trial Judgment," June 30, 2006, para. 324.

also exist outside a superior–subordinate relationship.[122] The ICTY Appeals Chamber in this regard mentions the example of a police officer who by virtue of his position is able to prevent or punish crimes under his jurisdiction; however this mere fact does not make him a superior under the doctrine of superior responsibility for any crimes committed by individuals within this jurisdiction.[123] The ICTY Appeals Chamber determined in *Čelebići* that effective control applies to both *de jure* and *de facto* superiors and that, when determining responsibility:

> [I]t is necessary to look to effective exercise of power or control and not to formal titles.…In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.[124]

The Prosecutor bears the burden of proof to demonstrate that the accused had effective control over his subordinates.[125] In the *Halilović* Appeals Chamber judgment, the judges enumerated several factors, indicative of effective control:

- the accused's position;
- his capacity to issue orders;
- his position within the military or political structure;
- the procedure for appointment;
- the actual tasks performed;[126]
- the capacity to issue orders.[127]

Importantly, in the *Hadžihasanović* judgment the ICTY Appeals Chamber set forth the principle, as confirmed in the *Halilović* judgment, that an accused cannot be charged under the doctrine of superior responsibility for crimes

122 *Prosecutor v. Halilović*, Appeals Chamber Judgment, Case No. IT-01-48-A, October 16, 2007, para. 59.

123 Id., para. 59.

124 *Prosecutor v. Delalić* et al. (Čelebići), "Appeals Judgment," February 20, 2001, para. 197.

125 *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Appeals Chamber Judgment, Case No. IT-01-47-A, April 22, 2008, para. 21.

126 *Prosecutor v. Halilović*, "Appeals Judgment," October 16, 2007, para. 66.

127 Id., para. 70.

committed by a subordinate before the accused assumed command over this subordinate.[128]

As a consequence, the ICTY Appeals Chamber requires that several material facts must be pleaded in the indictment in order to validly prosecute an accused on the basis of superior responsibility. The first fact which is necessary for such a plea is that the indictment clearly should allege:

(1) that the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
(2) the criminal acts of such persons, for which he is alleged to be responsible;
(3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
(4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[129]

In the *Halilović* case, the ICTY Appeals Chamber concluded that the prosecution had failed to timely, clearly and consistently inform the defence that even if Halilović was not *de jure* or *de facto* commander of the specific military operation, he allegedly still had effective control over the perpetrators of the crimes charged in the indictment, on the basis of his position as the most senior ranking officer of the army of Bosnia and Herzegovina due to his position as a Team Leader.[130]

In its judgment of 22 April 2008 in *Prosecutor v. Hadžihasanović*, the ICTY Appeals Chamber provided two additional refinements of the criterion for superior responsibility, namely the scope of a superior's duty to punish and the causal link between a commander's failure to act and his subordinates' crimes. As to the latter element, it is well-established in jurisprudence that causality is not a requirement of superior responsibility, since:

> [T]he nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set

128 Id., para. 67.
129 Id., para. 78.
130 Id., para. 97.

> out in Article 7(1), does not require a causal link. Command responsibility is responsibility for omission, which is culpable due to the duty imposed by international law upon a commander. If a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability imposed under Article 7(3).[131]

Accordingly, causality as a separate element within the scope of Article 7(3) ICTYSt. was not adopted. The Appeals Chamber further recalled its finding in the *Blaskić* judgment, holding that proof by the Prosecution of a causal relationship "between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes," is not required in all circumstances of a case.[132] The Appeals Chamber in *Hadžihasanović* determined the following refinement:

> Considering that superior responsibility does not require that a causal link be established between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, there is no duty for an accused to bring evidence demonstrating that such a causal link does not exist. The Appeals Chamber considers that the Trial Chamber erred in law by making such finding.[133]
>
> ...
>
> In the present case, the Trial Chamber examined the issue of the causality between a commander's failure to act and his subordinates' crimes when it assessed Hadžihasanović's responsibility in relation to the crimes committed at the Orašac camp in October 1993. It found that 'by deciding not

131 *Prosecutor v. Hadžihasanović and Kubura*, "Appeals Judgment," April 22, 2008, para. 30, referring to: *Halilović* Trial Judgment, para. 78; similarly, the ICTY Trial Chamber held in the *Čelebići*-case that it "...has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject," see *Prosecutor v. Delalić* et al. (Čelebići), "Trial Judgment," November 16, 1998, para. 398.

132 *Prosecutor v. Hadžihasanović and Kubura*, "Appeals Judgment," April 22, 2008, para. 38, referring to *Blaškić* Appeal Judgment, para. 77.

133 *Prosecutor v. Hadžihasanović and Kubura*, "Appeals Judgment," April 22, 2008, para. 40.

> to use force against his subordinated troops and by deciding, on the contrary, to adopt a passive attitude towards resolving the ongoing crisis, the Accused Hadžihasanović failed to take the necessary and reasonable measures, in view of the circumstances of the case, in order to prevent the crimes of murder and mistreatment which he had reason to believe [were] about to be committed'. This demonstrates that the Trial Chamber first correctly assessed whether the measures taken were 'necessary and reasonable'. It then turned to examine whether Hadžihasanović 'could have prevented the crimes of murder and mistreatment by using force…against the El Mujahedin detachment', though such assessment was not needed.[134]

As to the former element (i.e. the scope of a superior's duty to punish), the Appeals Chamber held the following:

> As the Appeals Chamber previously held, 'what constitutes [necessary and reasonable] measures is not a matter of substantive law but of evidence'; the assessment of whether a superior fulfilled his duty to prevent or punish under Article 7(3) of the Statute has to be made on a case-by-case basis, so as to take into account the 'circumstances surrounding each particular situation'. Under Article 86 of Additional Protocol I, for example, superiors have a duty to take 'all feasible measures within their power' to prevent or punish a breach of the laws of war and, under Article of Additional Protocol I, such 'feasible measures' may take the form of both 'disciplinary or penal' measures. It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute. In other words, whether the measures taken were solely of a disciplinary nature, criminal, or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under Article 7(3) of the Statute. The Prosecution's argument is dismissed.[135]

Article 28 ICCSt. has adopted almost similar principles for superior responsibility as the ICTY, in order to vest liability for the crimes as laid down in the ICCSt. In the *Bemba* case before the ICC, the Pre-Trial Chamber held that the element of causality (between a superior's failure to prevent or punish and crimes committed by his subordinates) is restricted to a duty to prevent future crimes; it is only necessary to prove that the commander's omission increased the risk of future crimes, which can be inferred from his past failure to punish

134 Id., para. 41; internal footnotes omitted.

135 Id., para. 33; internal footnotes omitted.

crimes.[136] The innovative element of Article 28 ICCSt. is, however, the distinction between two types of superior responsibility; for military commanders or equivalent persons and for civilian "superiors". As to the former, negligence suffices, while as to the latter, a higher test (recklessness) is required.

3.6 *Joint Criminal Enterprise*

3.6.1 ICTY Case Law as Origin

Joint Criminal Enterprise (JCE) constitutes a liability mode, which, according to the ICTY Appeals Chamber in *Tadić* – where this concept was first developed – "warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design."[137] An individual who did not physically commit the crimes charged, may nonetheless be held criminally responsible for a crime that went beyond the agreed object of that crime, presupposing that the criteria of one of the three categories (JCE I, II, or III) discussed in section 3.6.2. are met. The application of the special concept of individual criminal responsibility, may result in the judicial finding that all participants in a JCE are equally guilty of the crime regardless of their individual roles in the commission of the crime.[138] Moreover, the seriousness of what is allegedly committed by a participant in a JCE, who is not the principal offender, is, according to the ICTY, greater than what is done by one who merely aids and abets the principal offender. This is because the former, unlike the latter, must share the intent of the principal offender.[139]

3.6.2 Application in Case Law

In *Prosecutor v. Krnojelac,* the ICTY Trial Chamber defined a joint criminal enterprise as:

> …an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons

136 *Prosecutor v. Bemba*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," Pre-Trial Chamber II, Case No. ICC-01/05-01/08-424, June 15, 2009.

137 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 193.

138 *Brdanin and Talic*, Case No. IT-99-36-T, May 11, 2000, para. 15.

139 *Prosecutor v. Milorad Krnojelac,* Trial Chamber Judgment, Case No. IT-97-25-T, March 15, 2002, paras. 72–77.

> are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement formed between them then and there to commit that crime.[140]

After having defined this concept, the ICTY declared that an accused can participate in a joint criminal enterprise in three ways:

1. by participating directly in the commission of the agreed crime itself (as a principal offender);
2. by being present at the time when the crime is committed and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or
3. by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system (the so-called JCE of the third category).[141]

The ICTY, in applying the doctrine of joint criminal enterprise, requires a clear evidentiary link between the theory and the particular crimes with which the accused has been charged. The *Krnojelac* case provides an example of this requirement. The ICTY considered that the following conditions must be fulfilled with respect to holding the accused criminally accountable for the charge of persecution:

> To attach criminal responsibility to the Accused for the joint criminal enterprise of persecution, the Prosecution must prove that there was an agreement between himself and the other participants to persecute the Muslim and other non-Serb civilian male detainees by way of the underlying crimes found to have been committed, and that the principal offenders and the accused shared the intent required for each of the underlying crimes and the intent to discriminate in their commission.[142]

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140 Id., para. 80.

141 Id., para. 81.

142 Id., para. 487; see for this requisite link as regards other crimes, paras. 127, 170, 315, 346 and 427; Daryl A. Mundis, "Current Developments at the *ad hoc* International Criminal Tribunals," *Journal of International Criminal Justice* 1 (2003): 206.

The Prosecutor must establish:

i. the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed. The arrangement or understanding need not be express, and it may be inferred from all the circumstances. The fact that two or more persons are participating together in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act;[143] and
ii. that the accused shared a common state of mind – the state of mind required for that crime – with the person who personally perpetrated the crime charged (the "principal offender"); a mutual understanding that the crime charged should be carried out. Where the prosecution relies upon proof of state of mind by inference, that inference must be the *only* reasonable inference available on the evidence.[144]

As mentioned above, three different forms of JCE have emerged in the jurisprudence of the ICTY, which entail different levels of proof. Criminal responsibility may arise:

(a) when all the participants in the criminal enterprise, acting pursuant to a common design, share the same criminal intent (JCE I);[145]
(b) where the accused was aware of the nature of the particular organized (criminal) system and that such a crime was a possible consequence of the execution of that enterprise and, with that awareness, participated in that enterprise. This second category is associated with the concentration camp cases or situations alike, drawing upon the World War II camp cases (JCE II);[146] and
(c) when, even though all of the participants share a common intention to commit specific acts, one of them commits an act outside the scope of

143 *Prosecutor v. Vasiljević*, Judgment, Trial Chamber II, Case No. IT-98-32-T, November 29, 2002, para. 66.

144 Id., para. 68.

145 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, paras. 196–201; the accused must voluntarily participate in one aspect of the common design, for instance, by providing material assistance; also, the accused must intend this result.

146 Id., paras. 202–203; see *Prosecutor v. Brdanin and Talic*, Decision on Form of Further Amended Indictment, Case No. IT-99-36-PT, June 26, 2001, para. 30; see also *Prosecutor v. Vasiljević* case, "Trial Judgment," November 29, 2002, paras. 63–69.

the common plan but which was a "natural and foreseeable consequence" of carrying out the common plan or purpose (JCE III).[147] The two requirements for this form of participation are: criminal intent to participate in a common criminal design, and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.[148]

The distinction between JCE I and II on the one hand, and JCE III on the other, is that the first two require proof that the accused shared the intent of the principal offenders of the crime.

The *actus reus* of the JCE is equal for all three categories, and requires:

(i) *A plurality of persons*. They need not be organized in a military, political or administrative structure, as is clearly shown by the Essen Lynching and the Kurt Goebell cases.
(ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
(iii) *Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute*. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[149]

The *mens rea* element is different for each JCE, as will be outlined in the subsequent section.

JCE I

The *intent* to perpetrate a certain crime, which intent is shared by all members of the group (i.e. the co-perpetrators), forms the *mens rea* element of JCE I.[150]

147 Id., paras. 204–219; this third category relates for instance to mob violence, that is, situations of disorder where multiple offenders act out a common purpose.

148 Id., para. 206.

149 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 227.

150 Id., para. 228.

JCE I requires a common design, a concept that was elaborated upon in 1951 by the US Tribunal sitting at Nuremberg in the *Einsatzgruppen* case, holding that:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corps…Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility…Any member who assisted in enabling these units [*Einsatz* units, with the mission to carry out a large scale program of murder] to function, knowing what was afoot, is guilty of the crimes committed by the unit."[151]

It must be noted, however, that many post-World War II trials held in other countries (e.g. Germany, Italy), did not rely on the notion of common plan or design *per se*, but instead on the notion of co-perpetration, while embracing the approach *vis-à-vis* crimes in which two or more persons participated with a different degree of involvement.[152]

JCE II

Whereas JCE I requires proof of a common intent of the crime charged, JCE II imposes a more lenient *mens rea* standard, namely that of a common design or purpose. This form is the systemic form and derived from the "concentration camp" cases, conducted after World War II. From these cases followed that if a person is employed to run a concentration camp, either as a camp commander, a deputy commander, a cook, or a guard, he may be held criminally responsible for having run a joint criminal enterprise, as the people working at the camp had to be aware of what was going on at the camp.[153] The *actus reus* encompassed the "participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by the accused." The *mens rea* element consisted of: "(i) knowledge of the nature of the system and

151 *The United States of America v. Otto Ohlenforf* et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. IV, p. 373.

152 Cited from *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 201.

153 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, footnote 245.

(ii) the intent to further the common concerted design to ill-treat inmates."[154] What has to be proven is that the person was voluntarily working at the camp. Noticeably, the intent of the accused could, in the concentration camp cases, be inferred from the position of authority held by the accused. High rank or authority, in and of itself, already amounted to awareness of the common design and intent.[155] Thus, whereas JCE I requires a common design *and* proof of intent of the specific crime, JCE II only requires that the accused had the knowledge of the common design and had the intent to further the common purpose of that design.

JCE III

The most controversial form of JCE liability is under the extended form called JCE III, which is in fact a form of guilt by association. A person who voluntarily participates in a JCE may be held criminally responsible for acts of other members of the enterprise, if the acts were "a natural and foreseeable consequence" in the furtherance of the common purpose.[156] JCE III has its roots in the common law system's felony murder doctrine, which applies the same criteria.[157] An example, which may give rise to criminal responsibility under JCE III, can be found in the situation where a group shares the common intention of forcibly displacing other members of a group and, while pursuing this goal, a person of the displaced group is shot and killed. Even though murder may not have been agreed upon in the common design, members of the group may nevertheless incur criminal responsibility as this was "a natural and foreseeable consequence" of forcible displacement.[158] Two criteria arise: (1) the consequence (*in casu* risk of death) was a predictable outcome of the execution of the common plan, and (2) the accused was either reckless or indifferent to that risk.[159]

The requirements for JCE III, set forth in the *Essen Lynching* and *Borkum Island* case in the aftermath of World War II, are two-fold:

(1) a criminal intention to participate in a common criminal design; and
(2) the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.[160]

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154 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 203.

155 Id., para. 203.

156 Id., para. 204.

157 Michael P. Scharf, "Joint Criminal Enterprise, The Nuremberg Precedent, and the Concept of 'Grotian Moment'," in *Accountability for Collective Wrongdoing*, eds. Tracy Isaacs and Richard Vernon. Cambridge: Cambridge University Press, 2011.

158 *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 204.

159 Id., para. 204.

160 Id., para. 206.

Thus, the requisite level of *mens rea* for JCE III encompasses the intent to participate in a common design, and also that the outcome of that design must have been predictable. Mere negligence will not suffice, as it requires:

> a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.[161]

JCE III has faced criticisms because a conviction can already be reached as soon as the Prosecutor has demonstrated that the accused was part of a certain group with a shared criminal intent, which is a form of guilt by association. The ECCC therefore rejected JCE III (see *infra*). Every person who is part of that group, may be held criminally responsible for the "reasonable and foreseeable consequences" of the crimes committed by that group (e.g. a paramilitary group or a military committing atrocities). While JCE I and II require either intent towards the crime or intent towards the common purpose, under JCE III mere group membership may suffice to reach a conviction, provided that the consequences were reasonable and foreseeable.

This can be further exemplified by the atrocities committed by US soldiers during the 2003-Iraq War. In early 2004, media reports showed that military police personnel of the US Army, operating in Iraq during the US-Iraq war, had committed human rights violations against Iraqi prisoners held in the Abu Ghraib prison near Baghdad. US soldiers had physically and sexually abused, tortured and killed Iraqi prisoners.[162] If the JCE doctrine would have been applied to this situation, the following ensues. Firstly, there must be a "plurality of persons" involved, which is certainly the case, as it has been established that twenty-seven military intelligence personnel were involved in the abuse and eight persons knew of the abuse but did not act.[163] Secondly, there must be a common plan, design or purpose, amounting to the commission of a crime provided for in the Statute. Although this is not a situation that falls under one of the ICTs (see chapter 4 on jurisdictional issues), it can be

161 Id., para. 220.

162 Seymour M. Hersch, "Torture at Abu Ghraib," *New Yorker*, May 10, 2004; involved were, *inter alia*, members of the 205th Military Intelligence Brigade (who instructed Military Police personnel at Abu Ghraib), the 372nd Military Police Company, which was attached to the 320th Military Police Battalion (tasked with force protection and security for the Abu Ghraib prison), see "Investigation of Intelligence Activities At Abu Ghraib," August 23, 2004, accessed March 14, 2014, http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/26_08_04_fayreport.pdf.

163 "Investigation of Intelligence Activities At Abu Ghraib," August 23, 2004, accessed March 14, 2014, http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/26_08_04_fayreport.pdf.

argued that the personnel acted in furtherance of a common purpose, namely eliciting statements of Iraqi prisoners through torture. Thirdly, the accused must have participated in the common design, although this participation does not need to involve the commission of a specific crime. Under JCE I, all soldiers, as part of the battalion who committed the atrocities, can be held criminally responsible for human rights violations against Iraqi prisoners, as long as they shared the *intent* of the perpetrators. Thus, it must be established that they intended to torture as a means of eliciting statements, even though they need not necessarily have committed the torture. Under JCE II, all soldiers, as part of the battalion who committed the atrocities, could be held criminally responsible for human rights violations, as long as they had knowledge of the nature of the system and acted in furtherance of that system. Thus, they might not have specifically intended to torture, but they were aware of the fact that statements were elicited through torture and acted in furtherance of the system, be it as a guard, investigator or translator. In the Abu Ghraib situation, the eight persons who knew of the acts, but did not act, would fall under JCE II liability. Under JCE III, the US military – perhaps the entire military is somewhat overstated, but for a smaller group, one can think of the US military operating in Iraq, the military battalions linked to the battalions who committed the atrocities, or the interrogation units of the US military – can be held criminally responsible for the crimes committed by the US soldiers at Abu Ghraib, as long as the torture was a "reasonable and foreseeable" consequence of US military interrogation operations. For example, they agreed upon certain forms of torture, but not on more serious forms, while these forms of torture were in fact "reasonable and foreseeable" consequence of allowing some forms of torture.

3.6.3 Diverging ICTs Views

Though the ICTY Appeals Chamber argued in *Tadić* that JCE III was well-established in international criminal law, this was not followed by other tribunals, and reflects another criticism of this liability mode. The Special Tribunal for Lebanon (STL), which was established to investigate and prosecute the persons responsible for the terrorist attack on Lebanon's former Prime Minister Mr. Rafik Hariri, rejected the concept of JCE III for the crime of terrorism.[164] JCE III applies a negligence standard and this contradicts the crime of terrorism, which requires specific intent, namely, the specific intent to instill fear in a population.

164 *Prosecutor v. Ayyash* et al., "Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging," Appeals Chamber, Case No.: STL-11-01/I, February 16, 2011, p. 5.

Further, the Cambodia Tribunal (ECCC), also rejected the notion of JCE III. It held that JCE III was not customary international law in 1976–1979, when the leaders of the Khmer Rouge committed the killing field atrocities in Cambodia.[165] The *Tadić* precedent, which was followed by the ICTR, SCSL and subsequent ICTY judgments, could not be applied to the crimes committed in Cambodia, as the atrocities predated this decision. The ECCC was unwilling to infer the JCE III liability mode from the *Essen Lynchen* case, which was not a part of the Nuremberg Trial, but one of the subsequent (mini) trials. The ECCC concluded that JCE III was *not* the state of the law in 1976 and therefore, this liability mode was not something that the perpetrators "should have known" when they committed the crimes.

The ICC ruled against applying the JCE III liability mode, but instead applied the "Control Theory," developed by the German scholar Claus Roxin. This theory requires that the defendant's contribution was so "essential," that the crime would not have occurred in absence of the defendant's contribution.[166] In the Decision on the confirmation of the charges in the case of Lubanga, the ICC Pre-Trial Chamber explicitly rejected the joint criminal enterprise and instead opted for the control theory:

> The subjective approach – which is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine – 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.[167]
>
> The concept of control over the crime constitutes a third approach for distinguishing between principals and accessories…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

165 ECCC, "Decision on the Applicability of Joint Criminal Enterprise," Case File/Dossier No. 002-19-09-2007/ECCC/TC, September 12, 2011.

166 Jens David Ohlin, "Lubanga Decision Roundtable: Lubanga and the Control Theory," *Opinio Juris*, March 15, 2012.

167 *Prosecutor v. Lubanga*, "Decision on the confirmation of the charges," Pre-Trial Chamber I, Case No. ICC-01/04-01/06-803, January 29, 2007, para. 329.

> crime, control or mastermind its commission because they decide whether and how the offence will be committed.[168]

The ICC Pre-Trial Chamber continued, outlining the objective and subjective elements of this approach, which are, respectively, "the appropriate factual circumstances for exercising control over the crime" and "the awareness of such circumstances."[169]

Although the wording of Article 25(3)(d) ICCSt. resembles the notion of a JCE, as noted by the ICC Pre-Trial Chamber, the provision in the ICCSt. must be read as a "residual form of accessory liability," making 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) ICCSt., by reason of the state of mind in which the contributions were made."[170]

3.6.4 Distinction Between Joint Criminal Enterprise and other Forms of Criminal Participation

The JCE differs from aiding and abetting in that the "common criminal purpose" of the group must be established, instead of participation as an accomplice in an offence.

The doctrine of joint criminal enterprise raises the question of its relation to other forms of criminal participation particularly by means of aiding and abetting. In the *Krnojelac* case, the following distinction between these modes emerges:

i. the participant in a joint criminal enterprise must have the same intent as that of the principal offender;[171]
ii. a person charged with aiding and abetting, need only be aware of the principal offender's intent, without the requirement ad (i) to share that intent.[172]

As a consequence, the Trial Chamber attaches more gravity to acts sub (i) as opposed to acts sub (ii). In paragraph 75 of the *Krnojelac* judgment, the ICTY Trial Chamber held:

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168 Id., para. 330.

169 Id., para. 331.

170 Id., para. 337; see for individual criminal responsibility under Article 25(3)(a) ICCSt. as a result of control also *Prosecutor v. Gbagbo*, "Decision on the confirmation of charges against Laurent Gbagbo," Pre-Trial Chamber I, Case No. ICC-02/11-01/11-656-Red, June 12, 2014, paras. 233–234.

171 *Prosecutor v. Kronelejac*, Judgment, Trial Chamber II, Case No. IT-97-25-T, March 15, 2002, para. 75.

172 Id., para. 76.

> The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender.[173]

Accordingly, the Trial Chamber adopted the approach that this form of liability is to be equated with that of an accomplice, yet it may result in a more severe sentence than that imposed on the principal offender.[174]

The ICTY Appeal Chamber's acquittal of Ante Gotovina and Mladen Markač, is an example of how unpredictable the outcome of a criminal case based on JCE can be. The two accused stood trial as alleged participants in a JCE with the common objective of permanently removing the Serb population from the Krajina region, by means of persecution, deportation and forcible transfer, plunder, and destruction. Other crimes, such as murder, inhumane acts, and cruel treatment were said to be a natural and foreseeable consequence of the participation in the alleged JCE.[175] The Appeals Chamber reversed the Trial Chamber's finding that there was a JCE to permanently remove the Serb civilian population from the Krajina region.[176] An individual may be held responsible for the commission of a crime for the first form of JCE when it is established beyond reasonable doubt that:

> [a] plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place. Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this

173 Id., para. 75.

174 Id., para. 77, referring to the *Prosecutor v. Tadić*, "Appeals Judgment," July 15, 1999, para. 229.

175 *Prosecutor v. Gotovina and Markač*, "Appeals Judgment," Case No. IT-06-90-A, November 16, 2012.

176 Id., para. 98.

> goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[177]

Convictions for crimes that fall outside the scope of the common purpose, are still possible under JCE III. Such convictions require that the derivative crimes were "a 'foreseeable' possible consequence of carrying out 'the *actus reus* of the crimes forming part of the common purpose', and 'the accused, with the awareness that such a crime was a *possible* consequence of the implementation of th[e] enterprise, decided to participate in that enterprise'."[178] The Trial Chamber concluded that a JCE existed with the common purpose of forcibly removing Serb civilians from the Krajina region, which finding was primarily based on the existence of *unlawful* artillery attacks against civilians and civilian objects.[179] The Appeals Chamber (by majority) did not affirm the Trial Chamber's finding that "the only reasonable interpretation of the circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force existed."[180] Most notably, it held that the "error rate" of artillery shelling lacked foundation in the facts of the case. Since the unlawfulness of the attacks and the subsequent *forced* displacement of Serb civilians could not be proven, the basis for the Trial Chamber's conclusion that the common purpose crimes of deportation, forcible transfer, and related persecution took place, ceased to exist.[181] As the existence of a JCE could not be proven beyond reasonable doubt, the crimes adduced via JCE III, with a "natural and foreseeable consequence of the JCE's implementation," could not be upheld by the Appeals Chamber.[182]

Strikingly, after it became unclear whether the conviction under the JCE liability mode could stand, the prosecution was ordered to provide submissions

177 Id., para. 89; *Brdanin* Appeal Judgement, para. 430; *Krajišnik* Appeal Judgement, para. 662.

178 *Prosecutor v. Gotovina and Markač*, "Appeals Judgment," Case No. IT-06-90-A, November 16, 2012, para. 90.

179 Id., para. 91.

180 Ibid.

181 Id., para. 96.

182 Id., para. 97.

on the possibility of entering convictions under other liability modes, to which *Gotovina* and *Markač* had to respond.[183] The defendants claimed that entering additional convictions would infringe their fair trial rights, as it would deprive them from the possibility to appeal these convictions.[184] Nevertheless, the case proceeded before the Appeals Chamber. However, ultimately, the majority voted against a conviction for *Gotovina* on the basis of alternate liability modes. The Trial Chamber's findings that *Gotovina*: (i) conducted unlawful artillery attacks on the towns of Knin, Obrovac, and Benkovac, and (ii) failed to take additional measures, could not be upheld, as the Appeals Chamber found that the attacks were not unlawful. Consequently, the failure to take additional measures could not incur criminal liability and *Gotovina* could not be held liable for deportation.[185] Likewise, convictions on the basis of alternate liability modes could not be entered for *Markač*.[186]

183 Id., para. 99.
184 Id., para. 101.
185 Id., para. 135.
186 Id., paras. 156–157.

CHAPTER 6

International Criminal Law Defenses

1 Introduction

Criminal defenses to international crimes are perhaps the most important instrument for defense counsels operating before ICTs to challenge a charge. Their invocation requires circumspection as to the legal parameters and the facts underpinning such defenses. Firstly, a defense may be based on procedural issues. Such a defense stands apart from the question of guilt or innocence; rather it focuses on the procedural dimension of a criminal case, meaning that the defendants fair trial rights have been violated predominantly in the course of an investigation and prosecution, thereby infringing upon the defendant's fair trial rights. Procedural defenses embrace the defense of selective prosecution, the defense of prosecutorial misconduct and the defense of immunities of (former) heads of State.

Secondly, a defense may entail a justification for the crime(s) charged. A defense of justification relies on the claim that the defendant committed an alleged 'criminal' act, which was in the particular case justified. A justification defense includes claims of self-defense or defense of other persons or property.

Thirdly, a defense may entail an excuse for the crime(s) charged. This line of defense relies on the claim that the defendant committed the crime charged, but that he or she had no other choice given the circumstances – due to a certain mental state at the time the alleged crime was committed or due to a lack of *mens rea* – and should thus be excused. Defenses of excuse include defenses of insanity, duress, intoxication, diminished responsibility, and mistake of law or fact.

Fourthly, the defendant can claim actual innocence and pursue an alibi defense in which he produces evidence or testimony which demonstrates his innocence.

Several of these defenses involve questions of personal excuses, that may prevent the imposition of criminal responsibility or criminal sanctions.[1] Since conditions of exoneration differ among the world's major legal systems,[2] it is

1 M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law 2nd rev. ed.* (The Hague: Kluwer Law International, 1999), 448.

2 Ibid.

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important to analyze if, and to what extent, criminal law defenses obtain the status of "general principle of international criminal law" within the law of the contemporary international criminal tribunals.

This chapter addresses the following criminal law defenses:

(i) Procedural defenses (abuse of process, immunities, selective prosecution, prosecutorial misconduct);
(ii) Justifications (self-defense, necessity);
(iii) Excuses (duress, superior orders, insanity, intoxication, diminished responsibility);
(iv) Alibi defenses.

2 Procedural Defenses

Procedural defenses are abstracted from the question of guilt or innocence in criminal proceedings; rather they revolve around the accused's fair trial rights that have been violated by claiming that procedural rules have not been respected or that the accused has been unjustly singled out in the criminal proceedings (i.e. principle of non-discrimination). The Statutes of ICTs bestow several rights to the accused, such as the right to a fair and public hearing, the right to be present during the trial, the right to be presumed innocent until proven guilty, the right to be tried without undue delay, the right to examine witnesses and the right to disclosure of evidence.[3] A procedural defense may also aim at the exclusion of evidence, for example, when the accused made statements without presence of a lawyer or the exclusion of evidence obtained under torture.[4] This paragraph discerns procedural defenses aiming at the

3 See for example, Article 63, 66, 67 ICCSt.; Article 20 ICTRSt.; Article 21 ICTYSt.

4 The UN Convention against Torture provides that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"; the jurisprudence of international criminal tribunals indicates that evidence obtained under torture should always be excluded, see for example: *Prosecutor v. Lubanga*, Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), Case No. ICC-01/04-01/06, February 17, 2009 ("This is not evidence obtained through coercion or torture which would seriously cast doubt on its reliability"); *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, October 9, 2002 ("the Chamber holds that, in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the

exclusion of evidence, but also focusing at (permanent) stays of the proceedings and, as a result, a dismissal of the charges.

2.1 *The Doctrine of Abuse of Process*

The doctrine of abuse of process was developed in common law systems. The rationale of it being that "proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process."[5] Within the laws of the ICTs, adopting this doctrine, two refinements have been made:

(i) Abuse of process does not result in lack of jurisdiction on part of the ICTs; rather it leads to the question whether the Tribunal, while assuming jurisdiction, should exercise its discretion to refuse to try the defendant;
(ii) Only if there has been an egregious violation of the rights of the defendant, the ICTs are willing to repudiate the prosecution to try the defendant.[6]

In the *Barayagwiza* case, ICTR Appeals Chamber considered the doctrine of abuse of process. The Appeals Chamber held that a court, as a matter of discretion, may rely on the abuse of process doctrine, in either one of the following two situations:

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exercise of jurisdiction over such an accused," para. 114); *Prosecutor v. Radovan Karadžić*, Decision on Karadžić's Appeal of the Trial Chamber's Decision on Alleged Holbrooke Agreement, Case No. IT-95-5/18-AR73.4, October 12, 2009 ("The Trial Chamber further noted an *obiter dictum* in the *Nikolić* Trial Decision, according to which the Tribunal should not exercise its jurisdiction over persons who have been 'seriously mistreated' by a party not acting for the Tribunal and before being handed over to the Tribunal. Having observed that the *Nikolić* Trial Decision limited the notion of 'serious mistreatment' to situations of torture or cruel or degrading treatment, the Trial Chamber considered that the Accused did not suffer any such mistreatment, nor 'any other *egregious* violation of his rights, including his right to political activity'. Finally, the Trial Chamber expressed its position that 'it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed'." (footnotes omitted), para. 42); see also Amal Alamuddin, "Collection of Evidence," in *Principles of Evidence in International Criminal Justice*, ed. Karim A.A. Khan, Caroline Buisman and Christopher Gosnell (Oxford: Oxford University Press, 2010), 280.

5 *Jean-Bosco Barayagwiza v. the Prosecutor,* Appeals Chamber Decision, ICTR-97-19-AR72, 3 November 1999, para. 74.

6 André Klip and Göran Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals* (Antwerpen-Oxford: Intersentia, 2005), 23.

(i) "where a fair trial for the accused is impossible, usually for reasons of delay; and
(ii) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."[7]

A court may use its discretionary power to terminate the proceedings where exercising jurisdiction "in light of the *serious and egregious violations of the accused's rights* would prove detrimental to the court's integrity."[8] Yet, accountability for international crimes is deemed to be a necessary condition for obtaining international justice. Consequently, terminating the proceedings will usually be disproportionate, as a balance must be struck between "the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."[9] In the practice of ICTs, the defense of abuse of process did not yet result in a full dismissal of charges.[10]

Several other procedural defenses, such as defense of selective prosecution, the defense of (head of state) immunity and the defense of prosecutorial misconduct, are to be subsumed under the abuse of process doctrine and will be discussed in the subsequent section.

2.2 *Immunities of Former Heads of State and other State Officials as Defenses before ICTs*

An immunity defense implies that, irrespective of the charges, the defendant may not be prosecuted, because of his official capacity as an officer of a government. The basis for an immunity claim may follow from an international agreement or statute. The Vienna Convention on Diplomatic Relations, for example, is an international agreement which guarantees immunity to diplomatic agents on the territory of the host State.[11] This is a form of personal

7 *Jean-Bosco Barayagwiza v. the Prosecutor,* Appeals Chamber Decision, Case No. ICTR-97-19-AR72, November 3, 1999, para. 74, 77.

8 Id., para. 74; *Prosecutor v. Karadžić*, Decision on Karadžić's Appeal of the Trial Chamber's Decision on Alleged Holbrooke Agreement, Case No. IT-95-5/18-AR73.4, October 12, 2009, para. 45.

9 *Prosecutor v. Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, June 5, 2003, para. 30.

10 See, for example, also the case against Charles Ghanakay Taylor before the SCSL, as discussed in para. 2.3.1. *infra*.

11 Article 31(1) Vienna Convention on Diplomatic Relations reads: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State"; Thomas J. Gardner

immunity, or immunity *ratione personae*, which confers immunity to individuals holding a certain office, only as long as the person concerned holds office. Functional immunity, or immunity *ratione materiae*, on the other hand, confers immunity to persons performing acts of state.

The Charter of the Nuremberg Tribunal already barred defendants from resorting to State immunities in order to prevent criminal prosecutions.[12] Yet, it has been (partly and temporarily) successfully invoked in several cases since 1945, though only for incumbent Heads of State, heads of government and foreign ministers.[13] Such "holders of high-ranking office," as well as diplomatic and consular agents, enjoy both civil and criminal immunity from jurisdiction in foreign States.[14] Even if alleged crimes were committed *before* the term of office, personal immunity from foreign jurisdiction should be conferred to high ranking government officials, since an arrest would bar him or her from exercising official functions.[15] It is irrelevant whether the alleged acts were committed in an "official" or "private" capacity. However, personal immunity can be set aside if certain states are party to a specific treaty rule, such as the Rome Statute, which waives government officials' immunity from ICC prosecutions under Article 27 ICCSt.[16] As soon as the high ranking government official ceases to hold office, he cannot invoke *ratione personae* immunity, but *ratione materiae* immunity (i.e. "the immunity embracing the official acts performed by the State agent in the exercise of his or her official functions") might be successfully invoked as a defense, as long as the State concerned has not expressly waived immunity of former government officials.[17] Yet again this form of immunity is only relative, as treaty obligations may set aside

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and Terry M. Anderson, *Criminal Law 12th ed.* (Stamford, CT: Cengage Learning, 2014), 165.

12 Article 7 IMT Charter reads: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

13 See for example *Democratic Republic of the Congo v. Belgium*, Arrest Warrant of 11 April 2000, ICJ Judgment, February 14, 2002.

14 Id., para. 51.

15 Id., para. 54.

16 Pierre d'Argent, "Immunity of State Officials and Obligation to Prosecute," *Cahiers Du CeDIE Working Papers* 4 (2013): 7; also published in *Immunities in the Age of Global Constitutionalism, Proceedings of the Joint conference of the French and German Societies for International Law*, ed. A. Peters, E. Lagrange and S. Oeter (Leiden: Martinus Nijhoff Publishers, 2013).

17 Paola Gaeta, "*Ratione Materiae* Immunities of Former Heads of State and International Crimes: *the Hissène Habré* case," *Journal of International Criminal Justice* 1 (2003): 189.

immunities and, also, the obligation to prosecute international crimes may supersede the "obligation" to respect immunity.[18] To this end, it is important to distinguish civil suits against States from criminal cases against foreign State officials.[19] Whereas immunity of foreign States must always be respected in civil suits, this may be different for criminal cases if there exists an obligation to prosecute.

In its judgment of 14 February 2002 (the arrest warrant case of *Congo v. Belgium*), the International Court of Justice (ICJ) held that:

> the functions of a Minister of Foreign Affairs are such that…he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.[20]

The rationale behind this rule is "to ensure the effective performance of their functions on behalf of their respective States."[21] Thus, the ICJ avers that, unless the State waives immunity, the courts of a foreign state cannot prosecute such a person for international crimes allegedly committed in an official capacity during his or her period of office. By way of analogy, this view may also apply to other former high-ranking State officials, such as Heads of State and Government.[22] However, the ICJ emphasizes that *immunity* from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs should not be equated with *impunity* with respect to any crimes they might have committed, irrespective of their gravity. Thus, according to the ICJ, immunity from criminal jurisdiction and individual criminal responsibility are separate concepts.[23] Indeed, jurisdictional immunity is *procedural* in nature, whereas criminal responsibility pertains to *substantive* law so that the former concept can only temporarily bar prosecution for certain offences, but never exonerate from criminal responsibility as such once the particular official ceases to hold office.[24]

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18 d'Argent, "Immunity of State Officials," 14–15.

19 Id., 14; see for example *Germany v. Italy*, in which Germany complained that Italy did not respect Germany's sovereign immunity, because Italy, inter alia, allowed civil claims to be brought against Germany, seeking reparations for atrocities committed by the German Reich during the Second World War. The ICJ held by majority (12–13) that Italy, by allowing such claims, breached its obligations under customary international law to accord jurisdictional immunity to Germany, ICJ Judgment, February 3, 2012, para. 139.

20 *drc v. Belgium* [Arrest Warrant Case], ICJ Judgment, February 14, 2002, para. 54.

21 Id., para. 53.

22 Gaeta, "*Ratione Materiae* Immunities of Former Heads of State," 189.

23 *drc v. Belgium* [Arrest Warrant Case], ICJ Judgment, February 14, 2002, para. 60.

24 Ibid.

Seen from the perspective of the ICJ, four situations emerge that may incur criminal prosecution for incumbent or former officials, despite them enjoying jurisdictional immunity:

(i) In situations in which criminal immunity is excluded domestically;
(ii) In cases where the State of the particular Minister of Foreign Affairs waives his/her jurisdictional immunity;
(iii) Once the person in question no longer holds office; this counts for events either before or after holding office as Minister of Foreign Affairs *and* in respect of acts committed during that period of office in a *private* capacity; and
(iv) In cases where ICTs pursue a prosecution of such an official.[25]

How does the ICJ's view interrelate with the Statutes of ICC and the *ad hoc* tribunals (i.e. a foreign court is not able to exercise its criminal jurisdiction for international crimes over former Ministers of Foreign Affairs without the consent of the State they represent, unless the alleged acts performed during their period of office constitute *private* acts)?

In paragraph 61 of the ruling in *Congo v. Belgium*, the ICJ holds that "an incumbent or *former* Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction," whereby specific mention is made of the ICTY, the ICTR and the ICC.

ICC

Article 27(2) ICCSt., to which provision the ICJ refers, unequivocally accrues jurisdiction providing that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." However, the question remains open as to whether the ICJ approach is applicable to former State officials of Non-States parties to the ICC, as the ICJ did not differentiate between States and Non-States parties.[26] Yet, in the ICC's Sudan case, the UN Security Council adopted a resolution in 2005 (Sudan being a non-ratifying State Party), which enabled the ICC Prosecutor to prosecute Mr. Al Bashir, the incumbent president of Sudan. This arrest warrant leads to a contradictory situation, because, on the one hand, States Parties are obliged to

25 Id., para. 61.

26 Gaeta, "*Ratione Materiae* Immunities of Former Heads of State," 193–194; see also William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 232.

cooperate with the ICC, but, on the other hand, are not required, under Article 98(1) ICCSt. to surrender individuals who are endowed with personal immunity.[27]

ICTY-ICTR

Similarly, Article 7(2) ICTYSt. (Article 6(2) ICTRSt.) excludes sovereign immunity as an admissible defense.[28] The former President of Serbia, Slobodan Milošević, claimed immunity due to his position as a Head of State, which defense was rejected by the ICTY Trial Chamber recalling that:

> Article 7, paragraph 2, of the Statute provides that the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment. The *amici curiae* say that the accused must be understood to be denying the validity of that Article.[29]
>
> There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law.[30]

In its 1999 *Pinochet* decision, the British House of Lords observed that the prosecution for torture facilitated by official actors, relying on the principle of universal jurisdiction based upon the Torture Convention, would be undermined once Head of State immunity for such crimes would be acknowledged.[31] With respect to the ICTY-ICTR, however, this concern does not arise as these courts are created under Chapter VII of the UN Charter (see Chapter 1), the obligations of which in principle cannot be derogated from by other international obligations.

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27 Article 98(1) ICCSt. reads: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

28 Article 6(2) ICTRSt.: "The official position of any accused person, whether as a Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment"; see also Article IV of the Genocide Convention; Article 7 IMT Charter; Article II (4)(A) Control Council Law No. 10.

29 *Prosecutor v. Slobodan Milošević*, Decision on Preliminary Motions, Case No. IT-02-54, November 8, 2001, para. 27.

30 Id., para. 28.

31 See 2 All England Reports 97, 111–115 (1999).

The defense of abuse of process based upon immunity was again raised by Radovan Karadžić, in his trial before the ICTY on charges of crimes against humanity, genocide and violations of the laws and customs of war. Karadžić filed a motion to dismiss the indictment against him on the basis of an alleged agreement between the United States special negotiator, Mr. Holbrooke, and himself.[32] The indictment claimed Mr. Karadžić had participated in a joint criminal enterprise aiming at permanently removing the Bosnian Muslim and Bosnian Croat inhabitants from the territory of Bosnia and Herzegovina, which was claimed to be Bosnian Serb territory.[33] Karadžić contended in said motion that the tribunal lacked jurisdiction, or, otherwise, that the Trial Chamber should use its discretion and decline to exercise jurisdiction, under the doctrine of abuse of process.[34] The lack of jurisdiction, as Karadžić argued, originated from an alleged agreement between Karadžić and the United States special negotiator, Mr. Holbrooke, who had granted Karadžić immunity from prosecution in The Hague, if he would resign from all his positions in the Serbian government and would withdraw completely from public life.[35] The Trial Chamber found that "the doctrine of abuse of process could not be triggered by a promise allegedly made by a third party, unconnected with the Tribunal, granting immunity to the Appellant years before his transfer to the Tribunal."[36] The Appeals Chamber dismissed Karadzić's appeal, holding that "even if the alleged Agreement were proved, it would not limit the jurisdiction of the Tribunal, it would not otherwise be binding on the Tribunal and it would not trigger the doctrine of abuse of process."[37] Moreover, the Appeals Chamber recalled that the

> public interest in the prosecution of an individual accused of such offences, universally condemned, is unquestionably strong. Against the legitimate interest of the international community in the prosecution of Appellant for Universally Condemned Offences stands the alleged

32 *Prosecutor v. Radovan Karadžić*, Holbrooke Agreement Motion, Case No. IT-95-5/18-PT, May 25, 2009, with Annexes ("Motion").

33 *Prosecutor v. Karadžić*, Third Amended Indictment, Case No. IT-95-5/18-PT, February 27, 2009; see also Case Information Sheet Radovan Karadžić, accessed April 7, 2014, http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf.

34 *Prosecutor v. Karadžić*, Decision on Karadžić's Appeal of the Trial Chamber's Decision on Alleged Holbrooke Agreement, Case No. IT-95-5/18-AR73.4, October 12, 2009, para. 4.

35 Id., para. 5.

36 Id., para. 15; *Prosecutor v. Karadžić*, "Decision on Holbrooke Agreement," July 8, 2009, paras. 84–85, 88.

37 *Prosecutor v. Karadžić*, "Decision on Karadžić's Appeal on Alleged Holbrooke Agreement," October 12, 2009, para. 53.

> violation of Appellant's expectation that he would not be prosecuted by the Tribunal, pursuant to the alleged Agreement.[38]

Furthermore, the defense of Head of State immunity was raised by Charles Taylor, the former Head of State of Liberia, who stood trial before the SCSL for his alleged role in the armed conflict in Sierra Leone from November 1996 to January 2002 (the indictment period).[39] Charles Taylor took office as the President of Liberia on August 2, 1997. On August 11, 2003, Mr. Taylor stepped down from his Presidency and went into exile in Nigeria, after the SCSL unsealed his indictment and arrest warrant on June 4, 2003.[40] Taylor claimed that he was immune from any exercise of jurisdiction of the SCSL, because he was a sitting Head of State at the time the indictment and arrest warrant were issued. Different from the immunity challenge of President Slobodan Milošević, the defense team of Charles Taylor argued that the SCSL was in fact a domestic court, instead of an international court, and was therefore bound by the international law principle that incumbent heads of state must be granted immunity.[41] The SCSL underlined its legal character of being an "international court," opining that this international law principle did not apply before an international criminal court. Consequently, the SCSL Trial Chamber, and subsequently the Appeals Chamber, denied Mr. Taylor's application claiming immunity from jurisdiction, holding that "the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[42]

Head of State immunity also featured in the case of the incumbent Head of State of Sudan, Omar al Bashir. While Sudan is not a State Party to the ICC, the case came within the ambit of the ICC after referral by the UN Security Council.[43] Although President al Bashir is still at large, several African States held that the ICC infringed the sovereignty rights of Sudan. Since the ICC lacks its own police force, with enforcement powers, it cannot apprehend President al Bashir in Sudan. As long as President al Bashir remains in his own country, he has not much to fear. Other ICC States Parties are, however, expected to surrender Al Bashir to the ICC as soon as he sets foot in their country. To date, ICC

38 Id., para. 49.

39 *Prosecutor v. Charles Ganakay Taylor*, Judgment, Trial Chamber II, Case No. SCSL-03-1-T, April 26, 2012, para. 3–4.

40 Id., para. 2.

41 *Prosecutor v. Charles Ghanakay Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, Case No. SCSL-2003-01-I, May 31, 2004; Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?," *Journal of International Criminal Justice* 7 (2009): 315–332.

42 *Prosecutor v. Taylor*, "Trial Judgment," April 26, 2012, para. 2.

43 UN Security Council Resolution 1593 (2005).

member States proved reluctant to surrender Al Bashir to the ICC. In December 2011, Mali and Chad were reprimanded by the UN Security Council and the Assembly of States Parties to the Rome Statute, because they failed to cooperate in the arrest and surrender of Al Bashir to the ICC during Al Bashir's State visit to these countries.[44] In 2011, Malawi and Djibouti, as well as Kenya and Chad in 2010, have been reprimanded for the same reason.[45] In April 2014, the ICC Pre-Trial Chamber reprimanded the Democratic Republic of Congo (DRC) for its non-cooperation in the arrest and surrender of Al Bashir.[46] The DRC had argued that it was not obliged to cooperate with the ICC Article 98(1) ICCSt., as cooperation would require the DRC to violate its obligations under international law (see *infra*). The Pre-Trial Chamber rejected the DRC's arguments; yet, it did not make reference to its earlier decisions on lack of compliance by States Parties.[47]

The Rome Statute expressly provides that immunities related to the official capacity of a person will not withhold the ICC from exercising jurisdiction, while States Parties are obliged to cooperate with the Court.[48] This seems to contravene with another principle in the Rome Statute, namely Article 98(1) ICCSt., which reads that:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with

44 Geert-Jan Knoops, "The International Criminal Court in 2011," in *The Global Community Yearbook of International Law & Jurisprudence* 2012 (I), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2012), 383–388.

45 Ibid.

46 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, Case No. ICC-02/05-01/09-195, April 9, 2014.

47 The ICC is, under Article 21(2) ICCSt., not bound to apply earlier decisions; the provision reads that the ICC "may apply…previous decisions." Yet, as noted by Gaeta, it does not cover changing its jurisprudence without making clear why. This becomes particularly relevant in "a highly sensitive issue such as that of immunities of Al Bashir as head of State of a State not Party to the Rome Statute, and more so in light of the stand taken by the African Union on that matter on multiple occasions," see Paola Gaeta, "The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again," *Opinio Juris*, April 23, 2014, accessed April 28, 2014, http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

48 Article 27 (2) ICCSt.; the preamble of the Rome Statute reads that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

> its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[49]

The rationale behind this provision being that a State should not be put in a position of "having to violate its international obligations with respect to immunities."[50] This potential contradiction only arises once third States (i.e. non-signatories to the ICC) are involved, since signatory States have accepted the principle embodied in Article 27(2) ICCSt., ensuring that immunities will not bar the ICC from exercising jurisdiction.[51] The ICC's stance on the apparent contradiction between Article 27(2) and 98(1) ICCSt. became visible in the "Decision on the Failure by the Republic of Malawi to Cooperate," when Malawi held that the refusal to arrest and surrender Al Bashir was justified under Article 98(1) ICCSt. The ICC Pre-Trial Chamber, however, opined that:

> customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.[52]

In the Decision on the DRC's cooperation with the arrest and surrender of Al-Bashir, the Pre-Trial Chamber held that:

> by issuing Resolution 1593(2005) the SC decided that the "Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution."[53]

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49 Article 98(1) ICCSt.

50 K. Prost and A. Schlunck, "Article 98," in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, ed. in: O. Triffterer (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 1131.

51 Gaeta, "Does President Al Bashir Enjoy Immunity," 328.

52 *Prosecutor v. Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber, Case No. ICC-02/05-01/09, December 12, 2011, para. 43.

53 *Prosecutor v. Al Bashir*, "Decision on the Cooperation of the DRC Regarding Omar Al Bashir's Arrest," April 9, 2014, para. 29.

According to the Pre-Trial Chamber, the Security Council Resolution was "meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities,"[54] otherwise, the Resolution, which explicitly held that Sudan "cooperate fully" and "provide necessary assistance to the Court," would be "senseless."[55] Article 98(1) ICCSt. requires that the ICC does not proceed with a request for surrender *unless* it "can first obtain the cooperation of that third State for the waiver of immunity." The ICC did not make any effort to obtain a waiver from Sudan (i.e. the third State); yet, it held that such a waiver:

> …was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.[56]

In conclusion, it can be said that the defense of Head of State immunity has no bearing before international criminal tribunals. Under specific circumstances, such a defense might be successful before national courts on the basis of international agreements, enshrining the principle that persons performing acts of the State must be protected, as long as they hold office. Modern international law endorses the notion that the protection of fundamental human rights is deemed to be of higher interest than the protection of State sovereignty and immunities. Another contributing factor to the mootness of the immunity defense within international criminal law is the tendency, as noted by Cassese, to attenuate State responsibility and give prevalence to criminal liability for individuals as regards international crimes (i.e. individual criminal liability overshadows and sets aside State responsibility).[57]

2.3 *Defense of Prosecutorial Misconduct*

The defense of prosecutorial misconduct aims at demonstrating that the Prosecutor violated procedural rules and thereby acted in such an inappropriate or unfair manner, that it infringes the defendants fair trial rights. Examples of prosecutorial misconduct are: withholding exculpatory evidence to the

54 Ibid.

55 Ibid.

56 Ibid.

57 Antonio Cassese, *International Law 2nd ed.* (Oxford: Oxford University Press, 2005), 113.

defense, bribing witnesses and selectively targeting a defendant for prosecution. The subsequent section will first discuss the defense of selective prosecution, followed by prosecutorial misconduct in relation to (witness) evidence.

2.3.1 The Defense of Selective Prosecution

The defense of selective prosecution is actually a derivative of the doctrine of abuse of process. Its rationale pertains to demonstrating that discriminatory motives underlie the defendant's prosecution. This defense follows from the principle that all persons must be equal for the law resulting in the principle of evenhandedness.[58] In general, it has been claimed that the ICC unequally targets defendants from African States, while crimes within the jurisdiction of the Court are potentially committed all over the world and not just in Africa. All current situations under the investigation of the ICC since its inception in 2002 until 2014, concern African States. However, the defense has only a legal standing once individualized in a concrete criminal case; this test was applied in the case of Charles Taylor before the SCSL, where Taylor argued that he was unjustly singled out, and in the *Čelibići* case before the ICTY.

The ICTY Appeals Chamber in *Čelibići* set forth the following two prong-test, which must be met by the defense advocating selective prosecution:

(i) "an unlawful or improper (including discriminatory) motive for the prosecution and
(ii) that other similarly situated persons were not prosecuted."[59]

The test puts a heavy burden on the defense canvassing that selective prosecution took place, since "clear evidence of the intent of the Prosecutor," must be demonstrated.[60] The defense of Charles Taylor argued that this two-prong test set forth by the ICTY Appeals Chamber had been met. As to the first prong, the defense purported that Taylor was the victim of selective prosecution since he had been singled out on the basis of "improper political motives."[61] This followed from leaked U.S. Embassy cables and comments of Prosecutor David Crane to the U.S. Congress, implying that Taylor had to be prosecuted at all costs.[62] As to

58 *Prosecutor v. Delalić, Mucić, Delić and Landžo* (*Čelibići* camp), Appeals Chamber Judgment, Case No. IT-96-21-A, February 20, 2001, para. 618.

59 *Prosecutor v. Taylor*, "Trial Chamber Judgment," April 26, 2012, para. 73, referring to *Čelibići* Appeals Chamber Judgment, para. 611.

60 *Prosecutor v. Taylor*, "Trial Chamber Judgment," April 26, 2012, para. 79.

61 Id., para. 73.

62 Id., para. 74.

the second prong, the defense argued that other, similarly situated individuals, were not being prosecuted. According to the defense it was improper to prosecute Taylor, while other African leaders such as Muammar al-Gaddafi (deceased) of Libya and Blaise Compaoré of Burkina Faso, who bore the same level of responsibility, were not being prosecuted.[63] This argument was substantiated by public statements made by David Crane, indicating that these three leaders participated in the same purported Joint Criminal Enterprise.[64] The SCSL Trial Chamber found that Taylor had not been singled out for selective prosecution, and that the dismissal of all charges – as requested by the defense – would be an "entirely disproportionate response."[65] According to the Trial Chamber, the actions of David Crane did not constitute "clear evidence of the Prosecutor to discriminate on improper motives." As an *obiter dictum* the Trial Chamber noted that also the second prong of the *Čelibići* test had not been met, since Crane, in his statements to the U.S. Congress, had referred to Taylor as "a catalyst" while Gaddafi and Compaoré were described as "compatriots" backing Taylor.[66]

In conclusion, it can be said that the ICTs have set a burdensome standard to successfully invoke the defense of selective prosecution. To date, the defense of selective prosecution has never been successfully raised before ICTs.

2.3.2 Prosecutorial Deals and Disclosure of Evidence

Pursuant to Article 67(2) ICCSt. and Rule 77 ICC RPE the prosecution is required to disclose "as soon as practicable" any evidence in its possession or control which "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"; if there exists doubt as to this provision, the Court shall decide.[67] Yet, restrictions may apply as provided for in Rule 81 ICC RPE which "subjects disclosure to the requirements of confidentiality contained *inter alia* in Article 54, as well as to Rule 82."[68] The RPEs of other ICTs contain similar provisions.[69] Prosecutorial (non) disclosure of evidence has been a major issue in the case of *Lubanga Dyilo* before the ICC.

63 Id., para. 73.

64 Id., para. 74.

65 Id., para. 83.

66 Id., para. 82.

67 Article 67(2) ICCSt.

68 *Prosecutor v. Lubanga*, Prosecution submission on undisclosed documents containing potentially exculpatory information, Case No. ICC-01/04-01/06-1248, March 28, 2008, paras. 5, 31.

69 See, for example, Rule 68 ICTY RPE: "(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may

In the *Lubanga* case, the Prosecutor entered into confidentiality agreements with certain witnesses on the basis of Article 54(3)(e) ICCSt., which provides that the Prosecutor may agree "not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating evidence, unless the provider of the information consents." However, the Prosecutor is also under the obligation to disclose possibly exculpatory evidence to the defense.[70] In the *Lubanga* case, the scope of prosecutorial disclosure obligations were already litigated during the Pre-Trial phase, when the Prosecutor failed to disclose over 200 possibly exculpatory documents, which had been collected with the assistance of the United Nations and other organizations "on the ground."[71] On 13 June 2008, the Trial Chamber rendered its decision on the consequences of the Prosecutor's inability to disclose potentially exculpatory materials to the accused, which materials were covered by confidentiality agreements entered on the basis of article 54(3)(e) ICCSt.[72] The defense had petitioned for: (i) the discontinuance of the the proceedings and release the accused; (ii) for the immediate disclosure of potentially incriminatory material; (iii) that the defense be relieved from its obligation to notify the Court of its lines of defense; and (iv) that potential charges currently investigated in the context of DRC situation will not be brought against the accused.[73] The defense *vis-à-vis* the lack of disclosure of evidence was – at least at this stage of the proceedings – successful, as the Trial Chamber concluded that the proceedings had to be halted in all respects, since the process had "been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial."[74] An important aspect in the Chamber's determination was the fact that even the Trial Chamber had not been able to determine whether or not the non-disclosure of potentially

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suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence" and "(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above"; see similar Rule 68(A) and (E) ICTR RPE.

70 Article 67(2) ICCSt.; Rule 77 ICC RPE.

71 *Prosecutor v. Lubanga*, 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, together with certain other issues raised at the Status Conference on 10 June 2008, Case No. ICC-01/04-01/06-1401, June 13, 2008, paras. 26, 63.

72 *Prosecutor v. Lubanga*, "Decision on the consequences of non-disclosure," June 13, 2008, para. 1.

73 Ibid.

74 Id., para. 93.

exculpatory material constituted a breach of Lubanga's right to a fair trial.[75] Following this decision, the Trial Chamber ordered Lubanga's immediate release on 2 July 2008.[76] The Prosecution appealed this order and Lubanga's release was suspended until the Appeals Chamber had decided on the issue. Finally, after a considerable delay, the Trial Chamber lifted the stay of proceedings, as the reasons for imposing the stay had "fallen away" (i.e. materials had been disclosed, followed by a review of the Chamber); the commencement of the trial was set for 26 January 2009.[77]

The scope of disclosure obligations of the Prosecutor were also subject of dispute at the trial stage. On 8 July 2010 the Trial Chamber ordered a second stay of the proceedings, because the Prosecutor had failed to comply with an order for the disclosure of the name of Intermediary 143.[78] This stay of proceedings was reversed by the Appeals Chamber on 8 October 2010; it concluded that orders of a Chamber are binding, whilst the Prosecutor's "wilful non-compliance constituted a clear refusal to implement the orders of the Chamber"; yet, the Appeals Chamber held that a different sanction, such as a financial sanction, should have been considered.[79] This illustrates once again the burdensome threshold of this defense.

The *Lubanga* defense prolonged its efforts to have the proceedings permanently stayed and filed an application thereto on 10 December 2010, arguing that prosecutorial abuse of process arose. The defense contended, *inter alia*, that four of the Prosecutor's intermediaries had facilitated false evidence, while the Prosecutor was aware that elements of the evidence connected to these intermediaries were false. Moreover, it argued that the Prosecutor failed

75 Id., para. 92.

76 *Prosecutor v. Lubanga*, Decision on the release of Thomas Lubanga Dyilo, Case No. ICC-01/01-01/06-1418, July 2, 2008.

77 See *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, Case No. ICC-01/04-01/06-2842, March 14, 2012, para. 10, referring to T-98-ENG, page 2, line 23 to page 4, line 1.

78 *Prosecutor v. Lubanga*, Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Trial Chamber I, Case No. ICC-01/04-01/06-2517-Red, July 8, 2010.

79 *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', Appeals Chamber, Case No. ICC-01/04-01/06-2582, October 8, 2010.

to fulfil his duty to investigate the reliability of the evidence.[80] The Trial Chamber dismissed this defense application on 23 February 2011, holding that the issues raised by the defense could be addressed as part of the ongoing trial process.[81] The Chamber set the following standard to determine alleged impartiality and biasedness on part of the Prosecutor: "**either** it would be "odious" or "repugnant" to the administration of justice to allow the proceedings to continue, **or** the accused's rights have been breached to the extent that a fair trial has been rendered impossible."[82] Yet, such a conclusion could not be inferred from the Prosecutor's conduct in the case of Lubanga.[83] In its final judgment, the Chamber held that it was not persuaded by the "suggested violations of the prosecution's statutory duties, particularly since the Chamber took measures throughout the trial to mitigate any prejudice to the defense whenever these concerns were expressed."[84]

Additionally, "the Chamber kept these obligations on part of the prosecution permanently under review."[85] The Chamber reiterated its measures taken when the Prosecutor invoked Article 54(3)(e) as a basis for non-disclosure – namely the disclosure of alternative evidence or summaries – while it addressed delayed prosecutorial disclosure in a number of ways during the proceedings.[86] This led the Chamber to conclude that "in each instance, any problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial."[87]

The legal standard set to successfully invoke a permanent stay of the proceedings seems almost insurmountable for the defense. The circumstances justifying an indefinite stay of the proceedings must be such that it is virtually impossible for the accused to receive a fair trial.[88] Within the arena of ICTs a

80 *Prosecutor v. Lubanga*, Requête de la Défense aux fins d'arrêt définitif des procédures, ICC-01/04-01/06-2657-tENG-Red (translation of public redacted version filed on 12 August 2011).

81 *Prosecutor v. Lubanga*, Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', Trial Chamber I, Case No. ICC-01/04-01/06, March 7, 2011, para. 217–218.

82 Id., para. 222.

83 Ibid.

84 *Prosecutor v. Lubanga*, "Trial Judgment," March 14, 2012, para. 120.

85 Ibid.

86 Id., paras. 121–122.

87 Id., para. 123.

88 *Prosecutor v. Radovan Karadžić*, Decision on Motion for Stay of Proceedings, Case No. IT-95-5/18-T, April 8, 2010, para. 4; *Prosecutor v. Radovan Karadžić*, Decision on Karadžić's Appeal of Trial Chamber Decision on Alleged Holbrooke Agreement, Appeals Chamber, Case No. IT-95-5/18-AR73.4, October 12, 2009, paras. 45–47; *Prosecutor v. Dragan Nikolić*,

defense advocating a permanent stay of the proceedings as a consequence of prosecutorial non-disclosure only partially succeeded in the *Lubanga* case. Even here, the decision was reversed as soon as the Prosecutor proved capable of fulfilling its disclosure obligations.

3 Duress and Necessity as Defenses before ICT

3.1 *Doctrinal Distinctions*

Duress and necessity as potential defenses to international crimes can be differentiated as follows:

(i) The defense of duress arises in the event the accused was put in a situation that showed an accumulation of the following conditions:
   (a) an immediate threat to the life or physical well-being of the accused or that of other persons, if he or she should refrain from committing the particular crime;
   (b) when no reasonable way to avert the imminent danger is available;
   (c) the crime committed was not disproportionate to the imminent danger; and
   (d) the accused did not voluntarily put him-or herself in the particular situation.[89]

(ii) The defense of necessity arises when the accused finds him or herself in circumstances *contre coeur* resulting in an inexorable conflict of legal norms which forces him/her to choose between a legal duty not to commit an international crime and the need to avoid imminent harm, which harm itself is more serious compared to the infringed norm, leaving the accused with basically no (other) moral option.[90]

Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, Case No. IT-94-2-AR73, June 5, 2003, paras. 28–33; *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, Appeals Chamber, Case No., December 14, 2006, para 37.

89 See also Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, 3rd ed.* (Oxford: Oxford University Press, 2009), 152; Geert-Jan Alexander Knoops, *Defenses in Contemporary International Criminal Law, 2nd ed.* (Leiden: Martinus Nijhoff Publishers, 2008), 46–57.

90 Ratner, Abrams and Bischoff, *Accountability for Human Rights Atrocities in International Law, 3rd ed.*, 153.

Suppose a low-ranking officer of State A captures a combatant of the adversary party during an armed conflict with State B, which is part of a forcible humanitarian intervention of State A. The combatant (prisoner of war) has vital information about a location where three hundred innocent schoolchildren of State A are held hostage by forces of State B. Within twenty-four hours these children will be killed by bombs if State A refuses to withdraw its military intervention to free State B from its tyrannical regime. The question is whether the defense of necessity can exempt the officer from criminal liability when he violates Articles 13 and 17 of the Geneva Convention III (the prohibition not to interrogate a prisoner of war with force) in order to save the lives of these three hundred children.[91] The defense of necessity is also commonly referred to as a "choice of evils," in which the defendant is confronted with a choice to either break the law, while at the same time preventing a certain evil, or to perform an act which constitutes or facilitates a greater evil. Necessity thus revolves around a moral-criminal balancing operation within the mind of the accused which is judged *ex post facto.*[92]

The essence of the distinction between duress and necessity is that duress pertains to the compulsion to commit the crime based on a threat to the life of the accused or to that of another person, whereas the compulsion element with regard to necessity results from circumstances or interests other than that of persons; the necessity "threat" thus originates from *objective circumstances* (although harm to persons may also be involved). The congruence between them is that they leave the accused with little or no viable moral option.[93]

3.2 *The Approach of ICTY-ICTR*

In general, one may observe that the Statutes of the ICTY and ICTR fail to define whether and to what extent defenses are available to international crimes which fall within the ambit of their jurisdictions. Rule 67(a)(ii) ICTY RPE (as well as ICTR RPE) refers to the alibi defense and that of diminished responsibility, merely in terms of the procedural presentation of these defenses. Although Articles 7(4) ICTYSt. and 6(2) ICTRSt. explicitly refer to the defense of superior orders (in terms of mitigation), they do not mention the defense of duress. The controversy over the admissibility of this defense as a potential

91 See further paragraph 3.2.

92 Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford: Oxford University Press, 2012), 182–184.

93 William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 229.

excuse to charges relating to crimes against humanity and war crimes can be illustrated by the different conclusions the ICTY Trial Chamber and the ICTY Appeals Chamber arrived at in the landmark case of the *Prosecutor v. Erdemović*.[94] In its sentencing judgment,[95] the ICTY Trial Chamber, adopting the rigorous and restrictive criteria of the post-World War II Military Tribunals, sets forth the three features and essential conditions for duress, the fulfillment of which leads to the admissibility of duress as a complete defense for violations of international humanitarian law, namely:

(i) the act charged was done to avoid an immediate, serious and irreparable danger;
(ii) there was no adequate means of escape; and
(iii) the remedy was not disproportionate to the evil.[96]

The Trial Chamber did not refer to the criterion mentioned in paragraph 3.1. above (i.e. the accused did not voluntarily put him or herself in the particular situation). Whenever a soldier or low-ranking officer, like Dražen Erdemović, is compelled to commit war crimes or crimes against humanity (in this case: the killing of seventy unarmed civilian Bosnian men during the aftermath of the siege of the "safe area" of Srebenica in July 1995) because he/she or his/her family is held at gunpoint, this situation is likely to cause potential and intricate moral and ethical dilemmas. As a result, this may open the possibility for a potential defense of duress or extreme necessity.[97] Unlike the Trial Chamber, which accepted that duress could serve as a complete defense to war crimes charges and crimes against humanity charges, the majority of the ICTY Appeals Chamber in the *Erdemović* case rejected the assumption that duress could ever be allowed as a complete defense to these crimes.[98] The majority of the Appeals Chamber held 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 beings," but might only be urged

94 *Prosecutor v. Erdemović*, Sentencing Judgment, Trial Chamber I, Case No. IT-96-22-T, November 29, 1996.

95 Id., para. 17.

96 Id., paras. 18–20.

97 Harmen van der Wilt, "Commentary to *Prosecutor v. Erdemović*," in *Annotated Leading Cases of International Criminal Tribunals 1*, ed. André Klip and Göran Sluiter (Antwerp: Intersentia, 1999), 676–677; Knoops, *Defenses in Contemporary International Criminal Law 2nd ed.*, 192–194.

98 *Prosecutor v. Erdemović*, Appeals Chamber Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, October 7, 1997, paras. 80–89.

in mitigation.[99] A divided Appeals Chamber (3–2) arrived at this conclusion, finding no customary international law rule or general principle of law on the admissibility of duress. It adopted a teleological approach in order to discern a rule that would best protect the innocent in times of war.

Notably, the joint separate opinion of Judge McDonald and Judge Vohrah reveal three arguments as to why the Appeals Chamber judgment might not be seen as authoritative:

(i) their rejection of the adjudicatory concept of "balancing of harms for and against killing of innocent human beings";[100]
(ii) their recognition that international humanitarian law should guide the conduct of combatants and their commanders and thus legal limits as to the conduct of these persons in armed conflict must be set;[101]
(iii) lastly, the reference to their "…mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in *any way* [emphasis added; GJK] undermined."[102]

Therefore, to fully appraise the authoritativeness of the Appeals Chamber's decision in the *Erdemović* case, one should bear in mind the nature and mandate of the ICTY being established as a subsidiary organ of the Security Council, while being based on a Security Council resolution as a means to restore international peace and security in the territory of the former Yugoslavia.[103] This implies that the precedent or future effect of this judgment must be nuanced, portraying it within the mandate of the ICTY.

3.3 *The Approach of the ICC*

The above observation may explain why the drafters of the ICCSt., in Article 31(1)(d), explicitly deviated from the approach taken by the ICTY Appeals Chamber in the *Erdemović* case. Under the ICC system, the defense of duress can be a potential (absolute) exoneration to international crimes, such as

99 *Prosecutor v. Erdemović*, Appeals Chamber Judgment, Case No. IT-96-22-A, October 7, 1997, para. 19.

100 *Prosecutor v. Erdemović*, "Appeals Judgment, Opinion of Judge McDonald and Judge Vohrah," October 7, 1997, para. 80; the Appeals Chamber rejected the so-called Masetti approach (i.e. the criterion that the victims would have been killed anyway even without the conduct of the accused).

101 Id., para. 80.

102 Id., para. 88.

103 See Chapter 1.

crimes against humanity and war crimes. For the first time in the history of ICTs, the defense of duress was statutorily codified, such that an act caused by duress might excuse the perpetrator,

> provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
> (ii) Constituted by other circumstances beyond that person's control.[104]

The ICC's codification implies that full exoneration is possible, as opposed to the view taken by the ICTY, which excludes the defense of duress when innocent life of civilians is taken.[105]

Another ground for excluding criminal responsibility, codified in the Rome Statute, is military necessity. Article 31(1)(c) ICCSt. provides that a person shall not be held criminally responsible if the person acted "reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected." Involvement in a defensive operation by forces, will not in itself constitute a ground for excluding criminal responsibility.[106] Yet, in theory a commander of a military unit committing a "war crime" in order to save property vital to his military mission, might be exonerated.[107] Article 8(2)(a)(iv) ICCSt. furthermore implies that "military necessity" may exclude criminal responsibility for the war crime of "extensive destruction and appropriation of property" if it has not been carried out "unlawfully and wantonly."

4 The Limited Scope of the Defense of Superior Orders under the Law of ICTs

4.1 *International Criminal Law Parameters*

Superior orders predominantly evolved from the proceedings at the IMT. This defense actually draws upon the principle of *nullum crimen sine lege*, which

104 Article 31(1)(d) ICCSt.

105 *Prosecutor v. Erdemović*, "Appeals Chamber Judgment," October 7, 1997, para. 19.

106 Article 31(1)(c) ICCSt.

107 Knoops, *Defenses in Contemporary International Criminal Law, 2nd ed.*, 46 *et seq.*

protects an individual against unreasonable expectations with respect to knowledge of existing law, albeit that ignorance of law as such is no excuse within international criminal law.[108] As a result, in order to successfully invoke this defense, the accused must show that he did not know the order was illegal and that it was not, in fact, patently illegal.[109] Therefore, under international criminal law obedience to superior orders could potentially provide a valid defense, unless the act is so outrageous that the particular order is deemed to be manifestly unlawful. It could indeed be questioned whether it is justified to convict an accused for an act committed pursuant to an order such that he or she had no moral choice but to obey. Yoram Dinstein suggests that the rationale of superior orders has its effect on the *mens rea* of an individual – akin to mistake of law or fact (Article 32 ICCSt.) – which could lead to full exoneration.[110]

The most significant decisions rendered by ICTs in the past addressing the superior orders defense were rendered by the International Military Tribunal (IMT) at Nuremberg. There, for the first time, the superior orders defense was enacted in Article 8 IMT Charter providing:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determine that Justice so desires.

Interpreting and justifying this provision, the Tribunal held that:

> The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether *moral choice* was in fact possible.[111]

108 Ratner, Abrams and Bischoff, *Accountability for Human Rights Atrocities in International Law, 3rd ed.*, 150.

109 Article 33(1) ICCSt.; Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, postscript preface.

110 Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, postscript preface.

111 *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Judgment of October 1, 1946, part 22, 447.

It is tenable that the defense of superior orders is not admissible once it is evident that the act is "manifestly unlawful" based upon the nature of a manifestly unlawful order. This approach was adopted in *Chief Military Prosecutor v. Melinki*,[112] where the Military Court of Appeal of Israel interpreted the term "manifestly unlawful" as follows:

> The identifying mark of "manifestly unlawful" order must wave like a black flag above the order given, as a warning saying: "forbidden." It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of "manifest" illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.[113]

Although the standard of "manifest illegality" *prima facie* does not seem to require a high threshold on part of the subordinate in terms of his/her exact knowledge of the "illegality" of the order, most orders to commit international crimes are so patently atrocious that such ignorance is not a defense as it normally leaves also a moral choice.[114]

Whereas the Statutes of the IMT, as well as those of the ICTY, ICTR and SCSL, explicitly promulgate that acting pursuant to superior orders will not exonerate a defendant from criminal responsibility, the ICCSt. does not fully erase this defense. Article 33 ICCSt. permits this defense for war crimes, once the following three conditions are fulfilled:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.[115]

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112 *Chief Military Prosecutor v. Melinki* (the Kafr Qasem case; 1957, cited in appeal before Military Court of Appeal), *Palestine Yearbook of International Law* 70 (1985): 108.

113 Id.

114 Ratner, Abrams and Bischoff, *Accountability for Human Rights Atrocities in International Law, 3rd ed.*, 150–151.

115 Article 33(1) ICCSt.

Although the criterion under sub (c) remains undefined, reflecting its vague contours in international case law, the Rome Statute drafters issued one clear guideline: orders to commit genocide or crimes against humanity are, no matter what, deemed to be *manifestly unlawful* within the meaning of this defense.[116]

4.2 *Superior Orders as a Mitigating Factor*

Once the defense of superior orders in a particular case does not exclude a defendant from criminal responsibility, it may lead to mitigation of a sentence if "justice so requires."[117] The ICTY dealt with the defense of superior orders in the mentioned *Erdemović* case of 1996, where it affirmed the inadmissibility of this defense in the case of a manifestly illegal order, which must be disobeyed.[118] In the *Erdemović* sentencing judgment, rendered on 29 November 1996,[119] the Trial Chamber was only willing to take the defense of superior orders into account in mitigation of the accused's sentence; the Chamber emphasized that such mitigation does not reduce criminality of the act.[120] In this particular case the Chamber held that it was insufficiently proven that the accused had no moral freedom to oppose the orders he had received and for that reason the ICTY did not accept this defense as having a relevant mitigating effect on the sentence.[121] The ICTY adduced several reasons for rejecting the defense of superior orders in mitigation of a sentence. The ICTY Trial Chamber held in the case of *Mrđa* that the manifest unlawfulness of an order may be an obstacle in mitigation of the sentence, as it considered that:

> [t]he orders Mrđa acted on were so manifestly unlawful that he must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that Mrđa obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment.[122]

116 Article 33(2) ICCSt.

117 Article 7(4) ICTYSt., Article 6(4) ICTRSt., Article 6(4) STSLSt.

118 *Prosecutor v. Erdemović*, "Sentencing Judgment," Trial Chamber, Case No. IT-96-22-T, November 29, 1996, para. 18.

119 Ibid.

120 Id., para. 46.

121 Id., para. 91; the Trial Chamber accorded relevance to the accused's low rank and age (23 years at the time of the events), para. 95.

122 *Prosecutor v. Mrđa*, Judgment, Trial Chamber I, Case No. IT-02-59-S, March 31, 2004, para. 67; moreover, the Trial Chamber had found no "evidence that the orders were accompanied by threats causing duress").

In conclusion, it can be observed that the practice of modern ICTs dictates that this defense only has modest effects on sentences.

4.3 *Superior Orders under the Rome Statute*

The Rome Statute dedicates more specificity to this defense compared to the *ad hoc* tribunals' Statutes. It opens the possibility to invoke this defense either as an absolute excuse to an international crime or as a mitigating factor due to Rule 145 (2)(A) ICC RPE.[123]

5 The Defenses of Mental Insanity, Diminished Responsibility and Intoxication before ICTs

5.1 *Nature and Burden of Proof*

The defenses of mental insanity and intoxication as enshrined by Article 31(1) (a) and (b) ICCSt. seem to anticipate only unique scenarios. The defense of insanity evolved from common law. It must be distinguished from the question of whether a person is unfit to stand trial by virtue of being insane at the time of his or her trial. The latter issue, most often and in most jurisdictions leading to hospitalization until fit to stand trial, pertains to procedural law and is dealt with in the following parapraph. The defense of insanity is not concerned with the accused's mental state at the time of prosecution but with her or his mental state at the time the offence in question was committed, or at least the *actus reus* of this offence. Broadly, it provides that where a defendant is legally insane at the time of committing this offence, and can prove this on the balance of probabilities, the defendant must be exonerated from liability. In common law, the nature of the verdict which the jury must return in this circumstance is simply "not guilty". According to common law, this defense may be successfully raised in case the accused has proven insanity on the balance of probabilities, which view was also adopted by the ICTY in the *Čelebići* case.[124] In the *Čelebići* case, the Appeals Chamber promulgated the view that diminished mental responsibility may be raised by the defendant in mitigation of a sentence. Yet, it held that:

> As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility

123 See paragraph 4.1.

124 *Prosecutor v. Delalić, Mucić, Delić and Landžo* (Čelebići camp), "Appeals Chamber Judgment," Case No. IT-96-21-A, February 20, 2001.

> in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.[125]

However, when it concerns the defense of *diminished* mental responsibility, the ICTY Appeals Chamber, in *Prosecutor v. Delalić et al.*, has accepted "that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense."[126] The Appeals Chamber noted that therefore Rule 67(A)(ii)(b) should be interpreted as referring to diminished mental responsibility "where it is to be raised by the defendant as a matter in mitigation of sentence."[127] As to this mitigation element, the accused must similarly establish diminished mental responsibility on the balance of probabilities, namely that more probably than not, said condition prevailed at the time of the alleged crime.[128]

5.2 *Fitness to Stand Trial*

Fitness to stand trial is not a defense, however, if the defendant argues that he or she was not fit during the commission of the crime, this can be considered as a defense. However, the principle of fitness to stand trial is akin to a procedural defense as it aims at preventing the accused from facing trial due to mental or physical incapacity. The issue of fitness to stand trial featured prominently in the ICTY case against *Jovica Stanišić*. In the course of the trial proceedings, the defense of Mr. Stanišić had filed several motions on Stanšić's fitness to stand trial, which were rejected by the Pre-Trial Chamber; yet, it did result in several delays and adjournments as the ICTY tried to secure Mr. Stanišić's presence at trial.[129] The first defense motion was

125 Id., para. 590.

126 Ibid.

127 Ibid.

128 Ibid.; see also *Prosecutor v. Vasiljević*, Judgment, Trial Chamber II, Case No. IT-98-32-T, November 29, 2002, para. 282.

129 *Prosecutor v. Stanišić and Simatović*, "Decision on Stanišić Defence's Motion on the Fitness of the Accused to Stand at Trial with Confidential Annexes," Pre-Trial Chamber, Case No. IT-03-69-PT, April 27, 2006; *Prosecutor v. Stanišić and Simatović*, "Decision on Motion Re Fitness to Stand Trial," Pre-Trial Chamber, Case No. IT-03-69-PT, March 10, 2008 (Confidential and ex parte), para. 130, as referenced in *Prosecutor v. Stanišić and Simatović*, Trial Chamber Judgment, Case No. IT-03-69-T, May 30, 2013, para. 2434; see also Case

dismissed on 27 April 2006, as the Pre-Trial Chamber found it premature.[130] The second defense motion was dismissed on 10 March 2008; yet, the Pre-Trial Chamber ordered a regime of afternoon hearings, four days a week (in 2009, this was reduced to two days a week).[131] Furthermore, it ordered regular medical examinations, while the resident doctor of the detention unit was required to provide the Pre-Trial Chamber with weekly reports on Mr. Stanišić's condition.[132] A gastroenterologist and a psychologist were ordered to submit medical reports to the Trial Chamber, addressing whether the accused:

- could understand the nature of the charges and proceedings against him, as well as the consequences of a conviction;
- was able to instruct his defense counsel;
- was able to testify on his own behalf, if he chose to do so;
- was physically able to withstand full-time trial proceedings, or whether some other construction (e.g. lesser hours than the standard five hours per day, five days per week) was necessary.[133]

In the course of the proceedings Stanišić maintained that he was too sick to stand trial; yet, he refused to participate in the trial proceedings via video conference, nor did he waive his right to be present at trial. The Trial Chamber decided, after reviewing medical reports, to proceed with the scheduled court sessions in Stanišić's absence,[134] which eventually led Stanišić to decide to participate via the video-conference link on 30 November 2009. On 20 January 2010, Stanišić participated for the first time in person in the trial proceedings. When he was urgently sent to the hospital on 5 July 2010, the Trial Chamber

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Information Sheet, Stanišić & Simatović (IT-03-69), accessed April 10, 2014, http://www.icty.org/x/cases/stanisic_simatovic/cis/en/cis_stanisic_simatovic_en.pdf.

130 *Prosecutor v. Stanišić and Simatović*, "Decision on Stanišić Defence's Motion on the Fitness to Stand Trial," April 27, 2006, p. 6.

131 *Prosecutor v. Stanišić and Simatović*, "Trial Judgment," May 30, 2013, para. 2435.

132 *Prosecutor v. Stanišić and Simatović*, "Decision on Motion Re Fitness to Stand Trial," March 10, 2008, paras. 131–2, 134; on 17 March 2008, the Pre-Trial Chamber denied the defense request for certification to appeal the fitness to stand trial decision. On 8 April 2008, the majority of the Pre-Trial Chamber decided not to reconsider that decision; see *Prosecutor v. Stanišić and Simatović*, "Trial Judgment," May 30, 2013, para. 2434.

133 *Prosecutor v. Stanišić and Simatović*, "Decision on 'Urgent Defence Motion for Prolongation of Provisional Release due to Medical Unfitness of Accused to be Detained'," Trial Chamber III, Case No. IT-03-69-PT, February 8, 2008.

134 *Prosecutor v. Stanišić and Simatović*, "Trial Judgment," May 30, 2013, para. 2436.

respected his right to be present, by only focusing on procedural matters in his absence.[135]

The determination of an accused's fitness to stand trial is contingent upon his or her mental capacity to understand the essentials of the proceedings, and the capacity to communicate, and thus consult with defense counsel.[136] In the case against *Milan Gvero*, who had suffered from a stroke, the ICTY Appeals Chamber promulgated the "Standard of Fitness" as:

> …meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings…An accused's fitness to stand trial should turn on whether his capacities, "viewed overall and in a reasonable and commonsense manner, [are] at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights."[137]

It is not required that the accused has the "capacity to fully comprehend the course of the proceedings in the trial, so as to make a proper defense, and to comprehend the details of the evidence."[138] Similar to the issue of diminished responsibility, the accused claiming unfitness to stand trial "bears the burden of proving so by a preponderance of evidence."[139]

5.3 *The Rome Statute: Expanding the Boundaries of Criminal Law Defenses before ICTs: Mental Insanity and Diminished Responsibility*[140]

5.3.1 Introduction

With the advent of prosecution of international crimes before ICTs evolving the last ten years, the danger of focusing merely on more effective prosecutorial

135 Id., para. 2437.

136 *Prosecutor v. Popović, Beara, Nikolić, Miletić, Gvero and Pandurević*, "Public Redacted version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero," Case No. IT-05-88-A, January 16, 2013, para. 21.

137 Id.; referring to *Prosecutor v. Popović et al.*, "Decision on Prosecution's Motion Seeking Clarification of Neurologist's Conclusions," Case No. IT-05-88-A, April 20, 2011 (confidential and *ex parte*); *Prosecutor v. Pavle Strugar*, Appeals Chamber Judgment, Case No. IT-01-42-A, July 17, 2008, para. 55.

138 *Prosecutor v. Strugar*, "Appeal Judgment," July 17, 2008, para. 60.

139 Id., para. 56.

140 This paragraph is (partly) adopted from: Knoops, *Defenses in Contemporary International Criminal Law, 2nd ed.*, 109 *et seq.*

mechanisms may exist. Hence, the creators of ICTs pursued an expansion of international criminal liabilities[141] and consequently intended to narrow the applicable defenses.[142] In this vein, the drafters of the Rome Statute were susceptible to this potential imbalance between prosecutorial and defense mechanisms in that they enacted in Article 31 ICCSt. four substantive grounds for excluding criminal responsibility:

(a) mental disease or defect;
(b) intoxication;
(c) self-defense or defense of others; and
(d) duress.

Unlike the ICTYSt. and ICTRSt., the ICCSt. codified the defenses under sub (a)–(d). Additionally, Articles 32–33 of the ICCSt. codify additional defenses, namely mistake of fact or law (which defenses affect the *mens rea* element),[143] superior orders and prescription of law.[144]

5.3.2 The Insanity Defense and Defense of Diminished Responsibility

The defense of mental insanity finds its origin in the famous *M'Naghten* case of 1843, tried in the United Kingdom.[145] The legal term "mental insanity" is actually a pleonasm since insanity *eo ipso* always relates to a mental capacity (there is no such thing as physical insanity). It would be more proper to speak of mental disease or defect and in fact this terminology has been adopted in Article 31(1)(a) ICCSt. which Article reflects the mentioned *M'Naghten* jurisprudence. Although the *M'Naghten* case was based on common law, the civil

141 See paragraph 2 *supra*.

142 See also Robert Cryer, "The Boundaries of Liability in International Criminal Law or 'Selectivity by Stealth'," *Journal of Conflict and Security Law* 6/1 (2001): 3–31. doi: 10.1093/jcsl/6.1.3.

143 The defense of mistake of law only succeeds if the accused was unaware of a normative element of the crime as a result of not realising its social significance, see *Prosecutor v. Lubanga*, "Decision on the confirmation of charges," Case No. ICC-01/04-01/06-803-tEN, January 29, 2007; see also the *Hartmann* case before the ICTY, where the Specially Appointed Chamber held that "a person's misunderstanding of the law does not in itself excuse a breach of it", *Case against Florence Hartmann*, "Judgment on Allegations of Contempt," Case No. IT-02-54-R77.5, September 14, 2009.

144 Article 8(2)(a)(iv) ICCSt. furthermore implies that "military necessity" may exclude criminal responsibility for the war crime of "extensive destruction and appropriation of property" if it has not been carried out "unlawfully and wantonly."

145 M'Naghten [1843] UKHL J16 House of Lords.

law systems follow, generally speaking, the same reasoning with regard to the defense of mental disease or defect.

This defense may be pleaded in respect of any crime. It has been said that most accused do not favor a verdict based on insanity, due to the stigma surrounding this defence, as a result of a verdict based on insanity (a matter of less importance in the case of a more serious crime, attracting its own stigma) and the nature of the accompanying custodial order, which will usually be imposed as a consequence of this verdict. Historically, the defense has usually been pleaded in response to a charge of murder (especially when murder is a capital crime). It is less often pleaded in those jurisdictions that recognize the statutory defense of diminished responsibility, which defense may be raised in response to a charge of murder (in fact, it may be pleaded only in this context). The insanity defense is not commonly raised. It was the first of the defenses concerned with the impairment of the mind's workings.[146] The defense, and the subsequent exoneration of the accused from liability should the accused satisfy its terms, may be justified on the basis of humanity. Another rationale for it was explained by Dixon J. of the Australian High Court in *R v Porter* (1933),[147] in the course of directing a jury:

> The purpose of the law in punishing people is to prevent others from committing a like crime or crimes. Its prime purpose is to deter people from committing offences. It may be that there is an element of retribution in the criminal law, so that when people have committed offences the law considers that they merit punishment, but its prime purpose is to preserve society from the depredations of dangerous and vicious people. Now, it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand the ground upon which the law proceeds.[148]

As said, the common law defense of insanity finds its origin in the so-called *M'Naghten* Case of 1843. Consequently, the defense is frequently referred to as the *M'Naghten* rules. M'Naghten had been charged with murder after he shot the secretary of Sir Robert Peel, whom he mistook for Sir Robert Peel. He was under the delusion that he was being persecuted by the Tories. He was

146 Peter Gillies, *Criminal Law 3rd ed.* (Law Book Co., 1993), 218.

147 *R v Porter* (1933) 55 C.L.R. 182 at 186. The trial was conducted in the original jurisdiction of the High Court at a time when it tried indictable crimes in the Australian Capital Territory.

148 Ibid.

acquitted on the ground of insanity. In consequence of the ensuing public controversy, the House of Lords put a number of questions to the judges concerning the law of insanity. These hypothetical questions, and the judges' answers, were reported in the law reports under the heading "Daniel M'Naghten's Case." Although not rendered in the course of a judicial decision, and therefore not a judicial precedent, the answers have nonetheless been adopted by the courts ever since as correctly laying down the foundation of this defense.

The core of the *M'Naghten* doctrine is contained in the following passage delivered by the opinion of Lord Tindal C.J., to which the other lords concurred:

> The jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proven to their satisfaction; that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[149]

Lord Tindal also commented upon certain matters, including the criminal liability of the person who commits an offence while under the influence of an insane delusion, which matter will be referred to below.

The *M'Naghten* rules are, therefore, based on the concept of a disease of mind which produces a defense such that either the accused did not know the nature of his or her act, or, if he or she did, the accused did not know that the act was wrong. Proof of either of both elements implies that the accused is legally insane. The distinction is referred to as the first and second "branch" of the *M'Naghten* rules respectively.[150]

In *Prosecutor v. Vasiljević*, the ICTY reaffirmed that it is satisfied that an accused suffers from diminished mental responsibility, when, at the time of the alleged crime, an impairment arises as to: (i) "his capacity to appreciate the unlawfulness of or the nature of his conduct," or (ii) "to control his conduct that would normally conform to the requirements of the law."[151]

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149 M'Naghten [1843] UKHL J16 House of Lords.

150 Gillies, *Criminal Law 3rd ed.*, 219.

151 *Prosecutor v. Vasiljević*, Judgment, Trial Chamber II, Case No. IT-98-32-T, November 29, 2002, para. 283.

The same principle has been adopted in Article 31(1)(a) ICCSt., introduction the axiom of "destruction" of criminal responsibility. Clearly, this reflects the "partial defense" of diminished responsibility (see below).

5.3.3 The Interrelationship of the Insanity/Diminished Responsibility Defense and the Intoxication Defense

On the one hand, doctrinally, the defense of mental disease or insanity and that of intoxication are two different categories of excluding criminal responsibility in terms of excuses.[152] On the other hand, consuming an intoxicant may produce a defect of mind satisfying one of the M'Naghten requirements (namely, that where the accused does not know the physical nature or moral quality of his/her act); yet, merely on this basis, the accused cannot resort to an acquittal due to insanity, since intoxication per se does not amount to a disease of mind in terms of the rules. This is not to say that he or she cannot plead the separate defense of intoxication without having this a causal relationship with the defense of insanity.

Thus, where the intoxicating product affects the accused's mind such that it causes (temporary) insanity, and the accused commits the act charged while insane, the accused could be exonerated on the ground of insanity. The burden yet lies on the accused to sustain this causal relationship between intoxication and insanity. For an intoxicant to produce insanity, there needs to be an underlying disease of mind (one which may or may not have been caused by an excessive taking of intoxicants over time). An example of this situation would be the causation of the disease of mind called delirium tremens by the consumption of alcohol, where this condition leads to the commission by the person affected of a criminal act while suffering a defect of reason satisfying the M'Naghten rules. Another example can be found in a disease of mind caused by defects in the accused's brain. In two criminal cases before Italian courts, the judges imposed lower sentences because the accused possessed the ineffective variant of the so-called "monoamine oxidase A gene" (MAOA-gene), a gene that is responsible for the degradation of neurotransmitters in the human brain.[153] In a U.S. criminal case, the jury amended the 1st degree murder charges

152 Kai Ambos, "Other Grounds for Excluding Criminal Responsibility," in *The Rome Statute of the icc: A Commentary Vol. I*, ed. Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Oxford: Oxford University Press, 2002), 1003–1048 at 1019.

153 Matthew L. Baum, "Monoamine Oxidase A (MAOA) Genetic Predisposition to Impulsive Violence: Is It Relevant to Criminal Trials?" *Neuroethics* (2011): 1. doi: 10.1007/s12152-011-9108-6; K. de Kogel and F. Leoné, "Beperkingen van neurowetenschap en gedragsgenetica in de rechtspraktijk," *NJB* 45 (2013): 3157–3161.

into voluntary manslaughter, because the accused turned out to have the inefficient variant of the MAOA-gene.[154] Persons with the inefficient variant of this gene, have a predisposition to violence. Even though these cases concern national cases and both nature and nurture may play a role in bringing about certain (violent) events, it is important to take into account that criminal liability for certain international crimes may be assessed on the basis of the new forensic scientific developments, particularly when it concerns low ranking individuals acting rather uncommon to situation on the battlefield.

In the House of Lords case of *Attorney-General* (*Northern Ireland*) *v. Gallagher* (1963)[155] Lord Denning suggested that, in one situation at least, the defendant afflicted with a disease of mind who voluntarily consumed a drug, with the result that the defendant became temporarily insane and committed a criminal act while thus affected, could not be absolved of liability on the ground of insanity. This pertains to the situation in which the defendant has committed himself to criminal behavior prior to the consumption of this drug. It is questionable whether this applies to all situations.[156]

The interrelation between the defense of diminished mental responsibility and intoxication was raised by the defense in *Prosecutor v. Vasiljević*. The defense asserted, supported by two expert witnesses, that at the time of the crime (the so-called *Drina River Incident* on 7 June 1992), the accused's mental responsibility was considerably diminished due to (*inter alia*) chronic alcoholism.[157] The ICTY rejected this argument, as the accused failed to establish this defense on the balance of probabilities. However, the ICTY, relying on an expert witness called by the prosecution, left open the possibility that such impairment of mind may be provoked by alcohol intoxication, delirium, or alcohol psychosis.[158]

The defense counsel acting before ICTs must be alert to the possibility of this defense in cases involving totally unexplainable behavior of an accused or absence of genuine recollection of the acts.

In conclusion, these examples suggest that the practical distinction made by the ICC drafters between Article 31(1)(a) and (b) ICCSt. will probably turn out to be artificial. It is not unlikely that the defense of Article 31(1)(a) ICCSt. (mental disease) can be combined with the defense envisioned in Article 31(1)(b) (intoxication), as the similar criteria of these provisions already suggest.

154 Baum, "MAOA Genetic Predisposition," 1.

155 *Attorney-General* (*Northern Ireland*) *v. Gallagher* [1963] A.C. 349 at 379, 382 per Denning J.

156 Gillies, *Criminal Law 3rd ed.*, 233.

157 *Prosecutor v. Vasiljević*, "Trial Judgment," November 29, 2002, paras. 283–295.

158 Ibid., paras. 291–295.

5.3.4 The Interrelationship of the Insanity Defense and the Diminished Responsibility Defense

The defense of diminished responsibility (as discussed in paragraph 3.5 above), likewise originated from common law, is distinguished from the insanity defense in a number of respects. Apart from the fact that it is of statutory creation, it may be pleaded only by way of answer to a charge of murder, and, if successful, the accused is not exonerated from liability but rather (assuming his or her guilt has been proven) the accused's liability is reduced to that for manslaughter. Both are alike in that they are concerned with mental disorder, although the categories of relevant disorder are less restrictive than are those stipulated under the M'Naghten rules. Both are alike in casting upon the accused the burden of proving, on the balance of probabilities, the facts which bring the accused's conduct within the scope of each defense. It is evident that a relevant fact situation (viz., a homicide committed by a person suffering from a mental disorder) will, *prima facie*, put each of these defenses in issue. It is presumably open to the accused to raise both defenses in the alternative, and, indeed, case law recognized that where the accused sets up a defense of diminished responsibility, the Prosecution is entitled to show that the accused was insane, and *vice versa*.[159] This procedural flexibility accorded to the Prosecution has been statutorily provided for in certain jurisdictions.[160] Where both defenses are left with the jury or ICTs, it is prudent that the issue of insanity must be considered first, for if the accused was indeed insane at the time he or she committed the murder charged, there is no legal basis for convicting the accused of murder, manslaughter or indeed of any other crime. An insane person cannot incur criminal responsibility. Only if the jury is not satisfied as to the accused's insanity it could consider the alternative defense of diminished responsibility, which defense could only mitigate a penalty.[161]

5.3.5 The Insanity Defense and Forensic Expertise before ICTs

Without doubt, the defense, raising either an insanity defense or that of diminished responsibility, must seek support of its plea by leading forensic expertise provided by medically qualified expert witnesses who have examined the accused. The problem is that such examination most likely only takes place some time after the alleged crimes, so that the evaluation of the accused's mental condition at the time of the alleged facts must be based on a

159 See *Bratty v. Attorney General* (*Northern Ireland*), 1963, A.C., 386.

160 Gillies, *Criminal Law 3rd ed.*, 237.

161 Ibid.

reconstruction, eventually supported by existing medical records about this condition at that time.

Although international criminal law sets no legal requirement that such forensic evidence be adduced to substantiate either one of these defenses, it is clear that in the absence of forensically based arguments, the burden of proof for the defense can hardly be met. Given the advances in scientific understanding of the mind and its disorders since the M'Naghten rules were propounded, such evidence is of more value than it would once have been. So, for example, it has been remarked that the "symptomology of a recognized mental disease such as schizophrenia is peculiarly a matter of expert psychiatric evidence."[162] Hence, once the defense relies on the nature of this disease and its effects on the accused, it should provide the court with expert evidence on this topic. Where medical evidence is adduced, it may be of considerable importance; yet, it is to be recalled that the jury is entitled to and indeed must look at other relevant evidence throwing light upon the accused's mental state – for example, the "previous and contemporaneous acts of the accused may often be preferred to medical theory."[163] As noted above, "disease of mind" in terms of the M'Naghten rules is a legal concept, rather than a medical concept. It is for the jury or court of law to decide whether the accused was suffering from this condition, and, whether it caused a relevant disturbance to the workings of the human mind.

On the other hand, as observed by the Australian forensic expert Freckleton:

> *Ex post facto* evaluation of culpability via insanity assessment is not a therapeutic evaluation. It is a forensic task, using legal criteria for legal purposes. Significant questions exist as to whether it is a function that mental health professionals should fulfill, given the limited extent to which the tools of the treating physician can be employed to arrive at the assessment. Much the same can be said of the process by which psychiatrists and psychologists provide opinions to courts about whether defendants functioned at a given time in the past as automatons or at the time were suffering from "diminished responsibility." Neither automatism nor diminished responsibility form a traditional part of medical discourse. They have been engrafted onto psychiatry by the demands of the law to evaluate whether defendants' actions can be regarded as willed and whether, if they were, the mental state that generated them was impaired by "abnormality of mind," as legally defined.[164]

162 *Hitchens v. R.*, 1962, T.S.R. 35, at 51; see further Gillies, *Criminal Law 3rd ed.*, 242–243.

163 *Attorney General* (*S.A.*) *v. Brown*, 1960, A.C. 432, 452.

164 See Freckelton, *infra* note 469 at 118.

6 The Jurisprudential and Statutory Self-Defense under the Laws of ICTs

ICTY-ICTR

Neither the ICTYSt. nor the ICTRSt. refer to the concept of individual self-defense, which defense should be admitted once the necessity to prevent an immediate danger to life or physical integrity of oneself or another person is established.[165] When considering the major legal systems of the world, self-defense is a generally accepted defense, albeit that common law and civil law apply a different test:

(i) in civil law, the necessity to protect oneself against the use of unlawful force is determined rather objectively,[166] whereas;
(ii) in common law, this requirement is fulfilled once the actor only *believes* that this necessity exists, which implies a more subjective approach. Illustrative is paragraph 3.04(1) US Model Penal Code which states that:

> Use of force for the protection of the person…the use of force upon or toward another person is justifiable when the actor *believes* [emphasis added; GJK] that such force [deadly force is not excluded; GJK] is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.[167]

An example thereof is the acquittal of George Zimmerman by a US jury in Florida in 2013 on the basis of an extended interpretation of self-defense; Mr. Zimmerman pursued an individual whom he suspected of being "a criminal". Despite instructions by phone of the police not to engage in a "hot pursuit", he

165 See for this defense: Knoops, *Defenses in Contemporary International Criminal Law 2nd ed.*, 63 *et seq.*

166 Although, for example, the Supreme Court of the Netherlands in the last decade did adopt a more subjective approach, *inter alia*, holding that if the accused reasonably – not limited to: objectively – could not have escaped from the crime scene, he can resort to self-defense. In a 2009 judgment, the Supreme Court of the Netherlands held that the fact that the suspect should have retreated from a self-defense situation cannot be answered in a general manner, but should be judged based on the circumstances of the case, see Supreme Court of the Netherlands, Judgment, Case No. NJ 2010, 301, October 6, 2009. In 2013, the Supreme Court of the Netherlands quashed a conviction of the Court of Appeals in Arnhem, holding that – in light of the circumstances of the case – it could not be expected of the defendant to retreat, see Supreme Court of the Netherlands, Judgment, Case No. ECLI:NL:2013:773, September 24, 2013.

167 Ambos, "Other Grounds for Excluding Criminal Responsibility," 1021–1023.

followed the "suspicious" 17 year old Trayvon Martin, who he subsequently shot to death.[168] Mr. Zimmerman had to face trial for second degree murder, and a discussion arose as to the legitimacy of the U.S. "Stand your Ground" laws, which rescinds the duty to retreat in self-defense situations where this would have been possible.[169] Under this law, it is "easier to prevail under self-defense theory."[170]

However, recourse to self-defense before ICTs is not frequently made. However, the ICTY Trial Chamber in the *Kordić* case (Lašva Valley) recognized individual self-defense as an admissible defense to international crimes within the jurisdictional scope of the ICTY.[171] In this case, the ICTY observed, with reference to the self-defense provision of the ICCSt., that:

> the notion of 'self-defense' may be broadly defined as providing a defense to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.[172]

The Trial Chamber acknowledged that indeed the ICTYSt. did not provide for self-defense as a ground for excluding criminal responsibility. However, it deemed this defense admissible before the ICTY as this "forms part of the general principles of criminal law which the (ICTY) must take into account in deciding the cases before it."[173] The Trial Chamber was supported by the self-defense provision of the Rome Statute and opined in paragraph 451 of the *Kordić* case that the latter provision "reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law."[174]

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168 Transcript of George Zimmerman's Call to the Police, accessed April 30, 2014, http://www.motherjones.com/documents/326700-full-transcript-zimmerman.

169 Barbara Liston, "Zimmerman lawyer seeks change in Florida trials on 'stand your ground' law," *Reuters*, February 26, 2014, accessed April 30, 2014, http://www.reuters.com/article/2014/02/27/us-usa-florida-selfdefense-idUSBREA1Q04W20140227; Kyle Hightower, "George Zimmerman's Lawyer, Mark O'Mara, Pursuing Traditional Self-Defense," *the Huffington Post*, August 13, 2012, accessed April 30, 2014, http://www.huffingtonpost.com/2012/08/14/george-zimmermans-lawyer-stand-your-ground_n_1775105.html.

170 Hightower, "George Zimmerman's Lawyer."

171 *Prosecutor v. Kordić and Čerkez*, Judgment, Trial Chamber, Case No. IT-95-14/2-T, February 26, 2001, para. 448 *et seq*.

172 Id., para. 449.

173 Ibid.

174 Id., para. 451.

In the *Kordić* case, the Trial Chamber rejected the defense argument that a defensive action in general, conducted in the course of an armed conflict, could amount to self-defense. More specifically it observed in paragraph 452 that "any argument raising self-defense must be assessed on its own facts and in the specific circumstances relating to each charge." Consequently, the ICTY concluded that "military operations in self-defense do not provide a justification for serious violations of international humanitarian law."[175] The ICTY case law is congruent with the Rome Statute. Article 31(1)(c) ICCSt. excludes defensive operations as such as self-contained ground for individual self-defense within the realm of international criminal law.

ICC

As noted, Article 31(1)(c) ICCSt. codifies two forms of self-defense:

(i) Proportionate self-defense and defense of others against an imminent and unlawful use of force, whereby the person acts "reasonably";
(ii) Self-defense stemming from serious danger to property which is either essential for the survival of persons or essential for accomplishing a military mission. Yet, in this regard, self-defense is, as a result of a compromise during the Rome Conference on the ICC, restricted to cases of war crimes.

Close reading of this provision indicates that acting pursuant to self-defense sub (i) and (ii) ICCSt. may result in a justification for the commission of war crimes. Some scholarly opinions hold that this provision is not in compliance with the Law of Armed Conflict and even a violation of *jus cogens*, presupposing that the prohibition of war crimes amounts to a *jus cogens* norm.[176]

7 Alibi Defenses

Alibi defenses actually amount to a refutation of the charges based on the establishment of certain facts making it improbable that the accused physically committed the crime. The burden of proof thereto rests on the defense in

175 Id., para. 452.

176 Eric David, *Principles de Droit des Conflicts Armés* (Brussels: Bruylant, 1999), 693; see for this defense under the ICC Statute in detail Knoops, *Defenses in Contemporary International Criminal Law, 2nd ed.*, 137; see also Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford: Oxford University Press, 2012), p. xv–xxxiii.

that it has to convince the court on the balance of probabilities that the defendant was absent at the crime scene or otherwise could not have physically contributed to the crime during the indictment period. The practice of the ICTs reveal several examples of this defense.

In the *Sredoje Lukić* case before the ICTY, the defense argued that Mr. Lukić, at that time a local policeman, was not present during the burning down of a house (which led to the death of civilians), since he was probably victim of a misidentification by two hearsay witnesses. The Trial Chamber held in this regard that:

> Sredoje Lukić bears criminal responsibility as an aider and abettor for the deaths of at least 59 people in the Pionirska incident, the victims of which were children, women and the elderly. Several victims of the Pionirska street incident either knew or recognised Sredoje Lukić as a policeman from Višegrad. There is no evidence that Sredoje Lukić did anything to stop the burning or to release the victims.[177]

Prior to this case, the SCSL was confronted with a similar defense made by Santigie Kanu, one of the Armed Forces Revolutionary Council (AFRC) defendants, who argued that he was in military custody at the time of a crime committed against UN peacekeepers in Freetown. Due to a court order of the SCSL, the defense was able to retrieve the military records – in possession of the Sierra Leonean government, which led to the conclusion that Mr. Kanu's argument proved to be true. As a result, these charges were dismissed.[178]

Alibi defenses can be successful presupposed the defense is enabled to conduct proper and effective fact finding, which in turn is contingent upon the principle of equality of arms, ensuring the defense to have:

(i) Access to State documents equal to the prosecution;
(ii) (Financial) resources to conduct its own investigation.

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177 *Prosecutor v. Lukić and Lukić*, Judgment, Trial Chamber III, Case No. IT-98-32/1-T, July 20, 2009, para. 1088.

178 *Prosecutor v. Santigie Borbor Kanu*, Decision on Kanu's Motion for Dismissal of Counts 15–18 of the Indictment due to an Alibi Defence and Lack of prima facie case and Request for Extension of Time for the Hearing of the Defence Motion, Case No. SCSL-04-16-PT, February 15, 2005.

CHAPTER 7

General Principles of Procedural Criminal Law envisioned by ICTs

1 Procedural Nature and Characteristics of Proceedings before ICTs

1.1 *The ICTY-ICTR System: A Merge of Common Law and Civil Law Procedural Elements*

1.1.1 Introduction

With the creation of the *ad hoc* international tribunals (ICTY and ICTR) and the International Criminal Court, the international community did enter into a new phase in the internationalization of criminal justice. Whereas the *ad hoc* courts extracted principles of substantive and procedural criminal law from common law and international treaty-law, the ICC merges adversarial and inquisitorial law traits. Its Statute and Rules of Procedure and Evidence combine elements of both systems into procedural guarantees for truth finding and fair trial, while reflecting ICTY-ICTR experience.

1.1.2 Procedural Reform as a Basis for System Change

The trial practice of the ICTY illustrates a gradual shift to a judiciary having a more prominent role in accelerating trials. A similar trend also occurred at the ICTR.[1] This development merits the question as to whether this shift can be qualified as one from primarily being common law in nature towards one with a more civil law accent. In 2000, the second President of the ICTY, Judge Gabriella Kirk McDonald, wrote that the tribunals' RPE "are truly unique and are not simply a hybrid of the civil and common law systems."[2] Be that as it may, it is true that the RPE and practice of the ICTY do not seem to lean in any significant degree toward one or the other of these two primary legal traditions, although ICTY judges adopt an essentially adversarial form of proceedings.

Nonetheless, while the first few trials at the ICTY closely resembled common law criminal trials, the level of control being exercised by the trial

1 Daryl A. Mundis, "From Common Law Towards Civil Law: The Evolution of the ICTY Rules of Procedure and Evidence," *Leiden Journal of International Law* 14/2 (2001): 367. doi: 10.1017/S0922156501000188.

2 Gabrielle Kirk McDonald, "Trial Procedures and Practices," in *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, ed. Gabrielle Kirk McDonald and Olivia Swaak-Goldman (The Hague: Kluwer Law International, 2000), 556.

 | DOI 10.1163/9789047429012_008

chambers in the last decade reflected elements of a civil law approach.[3] Consequently, a mixed jurisdiction surfaces that contains elements of both common law and civil law. The ICTY/ICTR yet never became a purely civil law tribunal since its Statutes embrace clear references to several adversarial or common law elements. For example, Article 16(1) ICTYSt. bestows the Prosecutor, rather than the judges, with the responsibility for the investigation and prosecution. It had the consequence that the judges never fully controlled the presentation of the cases they are asked to try. Another example relates to Article 21(4)(e) ICTYSt., which guarantees the accused the right to cross-examine the witnesses against him.[4] This is also a typical adversarial element. It is hard to imagine that the RPE will ever abandon this principal right of the accused to cross-examine the witness in Court instead of solely before an investigating judge. Nevertheless, the ICTY practice gradually transgressed into a more civil law oriented court, thereby abstracting from the more common law centered approach that dominated the early practice of the ICTY.[5] It should be noted, however, that neither system exists in a pure form, but that both systems "borrow from each other."[6] Two reasons for this tread may be identified:

(i) This evolutionary process is being fuelled to a large extent by the perception that ICTY trials are too lengthy and time consuming. In its first seven years, the ICTY rendered judgments in only twelve cases (*Tadić, Erdemović, Delalić, Furundžija, Aleksovski, Jelisić, Kupreškić et al., Blaškić, Kunarac et al., Kordić and Čerkez, Todorović, Krštić*).[7]

(ii) This process is also being driven by the notion that the best way to address the situation is by providing judges with more authority to control the proceedings, thus reducing the length of trials. Under the umbrella of improving case management, this process has been ongoing for the last three years, especially since the 18th Plenary session in July 1998.[8]

3 Mundis, "From Common Law Towards Civil Law," 368.

4 Article 21(4)(e) ICTYSt. reads: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:...(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

5 See for example, ICTY Global Legacy, Conference Proceedings, 15–16 November 2011 (The Hague: ICTY Outreach Programme, 2012), 97–98 (hereinafter: "Conference Proceedings").

6 Id., 98.

7 Mundis, "From Common Law Towards Civil Law," 368.

8 See also ICTY Press Release, "ICTY Judges successfully conclude review of judicial procedures," No. CC/PIU/333e, July 16, 1998, accessed April 15, 2014, http://www.icty.org/sid/7652.

> The practice of the Trial Chambers since that time have indeed demonstrated that the ICTY judges are following this practical approach, as envisioned by amendments to the RPE.

This paragraph will examine the evolution of the RPE and ICTY trial practice from a system primarily driven by the parties (common law) to one in which the judges themselves play a more active role similar to that existing in civil law tradition. I remark that in many civil law jurisdictions, there are in fact no rules of evidence, no cross-examinations, no objections and few (or no) (pre-trial) motions filed by either party. Furthermore, in most civil law systems, judges have sole discretion as to whether to accept evidence and which witnesses to summon; moreover, judges themselves conduct the examination of witnesses in most cases. With respect to the position of the Prosecutor, a remarkable difference exists: as opposed to the counseling position of the Prosecutor in most common law systems, the Office of the Prosecutor in most civil law countries is a judicial post. For example, in France there are two branches of the judiciary, the "sitting judiciary" (*magistrature assise*), composed of the examining magistrates and trial judges, and the "standing judiciary" (*magistrature debout*), or the Prosecutor, who has no "counsel" status.[9]

1.1.3 ICTY RPE and Amendments

The ICTY RPE, first adopted on 11 February 1994 and amended numerous times, consist of 125 Rules. As of this date, the ICTY judges, in accordance with Article 15 ICTYSt. (empowering the Judges to adopt the Rules) and Rule 6 RPE (amending the Rules),[10] have adopted new rules on 49 occasions in all. Whereas the first version consisted of "only" 69 pages of Rules, this was extended to 127 pages in the latest version, an extension of almost 85 percent from the original version.[11] Over the course of nearly 20 years, the number of rules increased with almost 30 per cent from the original version.[12]

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9 Mundis, "From Common Law Towards Civil Law," 370.

10 Rule 6 (A) ICTY RPE reads that: "Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the registrar and shall be adopted if agreed to by not less than ten permanent Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges."

11 At the time of writing, the RPEs were last amended on 22 May 2013 (IT/32/Rev. 49).

12 The ICTY RPE were adopted on 11 February 1994 and consisted of 127 Rules. At the time of writing, the latest amendments dated from May 22, 2013 (IT/32/Rev. 49), accessed March 26, 2014, http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence.

Interestingly, most of the amendments and new Rules relate to case management and represent attempts to reduce the length of ICTY Trials. Rule 92*bis*, for example, was adopted in December 2000 and provided for the acceptance of written witness statements or a transcript of evidence, which was given by a witness in other proceedings before the ICTY, to be admitted in lieu of oral testimony, as long as it does not concern the act and conduct of the accused as charged in the indictment. The Rules 92*ter* and 92*quater* were adopted in September 2006 and provided for a more concise presentation of witness testimony.[13] The question arises as to how this affects the preservation of the accused's right to a fair trial as guaranteed by Articles 20 and 21 ICTYSt. On the other hand, the RPE amendments are meant to ensure an expeditious trial, as also guaranteed by said Articles of the ICTYSt.[14] It has been said that the RPE amendments were aimed at achieving efficiency and fairness in the proceedings.[15] However, after the UN Security Council adopted the ICTY Completion Strategy in 2003, which dictated that all investigations had to be completed by 2004, all trials by 2008 and all work by 2010, the Tribunal "became obsessed with the devising of procedures to expedite its trials."[16] This is when the common law approach of the ICTY merged with the civil law approach, most particularly *vis-à-vis* the admissibility of evidence. The civil law model applies a

13 See also Report of ICTY Global Legacy Conference, 15–16 November 2011, accessed March 24, 2014, http://www.icty.org/sid/10405.

14 Relevant in this regard are, Article 20(1) ICTYSt.: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"; Article 21(4) ICTYSt.: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:…(c) to be tried without undue delay…(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him…."

15 ICTY Global Legacy, "Conference Proceedings," 96.

16 Id., 97; see S/RES/1503 (2003), adopted by the Security Council on August 28, 2003; the 2013 annual report of the ICTY to the UN Security Council mentions the cases that are still pending before the Trial and Appeals Chambers of the ICTY. The Trial Chamber Judgment in the case of Ratko Mladić is expected in July 2016. Clearly, the timeframe set by the UN Security Council in 2003 has not been met, this is partly due to staffing shortages and the loss of highly experienced staff members; see "Report of the International Tribunal for the Former Yugoslavia," A/68/255-S/2013/463, August 2, 2013; other reasons for not meeting the dates set by the UN Security Council pertain to the late arrest of the remaining fugitives and the complexity of certain cases, see ICTY, "Completion Strategy," accessed March 25, 2014, http://www.icty.org/sid/10016.

"more relaxed" evidentiary standard, in which (hearsay) evidence is admissible as long as it is relevant and has probative value.[17] The common law system, on the other hand, in principle, rejects hearsay evidence, although exceptions to this rule are not excluded.[18] The most controversial amendment in the ICTY RPE pertains to Rule 94(B), which provides that a Trial Chamber "may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."[19] This rule shifts the burden of proof from the Prosecutor to the accused, as adjudicated facts may be admitted in subsequent trials, even though these facts need not necessarily be contested in a previous case. This rule is disadvantageous to the accused, since in 99 per cent of the cases the Prosecutor seeks to have adjudicated facts admitted.[20]

Another important aspect related to expediency of the proceedings was the shift from a preference for single trials to multiple-accused trials, which evolved into "mega-trials" as a preferred way of adjudicating the accused.[21] Adjudicating multiple accused, as already provided for in the RPEs adopted on 11 February 1994, positively contributes to the judicial economy, as repeatedly litigating the same facts can be avoided.[22] The importance of adjudicating multiple accused became apparent after Slobodan Milošević died in prison on 11 March 2006, which resulted in the loss of four years of work and the possibility of creating an authoritative historic record.[23] ICTY practice proscribes that proceedings are terminated in case of the death of the accused.

The ICTY's difficulties with trial management and the length of the proceedings, were echoed in 1999, when the President of the ICTY, Judge Gabrielle Kirk McDonald, submitted a report to the ICC Preparatory Commission which

17 ICTY Global Legacy, "Conference Proceedings," 98.

18 *Ibid.*

19 Rule 94(B) RPE, amended July 10, 1998, amended December 8, 2010.

20 ICTY Global Legacy, "Conference Proceedings," 99.

21 G. Acquaviva, N. Combs, M. Heikkilä, S. Linton, Y. McDermott and S. Vasiliev, "Trial Process," in *International Criminal Procedure*, ed. Göran Sluiter, Hakan Friman, Suzannah Linton, Salvatore Zappala and Sergey Vasiliev (Oxford: Oxford University Press, 2013), 494.

22 Rule 48 and 49 ICTY RPE, adopted on February 11, 1994; see also Acquaviva *et al.*, "Trial Process," 494.

23 Slobodan Milošević's trial commenced on February 12, 2002; the proceedings against Milošević were severed from the other accused (Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković) in the initial indictment on September 5, 2002; see case information sheet, "Kosovo, Croatia & Bosnia" (IT-02-54) Slobodan Milošević, accessed March 25, 2014, http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf.

was tasked – at that time – with drafting the ICC RPE.[24] In her address to the Preparatory Commission, Judge McDonald, outlined the difficulties with the number of witnesses called by the parties, which, in one case, added up to over 300 witnesses for one of the parties. As this could have caused the proceedings to last for years, the ICTY judges adopted rules to expedite the proceedings, *inter alia* rules allowing "the Trial Chamber to reduce the number of witnesses if a party appears to be calling an excessive number of witnesses to prove the same fact" and "to reduce the estimated length of time required for each witness."[25] Another issue revolved around the evidence; Judge McDonald expressed the view that "an international court must principally rely on the discretion of the Chamber to resolve evidentiary issues."[26] In March 2000, Judge Richard May delivered remarks – on behalf of the ICTY Judges – to the Preparatory Commission for the ICC, elaborating upon the previous remarks of Judge McDonald. As a general comment, judge May noted: "while it is important for Rules to be clear, they also need to be flexible enough to allow Judges to deal with the different sets of circumstances which arise daily in the courtroom, many of which cannot be anticipated."[27] The ICTY judges brought their lessons to the attention of the Preparatory Commission, so that the ICC could benefit from what the ICTY had learned. The ICC, eventually, incorporated both common and civil law elements, with a predominant adversarial approach while providing the Court with extensive powers to intervene and control the procedure.[28]

In sum, this active role attributed to the ICTY and ICTR Trial Chambers, enabling these tribunals to expedite trials, materialized into:

(i) fixing the number of witnesses the parties may call (Rule 73 *bis* (c) and (d); Rule 73 *ter* (c) and (d));
(ii) establishing the time available to the parties for presenting evidence (Rule 73 *bis* (e) and (f), Rule 73 *ter* (e) and (f));

24 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, July 30, 1999, accessed March 25, 2014, http://www.icty.org/sid/7745.

25 *Ibid.*

26 *Ibid.*

27 Remarks of Judge Richard May, Judge of the International Criminal Tribunal for the former Yugoslavia, to the Fourth Session of the Preparatory Commission for the International Criminal Court, March 20, 2000, accessed March 25, 2014, http://www.icty.org/sid/7887.

28 William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 237.

(iii) supervising the interview of witnesses with a view of avoiding irrelevant hearings (Rule 90 (f));
(iv) admitting other than oral evidence, such as documentary evidence (Rule 89 (c); Rule 92 *bis*);
(v) excluding irrelevant evidence (Rule 89 (d)); and
(vi) excluding cumulative evidence.[29]

The shift towards a more civil law tradition, albeit understandable from an economic procedural point of view, will undoubtedly have an impact on the rights of the accused, especially the ability of the defense to strive for substantive cross-examination of prosecution witnesses.[30] On the other hand, these amendments may result in more procedural uniformity among defense counsels. It is up to the judges to find the proper balance.

In conclusion, it can be said that the ICTY, consistent with its *sui generis* nature, aimed at, as described by Judge McDonald, achieving efficiency and fairness by scrutinizing whether the accused and the victim received a fair and efficient trial, which fulfils the international standards, as opposed to assessing fair trial standards under either common or civil law perceptions of fairness.[31]

1.1.4 ICTR RPE and Amendments

The ICTR RPE were adopted on 29 June 1995 and have been amended on 22 occasions in total.[32] The original 126 rules were extended with another 29 (sub) rules over the course of eighteen years.[33] As with the ICTY, the ICTR was placed under time pressure by the UN Security Council, after it adopted Resolutions 1503 and 1534 on the completion strategy of the Tribunals.[34] Resolution 1503, adopted on 28 August 2003, urged the ICTR to formalize a detailed completion strategy, modelled after the ICTY's strategy. The strategy ought to involve the transfer of cases of intermediate- and lower-rank accused to national jurisdictions, so that the ICTR's investigations could be completed by the end of 2004, all trial activities by the end

29 *Prosecutor v. Kordić and Čerkez*, Trial Transcripts, Case No. IT-94-14/2, February 21, 2000, at 14702; see para. 2.1.4 *infra*; see also Richard May and Marieke Wierda, *International Criminal Evidence* (Leiden: Martinus Nijhoff Publishers, 2003), 280.

30 Mundis, "From Common Law Towards Civil Law," 376; see further Chapter 8.

31 ICTY Global Legacy, "Conference Proceedings," 102.

32 At the time of writing, the latest amendments were adopted at the 24th Plenary Session on April 13, 2014, accessed March 26, 2014, http://www.unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx.

33 *Ibid*.

34 S/RES/1503 (2003), adopted on August 28, 2003; S/RES/1534 (2004) adopted on March 26, 2004.

of 2008, and all of its work in 2010.[35] On 28 July 2003, the UN Secretary General wrote in a letter to the Security Council, that the ICTY and ICTR should each have its own Prosecutor, enabling the Prosecutor to devote his or her entire attention to the ongoing investigations and prosecutions, this was – in light of the completion strategy – deemed "essential, in the interests of efficiency and effectiveness."[36]

Even before said resolutions had been adopted, several measures were introduced to facilitate and expedite the proceedings at the ICTR. During the Tribunal's 13th Plenary Session on 26–27 May 2003, the ICTR judges adopted 23 of the 44 proposed amendments to the Rules of Procedure and Evidence.[37] Since 2003, the RPE of the ICTR have been amended 8 times, however, the amendments of 27 May 2003 were quite significant.[38] These amendments may be summarized as follows:

- The continuance of a trial with a substitute judge on the basis of Rule 15 *bis*. Until the amendment of Rule 15 *bis* trials could *only* proceed for a short period of time or with the approval of the accused, in case one of the three judges sitting on the bench was absent. This rule was amended to reduce the length of the trials and allows for a trial to continue with a substitute judge if a sitting judge dies, falls ill, is not re-elected, resigns or is in any other way unable to continue.[39]
- Reforms at the administrative level, such as the establishment of a Coordination Council and Management Committee (CCMC) to further facilitate the ICTR's work under Rule 23 *bis* and *ter*. The Coordination Council was endowed with the task to coordinate activities of the Tribunal in light of the completion strategy, as well as to support the President of the Tribunal in his supervisory tasks *vis-à-vis* administrative and judicial support to the Chambers and Judges.[40]

35 S/RES/1503 (2003), adopted on August 28, 2003.

36 Letter from the UN Secretary General to the President of the Security Council, July 28, 2003 (S/2003/766).

37 "ICTR Plenary Adopts Measures to Facilitate and Expedite Proceedings," *Press Release*, June 2, 2003, accessed March 27, 2014, http://ictr-archive09.library.cornell.edu/ENGLISH/PRESSREL/2003/348.html.

38 At the time of writing, the latest amendments were adopted at the 24th Plenary Session on April 13, 2014, accessed March 26, 2014, http://www.unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx.

39 "ICTR Plenary Adopts Measures to Facilitate and Expedite Proceedings," *Press Release*, June 2, 2003, accessed March 27, 2014, http://ictr-archive09.library.cornell.edu/ENGLISH/PRESSREL/2003/348.html.

40 *Ibid*.

- The introduction of a new plea agreement procedure under Rule 62 *bis*. Upon agreement between the prosecution and defense, the Prosecutor may, if the accused pleads guilty, amend the indictment and submit that a certain sentence is appropriate. In principle, the agreement – which is not binding to the Trial Chamber – will be publicly disclosed.[41]
- Elimination of the requirement under Rule 65 that the Trial Chamber finds exceptional circumstances before an accused may be provisionally released.[42]
- The right to appeal preliminary and subsequent motions under Rule 72 and 73, if it involves an issue that would significantly affect the fairness and expediency of the proceedings and if, according to the Trial Chamber, "an immediate resolution by the Appeals Chamber may materially advance the proceedings."[43]
- Restrictions on cross-examination of witnesses concerning matters raised during the witnesses' examination in chief under Rule 90.[44]
- The opposing party's obligation to notify the Trial Chamber whether or not it accepts the witness's qualification as an expert under Rule 94 *bis* (B)(i). Until the amendments of 27 May 2003 the opposing party was already under the obligation to notify the Trial Chamber whether or not it would accept the expert witness statement, or if it wished to cross-examine the expert witness.[45] This duty to inform the Trial Chamber on these issues is clearly in line with the courts' case management policy.

The influence of the UN Secretary General's letter, and the UN Resolutions can also be found in the subsequent amendments, adopted on 24 April 2004 during the 14th Plenary Session of the Judges. Rule 11 *bis*, for example, provides for the referral of an indictment to another (i.e. national) Court.[46] The Trial Chamber, if it refers a case to the authorities of a State willing to prosecute the accused,

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*; see particularly Rule 73(B) ICTR RPE as adopted on May 27, 2003.

44 *Ibid.*

45 Rule 94 *bis* (B)(i) and (ii) ICTR RPE (exp.); Rule 94 *bis* (B)(ii) and (iii) ICTR RPE as amended on May 27, 2003.

46 Rule 11 *bis* (A) reads: "If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber for the purpose of referring a case to the authorities of any State that is willing to prosecute the accused in its own courts, so that the authorities of the State concerned should forthwith refer the case to the appropriate court for trial within that State"; before this amendment Rule 11 *bis* provided for the suspension of an indictment in case of proceedings before national courts.

shall have to satisfy itself that the Court of the State concerned has jurisdiction over the case and that "the accused will receive a fair trial with due process."[47] This latter criterion has been raised during several ICTR referral cases. The ICTR referrals to Rwanda have been disputed by defense counsels because of fair trial concerns in Rwanda, even though the tribunal had created a monitoring mechanism for referred cases.[48] These difficulties became apparent in the case of *Jean Bosco Uwinkindi*, the first case to be referred to Rwanda pursuant to Rule 11 *bis*.[49] Uwinkindi's case had already been referred to Rwanda for trial on 28 June 2011, yet, he was not transferred until 19 April 2012.[50] In February 2012, just a month after Uwinkindi's case file had been transferred to the Rwandan authorities and after the Appeals Chamber had confirmed the referral decision, the transfer was stayed pending the establishment of a suitable monitoring mechanism, as there were difficulties in reaching an agreement with the African Court of Human and People's Rights (ACHPR), which was initially endowed with the task of monitoring the case.[51] In Rwanda, Uwinkindi continued to express his fair trial concerns, *inter alia* because the Prosecutor-General of Rwanda, Mr. Martin Ngoga, ventilated his disappointment with the acquittal of two ICTR indictees in February 2013, Justin Mugenzi and Prosper Muiraneza, on radio and television. Uwinkindi argued that such a statement by the Prosecutor-General made the presumption of innocence meaningless, and that he was already presumed guilty even before the commencement of the trial. Other issues related to the (lack of) payment of legal fees to defense counsel and the indictment still being in English, without a translated version so that Uwinkindi could fully understand the charges against him.[52] Even

47 Rule 11 *bis* (C)(i) and (ii).

48 Letter dated 22 May 2012 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, S/2012/349, para. 4.

49 *Prosecutor v. Jean Uwinkindi*, "Decision on the Prosecutor's Request for Referral to the Republic of Rwanda. Rule 11 *bis* of the Rules of Procedure and Evidence," Referral Chamber Designated Under Rule 11 *bis*, Case No. ICTR-2001-75-R11*bis*, June 28, 2011.

50 Pursuant to the Appeals Chamber's "Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and related Motions," Case No. ICTR-01-75-AR11*bis*, December 16, 2011.

51 *Uwinkindi v. the Prosecutor*, "Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions," Case No. ICTR-01-75-AR11*bis*, December 16, 2011; *Prosecutor v. Uwinkindi*, "Order to Stay the transfer of Jean Uwinkindi Pending the Establishment of a Suitable Monitoring Mechanism," Office of the President, Case No. ICTR-01-75R11*bis*, February 24, 2012.

52 Report of the Court Monitor for the Uwinkindi Case (1 to 28 February 2013), MICT-12-25, February 28, 2013, accessed March 27, 2014, http://unmict.org/files/cases/uwinkindi/other/en/130228_FebReport.pdf.

though some of the issues had been resolved, such as the payment of legal fees, the defense team still expressed concerns during subsequent visits of the Court Monitors for the *Uwinkindi* case. The defense request for the appointment of investigators and legal assistants, for example, was rejected by the Rwandan Court, while this would have been possible under the ICTR system.[53] Funding for the defense team also remained an issue; in October 2013, the Rwandan Ministry of Justice threatened to replace Mr. Gatera Gashabana, Uwinkindi's lead counsel, if he would not accept the proposed terms.[54] Mr. Gashabana furthermore contended that the Rwandan Government neglected its promises made during the transfer proceedings before the ICTR, when the Government stated to do anything necessary to facilitate the defense investigation of the case; when reminded of these commitments, the Government responded with intimidation.[55] Despite these criticisms, the monitoring mechanism has had an important role in providing a forum to ventilate these critiques. The concerns of the accused, defense counsel and the prosecution were written down in a report, which may strengthen the parties' commitment to ensure a fair trial.

1.1.5 Influence on the ICC Statute

The observed considerable shift in ICTY practice from common law to civil law emphasis was not without effect on the ICCSt.

A significant aspect of the ICCSt. is that, during its drafting stage, delegates pursued a departure from the predominantly common law nature of the ICTY and ICTR Statutes, making a conscious effort to negotiate a statute and set of RPEs that were acceptable to all states. The result is procedural system that is a hybrid of two different systems, incorporating both adversarial and inquisitorial elements; elements which are predominant within the common and civil law systems respectively.[56] It can therefore be said that the Rome Statute and the RPE represent a legal compromise acceptable to the major legal systems of the world,[57]

53 Report of the Court Monitor for the Uwinkindi Case (1 May to 30 June 2013), MICT-12-25, June 30, 2013, accessed March 27, 2014, http://unmict.org/files/cases/uwinkindi/other/en/130702_MayJuneReport.pdf.

54 Monitoring Report for the *Uwinkindi* Case, MICT-12-25, March 7, 2014, para. 33, accessed April 15, 2014, http://unmict.org/files/cases/uwinkindi/other/en/140307.pdf.

55 Id., para. 34.

56 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 235.

57 However, it is questionable whether this legal compromise has been successful, as there are still many differences of opinion between the different Pre-Trial/Trial and Appeals Chamber decisions on a variety of subjects (i.e. the doctrine of JCE).

while drawing on the experiences of ICTY/ICTR.[58] Some novel procedures were created with predominantly civil law features, such as:

– admissibility of evidence and defenses;
– pre-trial proceedings;
– supervisory responsibility of ICC over arrested individuals; and
– specific rights of victims and witnesses.

The comparison of ICTY/ICTR with ICC may be best portrayed as follows. As the *ad hoc* tribunals borrow the "best" elements from different national legal systems (although originally based on common law principles), the procedural regime of the ICC is largely a hybrid of common law and civil law approaches. Drawing on both systems, the Rome Statute primarily provides for an adversarial approach, but one where the Court has considerable power to intervene and control procedure (a civil law feature). In particular, the ICC has extensive authority under the Statute to supervise matters at the investigatory stage. Notably, the ICC Prosecutor and the Pre-Trial Chamber are bestowed with special responsibility in terms of identifying and securing exculpatory evidence to assist in preparation of the defense. In this respect the role of the ICC Prosecutor differs from the ICTY/ICTR Prosecutor.[59]

1.1.6 Conclusions

This paragraph illustrated the shift in the law practice of the ICTY from one in which the parties bear the primary responsibility to control their cases (common law feature) to one in which the judiciary exercises more control (civil law feature). This shift had its origin in several procedural reform activities of the ICTY judges resulting in amendments made to the RPE at the 18th Plenary Session in July 1998, followed by other amendments to these Rules and adapted by ICTY law practice. Several examples have been provided to illustrate this change. It is not unlikely that, based on the reform program commenced by President Jorda[60] on behalf of the ICTY judges to improve the effective operation of the Tribunal (which program contains various elements reflecting civil law tradition), this development will influence feature ICTs. The merger with civil law traditions accelerated in the last decade. No matter how understandable this trend may be from the perspective of court management and expediency, it is

58 *Ibid.*; although the ICCSt. and RPEs are said to represent a "legal compromise," in practice the two legal backgrounds (i.e. civil and common law) are in constant conflict with each other.

59 See further paragraph 2.2.

60 See President Jorda's letter of 12 May 2000 to the Secretary-General of the UN, UN Doc. A/55/382-S/2000/865.

pertinent to recall that a speedy and effective trial may not be detrimental to a fair trial. In this sense these efforts should be observed with great caution, since they have the potential to weaken the notion of a fair trial. For example, if the defense is limited to presenting a case based on a theory which it is obliged to reveal prior to the trial and before the prosecution has presented its case, several essential rights of the accused may be infringed; for instance, the right against self-incrimination in the event the accused is compelled to testify in order to avoid the potential negative conclusion or inference of the Chamber that would likely be deduced from his failure to elaborate upon the defense theory as revealed in the pre-trial phase.[61]

1.2 *The Legal Nature of the ICC Statute*

The drafters of the Rome Statute and its RPE aimed to incorporate the best elements of the major criminal law systems of the world, while drawing on the experiences of the ICTY and ICTR.[62] Significantly, in order to negotiate a Statute and a subsequent set of RPE that were acceptable to all states, the drafters of the Rome Statute departed from the predominantly common law nature of the ICTY and ICTR Statutes.[63] In this sense, the origin of the ICC system differs from that of the *ad hoc* tribunals also in that it is based on the outcome of States negotiations and subsequent agreement on common principles of "due process," rather than on procedural reform instigated by case management policies.[64] This may explain, for instance, why the Rome Statute devotes considerable provisions to "general principles of criminal law," and introduces a flexible approach, at least theoretically, towards admissibility of several criminal law defenses such as intoxication, self-defense, duress and necessity; all defenses which have no foundation in the ICTY or ICTR Statutes nor in the Nuremberg and Tokyo War Crimes Tribunals.[65]

2 Contemporary Procedural Pre-Trial Aspects of ICTs

2.1 *Introduction*

Having delineated the nature of the various ICTs, particularly its procedural characteristics, this section assesses five major pre-trial procedural issues, namely:

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61 Mundis, "From Common Law Towards Civil Law," 378; see also Chapter 6.

62 Donald Piragoff and Paula Clarke, *The Emergence of Common Standards of "Due Process" in International and Criminal Proceedings* (Romonville Saint Agne: Erès, 2004), 363–396 at 364.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

(i) the nature of pre-trial procedures before ICTs (paragraph 2.2);
(ii) the indictment and the principle of *Nullum crimen, sine lege, nulla poena sine lege* (paragraph 2.3.);
(iii) the principle of *ne bis in idem* (paragraph 2.4);
(iv) the presumption of innocence (paragraph 2.5); and
(v) the right to apply for provisional release (paragraph 2.6).

2.2 *The Nature of Pre-Trial Proceedings before ICTs*

2.2.1 Purpose of Pre-Trial

The main character of pre-trial proceedings (which commences from the moment of the execution of an arrest warrant and surrender to the seat of the tribunal) is the absence of the determination of guilt or innocence of the accused, as this is finally assessed at the subsequent trial stage. Accordingly, Pre-Trial procedures before ICTs are primarily concerned with:

(i) jurisdictional disputes; and
(ii) preparing the case for trial from the perspectives of both defense and prosecution, such as the composition of an (expert)witness lists and documents.

2.2.2 ICTY-ICTR: Rule 61 Hearings

Unlike the ICTY and ICTR, the Rome Statute does equip the ICC with a Pre-Trial Chamber. Yet Rule 65 *te*r of the ICTY-ICTR RPE opens the possibility of appointing a Pre-Trial Judge in order to ensure that the parties prepare for trial expeditiously and that matters of law and fact are determined for the trial judges as completely as possible.[66] One of the major problems for the *ad hoc* tribunals was – contrary to the 1945 Nuremberg and Tokyo tribunals – the absence of accused in the custody of these courts at the moment of their inception. This led the ICTY and ICTR judges to adopt special procedures empowering the Prosecutor to present an indictment together with the prosecutorial evidence to a trial chamber in open court in the absence of the accused, pursuant to Rule 61 of the ICTY RPE; the so-called "Rule 61 hearing." This procedure is meant to ensure the continuation of the criminal trial before the tribunal and was applied in five ICTY cases before 1995 (as opposed to none before the ICTR). This Rule 61 hearing enables the Prosecutor to persuade the Trial Chamber that there are reasonable grounds for believing that an absent accused has committed the crimes charged in the indictment. If the ICTY Prosecution was able to meet this requirement, the Trial Chamber issued an international arrest warrant to be transmitted to all states for the purpose of

66 See further Chapter 6.

surrender of the individual to the ICTY.[67] Once the accused has been apprehended and transferred to the ICTY, another Trial Chamber will be trying his/her case. Clearly, the determination under Rule 61 will have a prejudicial value to the detriment of the accused in terms of guilt or innocence.

2.2.3 ICC

The ICC pre-trial stage is characterized by the following elements:

(i) the statutory institution of a Pre-Trial Chamber;[68]
(ii) the absence of the "Rule 61 procedure" of the ICTY-ICTR system; and
(iii) the introduction of a two-phase system for the prosecution (absent at the other ICTS) to obtain be able to initiate a trial at all, which two phase system is to be pursued as follows:

(a) Firstly, the ICC Prosecution must ask leave for the issuance of a warrant of arrest from the Pre-Trial Chamber. In applying for this warrant, the Prosecutor must provide evidence to convince the ICC Pre-Trial Judges that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary…"[69] This burden of proof seems to be more strict as compared to the ICTY Rule 61 test (see above)
(b) Secondly, the Prosecution must obtain a confirmation from the ICC Pre-Trial Chamber of "the charges on which the Prosecutor intends to seek trial"; this confirmation hearing shall be held in the presence of the Prosecutor and the accused,[70] albeit that the ICC Pre-Trial Chamber is allowed to conduct this hearing in the absence of the accused in the event of the accused's waiver of right to appear or he/she has "fled or cannot be found and all reasonable steps have been taken to secure his/her appearance…"[71] For the confirmation of charges, "the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."[72]

67 See Chapter 8.
68 Articles 39, 56–57 ICCSt.; and Chapter 7.
69 Article 58 (1) (a) and (b) ICCSt., which provisions enumerate three reasons for this necessity; sections 2 and 3 of this provision entail the requirement of this application and warrant of arrest.
70 See difference with respect to the ICTY Rule 61 hearing.
71 Articles 61 (1) and (2) ICCSt.
72 Rule 61(5) ICCSt.

Furthermore, and unlike the ICTY Rule 61 procedure, under Article 61(7) ICCSt. the accused is enabled to object to the charge in the course of the confirmation hearing, dispute prosecution evidence, and even present exculpatory evidence at this pre-trial stage. The ICC confirmation hearing is thus a contradictory hearing during which the defense has a prominent standing. The evidentiary burden for the Prosecutor to obtain confirmation of the charges is relatively high compared to ICTY standards, namely only when he or she is able to convince the Pre-Trial Chamber that there is "sufficient evidence to establish substantial grounds to believe that the person committed *each* [emphasis added; GJK] of the crimes charged."[73]

2.3 *The Indictment and the principles of* nullum crimen sine lege, nulla poena sine lege

2.3.1 ICTY-ICTR Requirements

A second pre-trial related topic is the issuance of an indictment, which is the basis for the presentation of criminal evidence at trial. ICTY and ICTR indictments are different from indictments in civil law systems in that they involve rather extensive details regarding the background of a case, the person of the accused, the various modes of criminal liability applicable, the facts and the charges. The ICTY and ICTR Statutes, Rules of Procedure and Evidence and jurisprudence provide for the following parameters as to the form and content of an indictment:

(i) Article 18(4) ICTYSt. says that "upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime…" According to Article 19(1) ICTYSt. an ICTY-judge must review the indict in order to verify whether indeed a *prima facie* case exists against the accused; if not, the indictment shall be dismissed.[74] ICTY case law has interpreted "*prima facie*" case for this purpose as the existence of a credible case against the accused by way of first impression.[75]

(ii) ICTY case law reveals that the requisite specificity is not absolute. In the *Kvocka* case, the ICTY held that "the massive scale of the crimes…makes

73 Article 61(7) ICCSt.; see Chapter 8.

74 See also Article 17(4) ICTRSt., which likewise refers to the test of a *prima facie* case; see also Rule 47 (C) ICTY-ICTR RPE.

75 See for the history of this term and case law John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda* (New York: Transnational, 1998), 94–95.

it impractical to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes,"[76] albeit that the indictment must enable the accused and the defense to finally and adequately prepare the defense so that it must provide (some) information as to the identity of victims, place, date of the alleged crimes and means by which the offence was committed.[77] The indictment should thus not hinder the defense in, for example, investigating a meaningful alibi, or in the cross-examination of witnesses by reference to surrounding circumstances.[78] The criterion for the sufficient degree of specificity bears therefore the materiality of these elements; in the event such elements as identity of victims, place and date of the events and factual elements are more material, "…then the wording of the (charges) should lift the offence from the general to the particular."[79]

(iii) The ICTY case law provides guidance on the interpretation of Article 18(4) of its Statute (Article 17(4) ICTRSt.), mentioning the requirement for an indictment ("a concise statement of the facts") with respect to the principle of *nullum crimen sine lege*. In the *Delić* case, the ICTY Appeals Chamber, rejected the accused's argument that the indictment was incomplete and amounted to an infringement of this latter principle, and held that:

> Provided that it is clear in each count of the Indictment which serious violation of international humanitarian law is being charged, it matters little whether the Indictment refers to, for example, Article 2 of the Statute or to the relevant Articles of the Geneva Conventions of 1949. Indeed the Statute appears to favour the former approach; Article 18(4) mentions "a concise statement of facts and of the crime or crimes with which the accused is charged *under the Statute.*"[80]

(iv) The ICTY Appeals Chamber in the *Delić* case was also called upon to address the question whether Article 18(4) ICTYSt. (form of indictment)

76 *Prosecutor v. Kvočka, Kos, Radić and Žigić*, "Decision on the Defence Preliminary Motions on the Form of the Indictment," Case No. IT-98-30/1, April 12, 1999.

77 *Prosecutor v. Krnojelac*, "Decision on the Defense Preliminary Motion on the Form of the Indictment," Case No. IT-97-25-T, February 24, 1999, para. 12.

78 Id., para. 40.

79 *Prosecutor v. Kayishema and Ruzindana,* Trial Chamber Judgment, Case No. ICTR-95-1-T, May 21, 1999, para. 86.

80 *Prosecutor v. Delalić, Mucić, Delić and Landžo*, "Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)," Case No. IT-96-21-AR 72–75, December 6, 1996.

could violate the prohibition of "*ne bis in idem*." The accused complained that a charge for crimes individually committed must be separated from a charge as a superior, whereas he is charged for certain offences, both as a direct participant and as a superior, for example Paragraphs 35 (Counts 46 and 47), 36 (count 48) and 37 (count 49). According to the Appeals Chamber this defense argument only bears merit in *one* specific situation, namely:

> …in which the Accused's concern is justified with respect to the distinction between being charged as a direct participant and being charged as a superior; namely the failure, in those counts of the indictment which charge command responsibility for the acts of subordinates, to refer to the statutory sources for liability for the acts of subordinates, i.e., Article 7 (3) of the Tribunal's Statute. While the Bench is of the view that the said sub-Article should be explicitly mentioned wherever it is relied on, nevertheless there is no possibility in this indictment of the accused being mistaken as to which Article is being referred to when the "knew or had reason to know" formula is employed.[81]

However, the Appeals Chamber follows the view that the complaint of an indictment resulting in a charge with different crimes arising from one act or omission should be dealt with at the sentencing phase.[82]

In conclusion, it can be said that ICTY-ICTR jurisprudence espouses several conditions with respect to the form of an indictment insofar as they relate to the preservation of defense rights in terms of foreseeability. Yet, dismissal of an indictment is not seen as a primary mechanism to redress faulty indictments, unless defense rights are violated in a flagrant and irrevocable way.

2.3.2 ICC Requirements

The Rome Statute, in Article 58, entails the requirements for the warrant of arrest or summons to appear. Similar to Article 18(4) ICTYSt. and 17(4) ICTRSt. the arrest warrant should contain "a concise statement of the facts which were alleged to constitute (the) crime" and "a specific reference to the crimes…." Although Articles 22 and 23 ICCSt. set forth the principle of *nullum crimen sine lege* (prohibiting the prosecution of crimes that were not codified as such at the time they were committed),[83] it is not likely that these provisions (from the

81 Id.

82 Id.

83 The ICTY-ICTR tribunals are meant to try crimes also committed prior to their establishment; see Chapter 1.

defense point of view) could serve as an effective mechanism to quash indictments when considering the ICTY-ICTR case law on this point.[84] The ICTY-ICTR judges adopted the standard set by the ECtHR, promulgating that the illegality of retrospective crimes should have been accessible and foreseeable, which does not necessarily imply that the crimes should have been formally codified.[85] An example thereof was the acceptance by the SCSL of the 'crime' of forced marriages; a crime which was not included in the SCSL Statute as such nor part of the Sierra Leonean criminal law system at the time of the alleged offences.[86]

2.4 Ne bis in idem *before the ICC and ICTY-ICTR*

A third pre-trial procedural element relates to the plea of double jeopardy.

ICC

Defenses may be classified according to whether they are substantive or procedural. The latter category encompasses, *inter alia*, the plea of double jeopardy (*ne bis in idem*).[87] The Rome Statute avows respect for these criminal law classifications by both its provision in Article 19(4), which affords the accused or the state the right to challenge the admissibility of a case or the jurisdiction of the ICC, and its provision of Article 17(1)(c) which imposes on the court a *proprio motu* obligation to assess *ne bis in idem*. The international law status of this safeguard, despite the limitations, follow also from reference to it in Article 89(2) ICCSt., recognizing the right of the person sought for surrender to petition to the national court for recourse to *ne bis in idem* and its consequences for the execution of the warrant or request.

However, Article 89 ICCSt., addressing the surrender of suspects to the ICC, is one of the Achilles' heel provisions of the Rome Statute. If certain international

84 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 70.

85 In the Čelebići case the ICTY Appeals Chamber held that as "long as the punishment is accessible and foreseeable, then the principle cannot be breached," *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Appeals Chamber Judgment, Case No. IT-96-21-A, February 20, 2001, para. 817 n. 1400, citing *sw v. The United Kingdom* and *cr v. The United Kingdom*, ECtHR Judgment, Series A, Vol. 335-B, November 22, 1995; the ICTY furthermore held that: "There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties," para. 817; see also Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 70.

86 *Prosecutor v. Brima, Kamara and Kanu* (AFRC Case), Appeals Chamber Judgment, Case No. SCSL-2004-16-A, February 22, 2008.

87 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 191–193.

crimes engage the world's conscience sufficiently to attract universal jurisdiction, it must follow that states where these crimes have been committed have the primary duty to either prosecute or extradite the perpetrators.[88] Although it cannot be said that the Post-World War II Tribunals at Nuremberg established an obligation to extradite or surrender perpetrators of international crimes, Article 89(1) ICCSt. delineates the first (pivotal) general obligation in ICL for nation-states to comply with requests of an international criminal court for arrest and surrender of persons. Article 89(2) is explicit in granting the fugitive the defense of *ne bis in idem* as indicated in Article 20 ICCSt., its denunciation based on maintaining a possibility for surrender in case a question of admissibility is pending.[89] Article 89(2) ICCSt. articulates that the person sought for surrender is endowed with the defense of *ne bis in idem* before a *national* court. Although this provision reflects the contemporary preoccupation of national courts with *ne bis in idem* challenges by the person sought for surrender, it is ultimately to the ICC's discretion, and not to the national court's authority, to rule on the grant of *ne bis in idem*, as shown by the words in paragraph 2 that "if an admissibility ruling is pending, the requested state may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility."[90]

ICTY-ICTR

The *ne bis in idem* system is apparently less sophisticated under the ICTY and ICTR Statutes. The only provisions in these Statutes dedicated to this issue are Articles 10 and 9, respectively. The *Tadić* case shows the limited range of a defense against a surrender request of the tribunal.[91] This first precedent of the ICTY, set by the *Tadić* case, illustrates the potential role for the principle of *ne bis in idem* for indictees facing a surrender request to one of the current international tribunals. The *Tadić* defense tried to invoke *ne bis in idem* before the ICTY, insisting that criminal proceedings had already commenced in Germany. The Trial Chamber dismissed this argument with the observation that "the accused

88 Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Allen Lane/Penguin, 1999), 248.

89 See Claus Kreβ and Kimberly Prost, "Article 89, Margin 15," in *Commentary on the Rome Statute of the International Criminal Court: observers notes, article by article*, ed. Otto Triffterer ed. (Baden-Baden: Nomos Verlagsgesllschaft, 1999).

90 This text is derived from Geert-Jan Alexander Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Ardsley, NY: Transnational Publishers, 2002), 324.

91 *Prosecutor v. Tadić*, "Decision on Defence Motion on the Principle of *ne bis in idem,*" Case No. IT-94-1-T, November 14, 1995, para. 24 *et seq*.

has not yet been the subject of a *judgment* (emphasis added) on the merits on any of the charges for which he has been indicted, so he has not yet been tried for those charges." The *Tadić* ruling shows that the deferral of pending national pre-trial proceedings to the ICTY or ICTR does not violate the principle of *ne bis in idem* as set forth in Article 10 ICTYSt. and therefore does not bar a subsequent trial before this Court. Only when the German Court, in the *Tadić* case, would have rendered a final ruling (in one instance) regarding the indictee, a serious *ne bis in idem* defense could have emerged pursuant to Article 10(2) ICTYSt. It is questionable whether the exceptions mentioned in Article 10(2) ICTYSt. sub (a) or (b) would have been met.[92] Yet, the ICTY follows a rather formalistic application of Article 10(2) ICTYSt. based on the judicial qualification of the facts and not as much on the underlying factual conduct.[93]

In the context of *ne bis in idem* the question arises as to the legitimacy of cumulative convictions (for different crimes charged in the indictment based on the same conduct). Two situations must be distinguished:

(a) The so-called *inter-article* cumulative conviction. The ICTY allows such convictions, presupposing that each crime involved a materially distinct element not contained in the other crime. An element is materially distinct from another if it requires proof of a fact not required by the other.[94] The ICTY concluded that cumulative convictions for both Articles 3 and 5 ICTYSt., based on the same conduct, are acceptable, as each count contains a materially distinct element. This distinct element required by Article 3 is the close link between the acts of the accused and the armed conflict; the distinct element required by Article 5 is the existence of a widespread or systematic attack against civilians.[95]
(b) The so-called *intra-article* convictions. In the *Kunarac* Appeals Chamber judgment, the notion in sub (a) was extended to intra-article convictions.

92 Article 10(2) ICTYSt. reads that: "A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."

93 Knoops, *Surrendering to International Criminal Courts*, 325–329.

94 *Prosecutor v. Delalić et al.* (Čelebići case), Appeals Chamber Judgment, Case No. IT-96-21-A, February 20, 2001, paras. 401–426.

95 See also *Prosecutor v. Vasiljević,* Trial Chamber Judgment, Case No. IT-98-32, November 29, 2002, para. 266.

> The ICTY held that it was acceptable that the accused was convicted under two sub-categories of Articles 3 and 5 for the same underlying offense.[96]

In conclusion, Article 20(3) ICCSt. opens for the defense a wider margin compared to its counterpart of Article 10(2) ICTYSt. Unlike the latter provision, in Article 20 (3) it is not the judicial qualification but "the same conduct" that is conclusive for *ne bis in idem*.[97]

2.5 *The Presumption of Innocence before ICTs*

In essence, the presumption of innocence guaranteed by international law instruments[98] is one of the elements of a fair trial both in national as well as in international criminal trials.[99] In fact, it surfaces at the pre-trial stage in the realm of investigative conduct by the Prosecutor and Pre-Trial Judges.

Although Articles 21 (3) ICTYSt. (Article 20 (3) ICTRSt.) and Article 66 ICCSt., which impose the burden of proof upon the Prosecution, aim to have the evidence presented at the trial stage, it is clear that this presumption of innocence must be anticipated with regard to, *inter alia*, the accused's right to provisional release (para. 2.6 *infra*) and his/her right not to incriminate him/herself.[100]

2.6 *Provisional Release before ICTs*

An essential pre-trial right is that of the right to apply for provisional or interim release. Accordingly, the ICTs have incorporated this right in their Rules of Procedure and Evidence.

ICTY-ICTR

Rule 65 ICTY/ICTR RPE allow for provisional release. Rule 65(B) RPE allows for provisional release at any stage of the trial proceedings, prior to the final judgment, provided that the conditions laid down in this Rule are met.[101] Pursuant to Rule 65(C) the Trial Chamber may impose conditions upon the release of

96 *Prosecutor v. Kunarac, Kovač and Vuković*, "Appeals Chamber Judgment," paras. 185–196; convictions based on Article 5(c), (f) and (g) ICTYSt.

97 *Ibid.*

98 See, *inter alia*, Article 6(2) ECHR.

99 *Butkevicus v. Lithuania*, ECtHR Judgment, Appl. No. 48297/99, March 26, 2002.

100 Schabas, *An Introduction to the International Criminal Court*, 204.

101 Rule 65 (B) ICTY/ICTR RPE reads that: "Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and,

the accused, such as a bail bond. Likewise, Rule 65(I) provides for provisional release of an accused whose case is pending on appeal.

Rule 65(B) requires that two conditions must be met in order to allow for provisional release of an accused:

(i) there must not be a flight risk; and
(ii) there must not be a danger to victims, witnesses or other persons.

Until an amendment in the ICTY RPE, in December 2001, the defendant requesting provisional release also had to establish the existence of "exceptional circumstances" allowing for his or her release.[102] The deletion of the "exceptional circumstances" provision reflects a shift towards the adoption of the jurisprudence of the ECtHR, which transpires that provisional release should be the rule and pre-trial detention the exception. Yet, the preference for provisional release already echoed in the early years of the ICTY's operation, albeit rejected as a result of the gravity of the crimes.

In its decision on provisional release filed by the accused Esad Landžo in the *Čelebići* case, the Trial Chamber opined:

> …by international standards, pre-trial detention is the exception to the norm. The presumption is against detention and in favor of freedom. However, in certain circumstances, the gravity of the offense may justify pre-trial detention and the onus of showing exceptional circumstance to qualify for release before the trial is shifted to the accused…Such an exception to the general rule is particularly apposite in cases before the International Tribunal, where accused persons are charged with very grave crimes, and in view of the unique circumstances under which the International Tribunal operates. The International Tribunal has no police force of its own, relying on national enforcement mechanisms to carry out its judicial orders.[103]

In determining whether "exceptional circumstances" exist in order to grant provisional release, the ICTY also sought guidance from ECtHR jurisprudence,

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if released, will not pose a danger to any victim, witness or other person," Revised 30 Jan 1995, amended 17 Nov 1999, amended 13 Dec 2001.

102 The ICTR amended this Rule in May 2003.

103 *Prosecutor v. Delalić et al.* (Čelebići case), "Decision on Motion for Provisional Release filed by the Accused Esad Landžo," Trial Chamber II, Case No. IT-96-21-T, January 16, 1997, para 26.

holding that there must be a "reasonable suspicion" that the accused committed the crimes charged, to allow for an accused's detention.[104] In its decision on provisional release filed by *Delalić* in the *Čelebići* case, the ICTY Trial Chamber held that, despite the ECtHR's prevalence for provisional release, it would be consonant with the ECtHR's jurisprudence to take into account:

> whether there is reasonable suspicion that [the appellant] committed the crime or crimes as charged, his alleged role in the said crime or crimes, and the length of the accused's detention.[105]

The reasonableness of the suspicion must be reviewed in order to justify for the (continued) detention of the accused, as the ECtHR in *Stögmüller v. Austria* determined, the "persistence of such suspicions is a condition *sine qua non* for the validity of the continued detention of the person concerned."[106]

ICTY case law also firmly established the view that the accused bears the onus of showing that the requirements for release are fulfilled. This principle is vindicated in its *Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić,*[107] rendered on 25 September 1996, wherein the Trial Chamber enumerated four criteria that must be met in order for provisional release to be granted:

> Sub-rule 65(B) establishes the criteria which must be satisfied before a Trial Chamber can authorise the release of an accused pending trial. These criteria are fourfold, three of which are substantive and one procedural. They are conjunctive in nature, and the burden of proof rests on the Defense. Thus, the Defense must establish that there are exceptional circumstances that the accused will appear for trial, and that if released the accused will not pose a danger to any victim, witness or other person. Additionally, the host country must be heard. If any of these requirements

104 *Prosecutor v. Delalić et al.* (Čelebići case), "Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic," Case No. IT-03-69, September 25, 1996, para. 21, referring to, *inter alia*, *Stögmüller v. Austria*, ECtHR Judgment, Appl. No. 1602/62, November 10, 1969.

105 *Ibid.*

106 *Stögmüller v. Austria*, "ECtHR Judgment," November 10, 1969, para. 4; *Prosecutor v. Delalić et al.* (Čelebići case), "Decision on Motion for Provisional Release Delalic," September 25, 1996, para. 24.

107 *Prosecutor v. Delalić et al.* (Čelebići case), "Decision on Motion Provisional Release Delalic," September 25, 1996.

> are not met, the Trial Chamber is not authorised to grant provisional release and the accused must remain detained.[108]

Initially, the accused had the burden of proof to establish the exceptional circumstances but now this is no longer necessary; however the defendant still bears the burden of proving the other two criteria (i.e. there is no flight risk and there is no danger to victims, witnesses or other persons.[109] Yet, the mere possibility of influencing victims, witnesses and third persons does not by itself amount to a concrete danger to them. The same counts for the mere fact that the accused is familiar with the identity of witnesses.[110]

Rule 65(I) ICTY/ICTR RPE provides for the provisional release of an accused whose case is pending on appeal. Release may be granted if the Tribunal is satisfied that:

(i) the appellant will appear at trial hearings or surrender into detention after the fixed period of release;
(ii) the appellant will not pose a danger to victims, witnesses or other persons;
(iii) special circumstances warranting such release exist.[111]

Thus, in addition to the criteria of flight risk and danger for victims and witnesses, special circumstances warranting release must exist. Such circumstances may include a memorial service or an applicant's medical needs.[112] The poor health of a close relative (except if the relative's death is believed to be imminent) and the wish "to spend time with his family," do not constitute such a "special circumstance."[113] These "special circumstances" seem similar to

108 Id., para. 1.

109 *Prosecutor v. Brđanin and Talić*, "Decision on Motion by Radislav Brđanin for Provisional Release," Trial Chamber II, Case No. IT-99-36, July 25, 2000, paras. 12–13; see also Geert-Jan Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (The Hague: Kluwer Law International, 2005), 139.

110 *Prosecutor v. Brđanin and Talić,* "Decision on Motion by Radislav Brđanin for Provisional Release," July 25, 2000, para. 19.

111 Rule 65(I) ICTY/ICTR RPE.

112 *Prosecutor v. Dragomir Milošević*, "Decision on Application for Provisional Release Pursuant to Rule 65(I)," Case No. IT-98/29-1A, April 29, 2008, para. 7; *Prosecutor v. Brđanin*, "Decision on Radoslav Brđanin's Motion for Provisional Release," Case No. IT-99-36-A, February 23, 2007, para. 6.

113 *Prosecutor v. Dragomir Milošević*, "Decision on Application for Provisional Release," April 29, 2008, para. 7.

the "exceptional circumstances" discussed above. Yet, special circumstances warranting the release of the accused whose case is pending on appeal may also be based on his "detention for a substantial period of time," more particularly when "a date for hearing the appeal has not yet been set," and if the appellant has "shown good behavior while in detention."[114] Other factors that may be considered in the Chamber's determination on provisional release at the appeals stage, are the accused's return to custody after provisional release on previous occasions, the accused's compliance with the conditions for provisional release on previous occasions, and the time already served (if the accused has already served 2/3 of his sentence imposed at trial stage, he may be eligible for early release).[115] Yet, the decision to grant provisional release remains subject to the judge's discretion, making a determination "on a balance of probabilities."[116] As noted by the ICTY Appeals Chamber, the fact that an accused *may* be eligible for early release, does not imply that he is *entitled* thereto; likewise, it is up to the judges to decide whether the fact that the accused has served a substantial period of his sentence amounts to a special circumstance.[117] The ICTY Appeals Chamber determined that the wedding ceremony of an appellant's daughter did not amount to such a special circumstance.[118]

In the last decades, the jurisprudence of the ECtHR, as set forth in *Ilijkov v. Bulgaria* and *Smirnova v. Russia*, impacted upon the parameters for provisional release before the ICTY.[119] For instance, in the *Prosecutor v. Stanišić*, the ICTY, following this ECtHR judgment, held that "the gravity of the charges cannot by itself serve to justify long periods of detention on remand."[120] The ECtHR furthermore held in *Ilijkov v. Bulgaria*:

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114 *Prosecutor v. Popović, Beara, Nikolić, Miletić and Pandurević*, "Decision on Motion on Behalf of Vinko Pandurević for Provisional Release," Case No. IT-05-88-A, June 6, 2012; *Prosecutor v. Ramush Haradinaj et al.*, "Decision on Lahi Brahimaj's Application for Provisional Release," Case No. IT-04-84-A, May 25, 2009, para. 16.

115 *Prosecutor v. Popović et al.*, "Decision on Vinko Pandurević's Motion for Provisional Release," Case No. IT-05-88-A, March 14, 2014, para. 18.

116 Id., para. 19.

117 *Ibid*.

118 *Prosecutor v. Popović et al.*, "Decision on Motion Pandurević for Provisional Release," June 6, 2012.

119 *Ilijkov v. Bulgaria*, ECtHR Judgment, Appl. No. 33977/96, July 26, 2001; *Smirnova v. Russia*, ECtHR Judgment, Appl. Nos. 46133/99 and 48183/99, July 24, 2003.

120 *Prosecutor v. Jovica Stanišić*, "Decision on Provisional Release," Case No. IT-03-69-PT, July 28, 2004, para. 22, referring to *Ilijkov v. Bulgaria*, "ECtHR Judgment," July 26, 2001, para. 81.

> Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[121]

In *Smirnova v. Russia* the ECtHR recalled that a defendant should, in principle, always be released from trial, unless there are "relevant and sufficient" reasons that justify continued detention.[122] Acceptable reasons for refusing bail are: the risk that an accused will not appear for trial, the risk that the accused will commit further offenses, the risk that an accused will prejudice the administration of justice or cause public disorder.[123]

It has been said that, after the removal of the "exceptional circumstances" provision from the RPE, the grounds for refusing a request for provisional release shifted from "exceptional circumstances" to a focus on the gravity of the crimes and the lack of enforcement mechanisms, as due to the lack of such powers "pre-trial detention *de facto* seems to be…the rule."[124] On December 19, 2001, just after the RPE amendment, the ICTY nevertheless found, citing *Ilijkov v. Bulgaria*, that "any system of mandatory detention on remand is per se incompatible with Article 5(3) of the Convention."[125] Therefore, Rule 65 had to be interpreted "with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not *in abstracto*."[126]

In *Prosecutor v. Jovica Stanišić*, the ICTY Trial Chamber and Appeals Chamber specifically applied ECtHR case law with regard to the seriousness of the

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121 *Ilijkov v. Bulgaria*, ECtHR Judgment, Appl. No. 33977/96, July 26, 2001, para. 85.

122 *Smirnova v. Russia*, ECtHR Judgment, Appl. Nos. 46133/99 and 48183/99, July 24, 2003, para. 58.

123 Id., para. 59.

124 *Prosecutor v. Rahim Ademi*, "Order on Motion for Provisional Release," Case No. IT-01-46-PT, February 20, 2001, para. 14, citing *Prosecutor v. Hadžihasanović et al.*, "Decision granting provisional release to Amir Kubura," Case No. IT-01-47-PT, December 19, 2001, para. 7.

125 *Prosecutor v. Ademi*, "Order on Motion for Provisional Release," Case No. IT-01-46-PT, February 20, 2001, para. 14, citing *Ilijkov v. Bulgaria*, ECtHR Judgment, Appl. No. 33977/96, July 26, 2001, para. 84.

126 *Prosecutor v. Hadžihasanović et al.*, "Decision granting provisional release to Amir Kubura," Case No. IT-01-47-PT, December 19, 2001, para. 7; the ICTY issued identical decisions on that same day with regard to the other two accused in that case; see also *Prosecutor v. Ademi*, "Order on Motion for Provisional Release," Case No. IT-01-46-PT, February 20, 2001, para. 14, n. 13.

charges and held that "the gravity of the charges cannot by itself serve to justify long periods of detention on remand."[127]

Trial Chambers have decided on requests for provisional release on a case-by-case basis, while taking into account the "particular circumstances of the individual accused."[128] A factor that may be weighed is the accused's position prior to his arrest. The rationale behind this rule is that the accused may possess valuable information on the government providing guarantees of compliance with the conditions of provisional release, which could be disclosed to the Tribunal. This may result in the government's reluctance to guarantee the arrest and surrender of an accused after his provisional release.[129]

In conclusion, the ICTY jurisprudence reflects a shift towards a more lenient standard on provisional release, at least in law, especially compared to the absence of provisional release at the other ICTs, such as the SCSL and ICTR. This may be partly due to the influence of international human rights law on the judges of the ICTY, which endorses a prevalence of provisional release over custody. Yet, a decision on provisional release is contingent on an assessment on a case-by-case basis. Even though the requirement of exceptional circumstances has been deleted from the RPEs, the accused still bears the onus of establishing the remaining criteria for provisional release.

ICC

Under the ICC regime, provisional release may be granted in two situations:

(i) The right to apply for this release to the competent authority in the custodial state pending the surrender proceedings, while being detained in that state (Article 59(3) ICCSt.).
(ii) The right to apply for interim release upon the surrender of the accused to the ICC and pending trial (Article 60(1) and (2) ICCSt.).

Even though the Rome Statute accepts provisional release in accordance with Article 9(3) ICCPR, both forms of ICC provisional release are framed in favor of

127 *Prosecutor v. Jovica Stanišić*, "Decision on Provisional Release," Case No. IT-03-69-PT, July 26, 2001, para. 22.

128 *Prosecutor v. Mićo Stanišić*, "Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release," Case No. IT-04-79-AR65.1, October 17. 2005, para. 8; *Prosecution v. Šainović and Odjanić*, "Decision on Provisional Release," Case No. IT-99-37-AR65, October 30, 2002, para. 7.

129 *Prosecutor v. Mićo Stanišić*, "Decision on Appeal on Provisional Release," October 17, 2005, para. 17; *Prosecutor v. Mrkšić*, "Decision on Appeal Against Refusal to Grant Provisional Release," Case No. IT-95-13/1-AR65, October 8, 2002, para. 9.

detention, similar to the practice of the ICTY-ICTR.[130] The ICC Pre-Trial Chamber has determined that Article 21(3) ICCSt., requiring that the interpretation of law "must be consistent with internationally recognized human rights," applies to requests for interim release.[131] Yet, in the same case the Pre-Trial Chamber refused Lubanga's request for interim release on the basis of the gravity of the crimes, the "substantial risk" that Lubanga would abscond from justice and the existence of "reasonable grounds" that Lubanga committed the crimes charged.[132] The Pre-Trial Chamber also considered that there was a risk that Lubanga would influence certain witnesses, as he was aware of their identities. Moreover, a prolonged detention was deemed justified in light of the complexity of the case.[133]

Sub (*i*)

The custodial State authorities may only allow provisional release when justified by "urgent and exceptional circumstances" and in the presence of sufficient safeguards to ensure its ICC surrender obligations, which conditions are to be monitored by the ICC Pre-Trial Chamber.[134] For the existence of such circumstances, guidance can be sought at the ICTY's jurisprudence, which has determined that life-threatening or serious illness of an accused or his or her close relatives do constitute such a circumstance, while less severe illnesses do not amount to "exceptional circumstances."[135]

Sub (*ii*)

The ICC Pre-Trial Chamber may only grant provisional release pending trial if it is *not* satisfied that the conditions as enshrined in Article 58 (1) of the Statute are met. This means that (only) when:

(i) no reasonable grounds exist for believing that the accused has committed the particular crime; or

130 See also Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 263.

131 *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Application for the interim release of Thomas Lubanga Dyilo," Pre-Trial Chamber I, Case No. ICCICC-01/04-01/06-586-tEN, October 18, 2006.

132 *Ibid.*

133 Id., Citing *Van der Tang v. Spain*, ECtHR Judgment, Appl. No. 19382/92, July 13, 1995, para. 75.

134 See also Chapter 9 regarding due process norms.

135 See for example, *Prosecutor v. Ademi*, "Order on Motion for Provisional Release," Case No. IT-01-46-PT, February 20, 2001, para. 13.

(ii) his/her arrest appears no longer necessary (i.e., to ensure appearance at the trial or to prevent obstruction of the investigation and trial), this release is allowed.

A third type of application of provisional release can be found in the Pre-Trial Chamber's decision in the *Prosecutor v. Lubanga* whereby provisional release was imposed as a 'sanction' for prosecutorial misbehavior.[136] In the case of *Lubanga*, the Trial Chamber arrived at the conclusion to (permanently) stay the proceedings because the prosecutor had failed to disclose exculpatory documents to the defense.[137] Following this decision, the Trial Chamber had to consider the release of Mr. Lubanga. The legal representatives of victims argued against this release, saying that a stay of the proceedings should not automatically result in the release of the accused. The representatives submitted, *inter alia*, that the ICC could follow the ICTY practice granting provisional release under restrictions and only in "exceptional circumstances."[138] The Trial Chamber, however, held that the question whether or not to grant provisional release was not at issue, as a fair trial had been rendered impossible and thus the entire justification for Lubanga's detention had fallen away.[139] The Appeals Chamber overturned this decision on 21 October 2008, holding that the Trial Chamber erred in stating that the unconditional release of Lubanga was an inevitable consequence of the stay of the proceedings.[140] Judge Pikis appended a strong dissenting opinion, in which he argued:

> It is hardly humane treatment to expect the accused to live under the burden of accusation for an indefinite or uncertain period of time, while prevented from asserting his innocence before a court of law.[141]

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136 *Prosecutor v. Lubanga*, "Decision on the Application for the interim release of Thomas Lubanga Dyilo," October 18, 2006.

137 *Prosecutor v. Lubanga*, "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, together with certain other issues raised at the Status Conference on 10 June 2008," Case No. ICC-01/04/01/06-1401, June 13, 2008.

138 *Prosecutor v. Lubanga*, "Decision on the release of Thomas Lubanga Dyilo," Trial Chamber I, Case No. ICC-01/04-01/06-1418, July 2, 2008, Para. 20.

139 Id., para. 34.

140 *Prosecutor v. Lubanga*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'," Appeals Chamber, Case No. ICC-01/04-01/06-1487, October 21, 2008, paras. 37, 42.

141 Id., dissenting opinion Judge Pikis, para. 12.

Moreover, Judge Pikis found that "the mere possibility of holding a trial in the future," now provided a "ground for the detention of the accused."[142]

In conclusion, both the ICTY and the ICC have articulated a provisional release standard that seems congruent with human rights law; yet, in practice the rule favoring provisional release over detention is somewhat attenuated. Reasons applied to depart from that rule are: the fear that the accused will abscond from justice – a reason that finds approval in the ECtHR's jurisprudence – the fact that the ICTs lack their own police force and consequently the risk that the accused cannot be apprehended after interim release, and the possible outrage of victims, which would have an impact upon the ICT's reputation.[143] Yet, Article 9(3) ICCPR proclaims that provisional custody shall not be the general rule. Indeed, the right to interim release is an intrinsic element of the presumption of innocence.[144] The question is whether this right can be preempted by the nature of crimes to be tried at ICTs and by the policy reasons for their establishment.[145]

3 Contemporary Procedural Trial Aspects of ICTs

3.1 *Introduction*

Trial phases before ICTs aim at determining guilt or innocence of the individual accused based on the rule of law, whereby guilt is to be proven beyond reasonable doubt and due process norms are respected. In this respect, ICT procedures are not distinct from that of national criminal trials. This paragraph examines, in a comparative way, four essential elements of the trial stage of the ICTY, ICTR and ICC:

(i) the concept of plea agreements (paragraph 3.2);
(ii) sentencing procedures and policies (paragraph 3.3);
(iii) appeals proceedings (paragraph 3.4); and
(iv) the principle of procedural equality of arms, especially with respect to access to forensic expert evidence for both parties (paragraph 3.5).

3.2 *The Emerging Adjudicatory Concept of Plea Agreements before ICTs*

Trials before ICTs are most often lengthy and costly; the concept of plea agreements pertaining to guilty pleas presents an effective way to mitigate these

142 Id., dissenting opinion Judge Pikis, para. 13.

143 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 271.

144 See Chapter 7, para. 2.5.

145 See for an affirmative answer, Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 271.

disadvantages. Guilty pleas are an outgrowth of adversarial proceedings in which prosecution and defense come to an agreement on the scope of the criminal trial. From the outset, ICTs have been familiar with guilty pleas,[146] as ICTY-ICTR practice reveals.

ICTY-ICTR

Both before the ICTY and ICTR guilty pleas have been entered by the accused.[147] Rule 62 *ter* RPE formalizes the procedure for plea agreements, affirming that such agreements are not binding on the Trial Chamber and that the Court retains full discretion to reject such agreements. According to Rule 62 *bis*, the Trial Chamber must be satisfied that:

(i) the plea was voluntary, informed and unequivocal; and
(ii) there exists a sufficient factual basis for the crime and the accused's participation in it.

Rule 62 *bis* has its roots in an amendment made by the ICTY judges on 12 November 1997, four years after the inception of the ICTY. Significantly, this rule was promulgated due to the guilty plea entered in the ICTY *Erdemović* case.[148] In that case the ICTY Appeals Chamber majority, in its Decision of 7 October 1997, concluded that the accused's guilty plea had been made *involuntarily* and, by a minority, was to be seen as *equivocal* as well.[149]

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146 See Articles 24 (b) of the IMT Charter and 15 (b) IMTFE Charter.

147 Twenty plea agreements have been entered at the ICTY: Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Dražen Erdemovič, Miodrag Jokić, Goran Jelisić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajić, Duško Sikirica, Milan Simić, Stevan Todorović, Dragan Zelenović; at the time of writing, the proceedings had been concluded for 141 accused and there were ongoing proceedings for 20 accused (all 20 pleaded not guilty); see Key figures of ICTY Cases, <http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf>, accessed 27 March 2014; nine accused entered plea agreements at the ICTR: Michel Bagaragaza, Paul Bisengimana, Jean Kambanda, Joseph Nzabirinda, Juvénal Rugambarara, Georges Ruggui, Vincent Rutaganira, Joseph Serugendo and Omar Serushago; one accused was arrested for giving false testimony and entered a plea agreement; at the time of writing, the proceedings had been concluded for 59 accused (12 acquittals), 16 cases were pending on appeal, see Status of Cases, <http://www.unictr.org/Cases/tabid/204/Default.aspx>, accessed 27 March 2014.

148 *Prosecutor v. Erdemović*, Appeals Chamber Judgment, Case No. IT-96-22-A, October 7, 1997.

149 See for these criteria: G.G.J. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (The Hague: Kluwer Law International, 2007), 259 *et seq.*

On 27 February 2003, the Trial Chamber of the ICTY approved a plea agreement entered by the accused Biljana Plavšić and the ICTY Prosecutor. The plea agreement had been entered into on 2 October 2002. In this agreement, the accused entered a guilty plea as to violation of Article 5 (h) ICTYSt.: on a count of crimes against humanity, more specifically persecution based on political, racial and religious grounds. In exchange for this guilty plea, the accused and Prosecutor agreed that the other charges were to be dropped. The Trial Chamber rendered its sentencing judgment on 27 February 2003 and sentenced Biljana Plavšić to 11 years imprisonment.[150]

Two other plea agreement examples in ICTY-ICTR case law are:

(a) *Prosecutor v. Erdemović*, in which the accused pled guilty to war crimes and provided evidence in the case against Bosnian Serb leaders Karadžić and Mladić relating to the Srebrenica case. In exchange, the Prosecution recommended a sentence reduction to five years imprisonment, which was accepted by the ICTY.
(b) *Prosecutor v. Kambanda*, in which the former Prime Minister of Rwanda pled guilty before the ICTR (the first accused to do so) with respect to all six charges including genocide, based on a plea agreement.[151]

On the one hand, the procedural advantage of a valid guilty plea is that the lengthy trial phase can be overstepped so that defense and prosecution can directly move for sentencing. On the other hand, the Trial Chamber judges bear their own responsibility for the endorsement of the rule of law. This may be well illustrated by the overturning by the ICTY judges of the plea agreement entered into between defense and Prosecution in the *Nikolić* case. In that case, the ICTY Prosecutor and the accused, a former head of Security and Intelligence of Bosnia's Bratunac Brigade, concluded a plea agreement in which the accused would confess to crimes against humanity and testify on behalf of the prosecution.[152] In exchange to the guilty plea, charges of genocide, accessory to genocide, and war crimes would be dropped. In addition, part of the plea agreement involved:

150 *Prosecutor v. Plavšić,* "Sentencing Judgment," Trial Chamber, Case No. IT-00-390/40-1-S, February 27, 2003.

151 *Prosecutor v. Kambanda*, "Judgement and Sentence," Case No. ICTR-97-23-S, September 4, 1998; this plea, however, did not result in a reduced sentence; see para. 37 of this decision.

152 *Prosecutor v. Momir Nikolić*, "Joint motion for consideration of plea agreement between Momir Nikolic and the office of the prosecutor," Case No. IT-02-56, May 6, 2003.

(i) the obligation of the accused to testify in other ICTY cases, in which he could supply information regarding alleged crimes committed by Bosnian Serbs in Srebrenica in July 1995;
(ii) his confession to the charges of, *inter alia*, murder, cruel and inhumane behavior, and persecution of civilians; and
(iii) a proposal to request a reduced sentence, due in part to dismissal of the genocide charges.

However, at the ICTY hearing on 6 May 2003, the Trial Chamber, which was called upon to approve the plea agreement but which was not composed of judges from common law systems, questioned the validity of this plea agreement. In their opinion, the agreement was unclear as to whether the Prosecutor was empowered to prosecute the accused for the genocide charges in the event his confession would be found inadmissible, i.e., not equivocal and/or voluntary pursuant to Rule 62 *bis* (see above). Thus, the discretionary powers of ICTs to supervise plea agreements in order to uphold the rule of law and due process norms constitute a fundamental guarantee of the integrity of trials before them.

ICC

Under the ICCSt., the accused may make an admission of guilt pursuant to Article 64(8)(a).[153] The ICTY/ICTR view that even in the event of a guilty plea, the integrity of criminal evidence is to be secured, was clearly adopted in Article 65(1) ICCSt., which provision introduces "proceedings on an admission of guilt." The essence of this special procedure is that the Trial Chamber is not obliged to automatically accept an admission of guilt; rather it ought to consider such an admission in the context of "any materials presented by the Prosecutor which supplement the charges…and other *evidence* (emphasis added; GJK), such as the testimony of witnesses, presented by the Prosecutor or the accused."[154] Only when the ICC Trial Chamber is satisfied that this requirement is met, as well as two other requirements (namely, that the "accused understands the nature and consequences of the admission of guilt"[155] and that the "admission is voluntarily made by the accused after

153 Article 64(8)(a) ICCSt. reads: "At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty."

154 Article 65(1)(c) ICCSt.

155 Article 65(1)(a) ICCSt.

sufficient consultation with defence counsel"[156]), it considers the admission of guilt as a basis for conviction of the accused.[157] In case, however, the Chamber is not satisfied accordingly, it may, by virtue of Article 65(4) ICCSt., request the Prosecutor to provide additional evidence, or order the trial to be continued under "the ordinary trial procedures."[158] The decisive criterion for the ICC is whether the "interest of justice, in particular the interest of the victims," require a more complete presentation of the facts of the case.[159] This criterion provides the ICC with a wider margin of appreciation than the ICTY-ICTR to either:

(i) reject an admission of guilt and the continuance with an ordinary trial,[160] or
(ii) seek more evidence to determine the validity of this admission.[161]

Similar to Rule 62 *ter* ICTY RPE, Article 65(5) ICCSt. formalizes the principle that "any discussion between the prosecutor and the defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."

3.3 *Contemporary Sentencing Procedures and Policies before ICTs*

ICTY-ICTR

As to ICTY-ICTR sentencing procedures, separate sentencing hearings were conducted and distinct sentencing rulings have been issued.[162] However, the original Rule 100 ICTY RPE, which was interpreted as enabling the Trial Chamber to render a separate sentencing decision, was ultimately deleted and replaced with Rule 98 *ter* ICTY RPE. Based on this rule, an ICTY judgment, unlike the ICTR, comprises both the merits of the case and the sentence.[163]

156 Article 65(1)(b) ICCSt.
157 Article 65(2) ICCSt.
158 Article 65(4)(b) ICCSt.
159 Article 65(4) ICCSt.
160 Article 65(3) ICCSt.
161 Article 65(4) ICCSt.
162 See, *inter alia,* the separate sentencing judgment in the *Prosecutor v. Tadić*, "Sentencing Judgment," Trial Chamber, Case No. IT-94-1-S, July 14, 1997.
163 Rule 98 *ter* (A) ICTY RPE reads that "[t]he judgment shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present, subject to the provisions of Rule 102(B)," amended on 10 July 1998, amended on 12 April 2001.

The *ad hoc* tribunals seem to pursue a broad view on what evidence and information and which expert witnesses' or common witnesses' reports may reasonably assist the Trial Chamber "in determining an appropriate sentence," presupposing that the accused is not indirectly introducing new or other evidence about his or her guilt or innocence.[164] The ICTY-ICTR case law on sentencing factors is based on a case-by-case approach, and avoids to set fixed mitigation or aggravation sentencing guidelines. This was made clear in the *Krnojelac* case, in which the Trial Chamber developed a comparative analysis of other accused convicted by the ICTY under circumstances that *could* be seen as comparable to the accused in question, Mr. Krnojelac.[165] However, the Trial Chamber emphasized that, notwithstanding that consistency in sentencing is important in any "rational and fair system of justice," it was not bound to impose the same sentence merely because the facts of two or more cases are comparable.[166] Hence, the ICTY perceives the sentencing part as a self-contained element of the judgment, depending on the particularities of each case and individual.[167]

ICC

Unlike the ICTY-ICTR procedure, the Rome Statute, in Article 76(2), endorses a distinct phase of the trial to administer the appropriate sentence. This provision even refers to "a further hearing to hear any additional evidence or submissions relevant to the sentence."[168] For the first time, this separate sentencing procedure was followed in 2012, in the *Prosecutor v. Lubanga*, the Congolese leader who has been convicted for conscripting and enlisting child soldiers.[169] The ICC Trial Chamber sentenced Lubanga to 14 years imprisonment in a separate procedure after he was found guilty at the trial proceedings.[170] Such a distinct sentencing phase seems more fair than rendering an 'overall' judgment (as pursued by the ICTY-ICTR), as the accused is relieved of a dilemma in which he or she is forced to reveal relevant sentencing information about his or her exact role in the alleged crime while still on trial and having a right not

164 *Prosecutor v. Tadić*, "Scheduling Order," Case No. IT-94-1, May 27, 1997.

165 *Prosecutor v. Krnojelac*, Trial Chamber Judgment, Case No. IT-95-25, March 15, 2002, paras. 526–532.

166 *Ibid.*

167 Mundis, "From Common Law Towards Civil Law," 212–213.

168 Article 76(2) ICCSt.

169 *Prosecutor v. Lubanga*, "Judgment pursuant to Article 74 of the Statute," Case No. ICC-01/04-01/06-2842, March 14, 2012.

170 *Prosecutor v. Lubanga*, "Decision on Sentence Pursuant to Article 76 of the Statute," Case No. ICC-01/04-01/06-2901, July 10, 2012.

to incriminate him/herself.[171] Rule 145 of the ICC RPE encompasses a wide range of aggravating and mitigating sentencing factors, such as:

> the extent of the damage caused (in particular the harm caused to the victims and their families); the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.[172]

Additional aggravating circumstances may be:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
(ii) Abuse of power or official capacity;
(iii) Commission of the crime where the victim is particularly defenseless;
(iv) Commission of the crime with particular cruelty or where there were multiple victims;
(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;
(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.[173]

In particular, Rule 145(2)(a) ICC RPE offers a defense counsel acting before the ICC a significant tool. Contrary to the ICTY RPE, it mentions as a potentially mitigating circumstance those "…falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress."[174] In other words, once a defense is not successful, it could still serve as a mitigating factor. This means that defense counsel also could justify the presentation of a criminal law defense by referring to its potentially determinative nature as a mitigating sentencing factor. From this perspective,

171 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 305–306.

172 Rule 145(1)(c) ICC RPE.

173 Rule 145(2)(b) ICC RPE; Article 21(3) ICCSt. reads: "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."

174 Rule 145(2)(a)(i) ICC RPE.

defenses function as an additional law-finding mechanism under the ICC system. The Court may also take into account the "convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court."[175]

3.4 *Appeals Procedures before ICTs: Some Contemporary Issues*

This subparagraph deals with some main features of the right of appeal against decisions of ICTs at the end of the trial, leaving untouched the right to interlocutory appeal in certain situations. The former right is a derivative of the fair trial notion, as acknowledged by the ICTY Appeals Chamber in the *Aleksovski* case.[176] The ICTY and ICTR Statutes encompass this elementary right in Articles 25 and 24 respectively. Two appellate grounds exist:

(a) error of law invalidating the decision; and
(b) error of fact which has caused a miscarriage of justice.

Equally, the Rome Statute, in Article 81(1)(b), mentions as appellate grounds for the convicted person a procedural error, an error of fact, an error of law or "any other ground that affects the fairness or reliability of the proceedings or decision." Even the Prosecutor, by virtue of Article 81(1)(b), may appeal a conviction on behalf of the defendant based on the same grounds. According to Article 81(2)(a), sentences may be appealed on the basis of "disproportion between the crime and the sentence."[177] Article 81(2)(b), which empowers the ICC to intervene *during* the appellate proceedings in order to reverse the conviction, seems to be a novelty.

Appellate proceedings before contemporary ICTs bear three main characteristics:

(i) Firstly, they are not trials *de novo*. Hence, in *Prosecutor v. Erdemović*, the ICTY Appeals Chamber held that "the Appeals process of the international tribunal is not designed for the purposes of allowing the parties to remedy their own failings or oversights during trial or sentencing."[178]
(ii) Secondly, as the Trial Chamber is the primary fact-finding forum, the Appeals Chamber allows the Trial Chamber a margin of discretionary

175 Rule 145(2)(a)(ii) ICC RPE.
176 *Prosecutor v. Aleksovski*, Appeals Chamber Judgment, Case No. IT-95-14/1-A, March 24, 2000, para. 113.
177 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 307.
178 *Prosecutor v. Erdemović*, Appeals Chamber Judgment, Case No. IT-96-22-A, October 7, 1997, para. 15.

powers in reaching its factual findings.[179] In line with this and in order to appeal successfully, it does not suffice for either party merely to show that the Trial Chamber committed an error. Rather, it must be proven that this error caused a miscarriage of justice, which implies a rather higher threshold than simply a reassessment of the evidence.[180] The term "miscarriage of justice" is defined by the ICTY Appeals Chamber as the situation whereby it is established by either party that "…no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings."[181] The ICTY Appeals Chamber has adopted the approach that this test may be met in the event evidence, deemed reliable before the Trial Chamber, can reasonably qualify as unreliable due to new evidence presented on appeal.[182]

(iii) Thirdly, ICTY case law has set forth important guidance on the standard of review for appeals. From, *inter alia*, the *Kunarac* Appeals Chamber Judgment of 12 June 2002, it follows that increased emphasis is put on the role and contributions of parties themselves to the appellate proceedings.[183] The Appeals Chamber is inclined to balance the rights of the accused to a fair appeal process on the one hand and the need for effective trial management on the other hand.[184] Recognizing the necessity of this balancing operation, the ICTY Appeals Chamber issued the following appellate guidelines:

(a) On appeal, parties must present their case "clearly, logically and exhaustively," meaning that their appeal arguments or briefs must not be "obscure, vague…(or) suffer from other formal and obvious inefficiencies."[185]

179 Wierda, *International Criminal Evidence*, 303.

180 *Prosecutor v. Furundžija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, July 21, 2000, para. 37; *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jusipović and Vladimir Šantic*, Appeals Chamber Judgment, Case No. IT-95-16-A, October 23, 2001, para. 29.

181 *Prosecutor v. Kupreškić et al.*, "Appeals Chamber Judgment," paras. 44 and 75.

182 *Ibid.*

183 *Prosecutor v. Kunarac, Kovač and Vuković*, Appeals Chamber Judgment, Case No. IT-96-23 & IT-96-23/1-A, June 12, 2002, para. 43; see also *Prosecutor v. Kupreškić et al.*, "Appeals Chamber Judgment," para. 27.

184 Daryl A. Mundis, "Current Developments at the *ad hoc* International Criminal Tribunals," *Journal of International Criminal Justice* 1 (2003): 197–225 at 214.

185 *Prosecutor v. Kunarac, Kovač and Vuković*, "Appeals Chamber Judgment," para. 43.

(b) Accordingly, the parties, while addressing the Appeals Chamber, in order to substantiate their appeal must at least submit:
- the arguments for appeal;
- clear references to the records;
- the factual basis for appeal; and
- the legal basis for appeal.[186]

(c) Failure to duly comply with ad (a) and (b) can result in dismissal, without a reasoned opinion or detailed response, of the submissions of the appellant. The Appeals Chamber will only enunciate those issues for which ad (a) and (b) have been met.[187]

In conclusion, the current ICTY-ICTR appellate proceedings obligate the parties to file predominantly legal arguments to the Appeals Chamber, without merely seeking another evaluation of the existing facts and dossier. In its final outcome, the Appeals Chamber could still find that no reasonable trier of fact could have come to the disputed decision.[188] The emergence of an emphasis on "focused contributions by the parties"[189] at the appellate stage also brings to mind a new appellate procedure under Rules 72(B) and 73 ICTY RPE, namely the need for certification. This Rule requires that a party seeking to appeal from a preliminary motion under any of the last three categories of preliminary motions pursuant to Rule 72(A)[190] (as well as regarding all other motions under Rule 73) to first obtain a certificate from the Trial Chamber that issued the judgment. Failure to do so is fatal to the potential

186 Id., paras. 44–45.

187 Id., para. 46.

188 Id., para. 48; see also *Prosecutor v. Gotovina and Markač,* Appeals Chamber Judgment, Case No. IT-06-90-A, November 16, 2012, in which the Appeals Chamber cited the well-established reasonableness standard that applies on appeal regarding errors of fact: "In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.... Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber" [citations omitted], see para. 13; the majority of the Appeals Chamber concluded in this case that "no reasonable trier of fact could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks" and thus reversed the Trial Chamber's findings in that regard, see paras. 83–83.

189 *Prosecutor v. Kunarac, Kovač and Vuković*, "Appeals Chamber Judgment," para. 43.

190 The last three categories of Rule 72(A) ICTY RPE are: (i) defects in the form of the indictment; (ii) severance of counts, or separate trials; and (iii) objections based on failure to assign defense counsel.

appeal. The *rationale* of this new procedure is to select only those appeal issues:

(a) that would "significantly affect the fair and expeditious conduct of the proceedings" *or* the outcome of the trial, *and* (cumulative),
(b) upon which the Trial Chamber concludes that the proceedings would be "materially advanced" by means of a decision of the Appellate Court. Once such a certificate is allowed, the party has seven days to file its appeal brief.[191]

3.5 *The ICC and Forensic Evidence: Prosecutorial and Defense Implication of the Principle of Procedural Equality of Arms*

3.5.1 Introduction

Adducing forensic expert evidence in the field of neurosciences (still an undervalued area in criminal law matters) has proven to be of indispensable value for the law-finding process. After assessing three concrete cases derived from both national and international criminal law practice, this paragraph will address the legal forensic framework of the ICTY and ICC in view of the possibilities of invoking forensic evidence either by the Prosecution or the defense based on the procedural equality of arms principle. This paragraph concludes with several conclusions and recommendations on this emerging area of science and its ramifications for both prosecution and defense acting before international criminal courts.

In holding individuals criminally responsible for the most heinous offences, trials before international criminal courts must ensure the protection of the rights of the accused, as only the highest moral standards can legitimate the outcome of these trials. Accordingly, the judges of the ICTY, in the first major ruling of the Appeals Chamber, advocated that: "For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."[192] The Appeals Chambers clearly intend to provide guidance as to the rules of legal interpretation that ought to be followed with regard to the possibilities of the defense, including the invocation of expert witnesses, and thus opens the gate for an extensive use of forensic expertise which could assist either prosecution or defense.

191 See Rule 72(B)(ii) and Rule 72(C) and Rule 73(C) ICTY-ICTR RPE.

192 *Prosecutor v. Tadić*, "Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction," Case No. IT-94-1-AR72, October 2, 1995, para. 45.

The influx of forensics within ICTs is still an evolving issue.[193] Yet, in the last decade the role of forensic evidence has proven to be vital to prevent miscarriages of justice.[194]

The three case studies below illustrate that forensic sciences can also serve as adequate protection of the rights of accused who face the most severe charges imaginable within our legal systems.

A Man who Borrowed Cars (*Case Study 1*)

This particular case involves a 51-year-old man who had been convicted numerous times over a period of 17 years for car theft and who was imprisoned 12 times during that time. A neurobiological examination was eventually undertaken when it appeared that on each occasion, just prior to the car theft, the accused suffered from an irresistible urge to "borrow" a car, which urge was accompanied by a very severe depression. Although the accused was well aware of the fact that his actions were punishable, this "borrowing" gave him a psychological relieve upon which he simply left the cars in isolated places. Medication had no effect.

After his twelfth imprisonment, a neuropsychological examination took place. Despite the fact that the clinical examination revealed no abnormalities and neuropsychological screening revealed no impairment of memory, reasoning or motor-coordination, the CT-scan showed that the man's brain had a lesion in the right cerebral hemisphere. Such lesions, it was demonstrated, were known to lead to dramatic changes in behavior resulting in a rare neuropsychological compulsive disorder. Indeed, after treatment for this disorder the man never committed an offence again.

This example shows that such disorders may occur in the absence of any deficit in conventional neuropsychological tests, thus underscoring the importance of forensic neurobiological research in criminal cases.

Case of Ronny N. v. Prosecutor (*Case Study 2*)

The second example relates to a double homicide case which led to a conviction on 23 July 2002 by a Dutch District Court whereby the accused was sentenced to 20 years imprisonment. This conviction was based on the following

193 Melanie Klinkner, "Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution," *The International Journal of Evidence and Proof* 13/2 (2009): 102–129. doi: 10.1350/ijep.2008.12.1.284.

194 See for example, Geert-Jan Knoops, "De Puttense moordzaak: Herzieningsrechtelijke implicaties van de voortschrijdende forensische expertise in Strafzaken," *NJB* 29 [Dutch Legal Magazine] (2002): 1402–1407.

facts: The accused shot two brothers in the early morning of 20 May 2001 in their home, allegedly because he was forced to do so. A month before this double homicide the accused and his wife had been the target of a bombing. Remarkably, both victims survived this attack with minor injuries. However, during his meeting with the two brothers on 20 May 2001, he became convinced that they were implicated in this attack on his life and that of his wife. Due to a combination of post-traumatic stress disorder (in relation to the bombing) and a compulsive disorder, the accused was apparently mentally urged to kill the two brothers.

The Prosecutor held that the accused killed in cold blood, with no mental disorder, and initially intended to obtain a conviction for life imprisonment. The defense, however, mindful of a potential defense of duress, requested a thorough forensic psychiatric and medical evaluation. This evaluation, conducted by forensic experts, led to the conclusion that, at the time of the crime, the mental disintegration was considerable, and therefore the ability of the accused to oppose this mental urge (even further intensified by fear and paranoia, not to mention a combination of lack of sleep and use of drugs revealed by forensic neurobiological evidence), was deemed to be very limited.

Interestingly, the questions of the defense addressed to the forensic experts embraced the question of whether or not an irresistible mental force existed which could justify the defense of duress – a matter which depends on the medical-ethical authority of a forensic neurosciences expert. The investigating Judge held that this question was admissible in court, and, in the end, the defendant was sentenced to 20 years rather than life imprisonment.

Prosecutor v. Delalić (*Case Study 3*)

The influx of forensic expert testimony within the system of ICTs may be illustrated by the outcome of a case, which featured at the ICTY. On 15 November 1996 the accused Esad Landžo filed a notice of intent to offer a defense of diminished or lack of mental responsibility,[195] and to advance a plea of diminished responsibility and limited physical capacity pursuant to Rule 67(A)(ii)(b) ICTY RPE.

The Trial Chamber rejected the defense of diminished responsibility as put forward by the accused Mr. Landžo, noting that the defense did not establish the fact that, at the relevant time, the accused "was unable to distinguish between right and wrong." In making this decision, the Tribunal was guided by expert witness opinions from three forensic psychiatrists called by the accused

195 See Notice of the defence to the Prosecutor pursuant to Rule 67(A)(ii)(b) ICTY RPE of 15 November 1996, Case No. IT-96-21-T.

to testify on his behalf, as well as the opinion of a fourth psychiatrist from the U.S. called in rebuttal by the Prosecution. All four experts held fairly extensive sessions with the accused.[196] All defense expert witnesses were of the opinion that the accused suffered from a personality disorder. As noted, the Trial Chamber opined that the burden of proof by a preponderance of balances was not met in order to ascertain a disorder as such. The Trial Chamber differentiates between suffering from a personality disorder on the one hand, and evidence relating to the inability to control the physical acts of the accused on account of abnormality of mind on the other hand.[197] Only the latter situation may justify this defense. This case study illustrates the importance of forensic expert witnesses in order to assess the presence of certain criminal law defenses before ICTs.

3.5.2 Legal-Forensic Framework of Equality of Arms

Neither the ICTY Statute nor the Rome Statute explicitly recognize forensic expert evidence. Nor are procedural issues on the use of this kind of evidence adequately or completely addressed by these Statutes. However, the Rome Statute ensures the protection of the rights of the accused through a more detailed codification of procedural guarantees which enhance, extensively interpreted, the determination of the evidence through the use of forensic expert witnesses. For example, Article 67(1)(e) ICCSt., entitled "Rights of the Accused," is modelled on Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR), which is one of the principal human rights treaties.[198]

The general right to a fair hearing established in Article 67 ICCSt. provides defendants with an important mechanism that the respect of the ICC for the rights of an accused keep pace with the progressive development of forensic evidence. The Court's incentive to do so emerges especially as international case law has developed the notion of "equality of arms" within the concept of the right to a fair trial.[199] This international case law with regard to this

196 See for the contents of these observations of the expert witnesses, paras. 1173–1186 of *Delalić et al.*

197 *Ibid.,* para. 1186.

198 See International Covenant on Civil and Political Rights, 1996, UNTS 171.

199 *Neumeister v. Austria*, ECtHR Judgment, Appl. No. 1936/63, June 27, 1968; Manfred Nowak, *un Covenant on Civil and Political Rights. ccpr Commentary* (Kehl am Rhein: Engel, 1993). For recognition of the principle of 'equality of arms' by the International Criminal Tribunal for the Former Yugoslavia, see *Prosecutor v. Tadić* "Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements," Case No. IT-94-1-T, November 27, 1996, pp. 4 and 7.

principle of equality of arms directly affects the role of expert evidence under the ICTY Statute and the Rome Statute.

When comparing the most important provisions in both the ICTY Statute and RPE and the Rome Statute and RPE regarding forensic sciences evidence, the following differences emerge:

1. First of all, one may notice that the drafters of the ICC paid more attention to the possibility of setting up a more conclusive legal-forensic framework in view of the principle of equality of arms.
2. The ICTY RPE focuses clearly on providing evidence in general, using the term "psychiatric examination of the accused," but not within the context of substantiating a defense, albeit that Rule 67(B)(ii)(b) ICTY RPE may be a basis for this in its reference to "any special defense, including that of diminished or lack of mental responsibility" (see the ICTY judgment in *Delalić* et al). The ICC system, however, creates the possibility of a more extensive engagement of forensic expert evidence in the context of invoking defenses:

    1. Rule 80: Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 1 (Rule 79: Notice of defenses);
    2. Rule 113: Collection of information regarding the state of health of the accused;
    3. Rule 116: Collection of evidence at the request of the defense.
    4. Rule 135: Medical, psychiatric or psychological examination to verify that the accused understands the nature of the charges (Section 3: Appointing one or more experts from the list of experts approved by the Registrar).
    5. Rule 145: Mitigating sentencing circumstances; circumstances falling short of constituting diminished mental capacity or duress.

3.5.3 Equality of Arms in International Law: Balancing Prosecution and Defense Interests

The case law of the European Court of Human Rights (ECtHR) has established several standards designed to ensure that criminal proceedings involving expert evidence are fairly conducted. Two conditions can be derived from this case law:

(a) First, national courts must ensure that both Prosecution and defense are able to have knowledge of, and (at trial) comment on, the evidence adduced by the opposing party. If a justified and objective doubt exists

that the forensic expert appointed by the court is not acting with the presumed impartiality and neutrality, the second condition comes into effect.

(b) In such an event, (inter)national courts are obliged to ensure that the accused is endowed with the opportunity to secure the attendance and examination of experts and/or witnesses on his or her behalf under the same conditions as the experts of the prosecution.[200]

The above implies that the principle of equality of arms, as, interpreted by the ECtHR does not provide the defense with identical opportunities as the prosecution as regards the invocation of forensic expert evidence. One can say that this case law only secures two elements:

(a) Both Prosecution and defense must be given the opportunity to have knowledge of and comment on the forensic observations/evidence presented by the other party.
(b) Both Prosecution and defense must have the same opportunity to challenge expert evidence.

The drafters of the Rome Statute anticipated the element in sub a), as the ICC RPE contain a special provision for the endorsement of this element. Rule 10, titled "Retention of information and evidence," explicitly provides that "the Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of the investigations by his or her Office." This provision – clearly of a civil law nature – is an improvement on the ICTY rules, and could also be of assistance in recovering medical information about the personality of the accused.

200 *Bönisch v. Austria*, ECtHR Judgment, Appl. No. 8658/79, May 6, 1985; *Brandstetter v. Austria*, ECtHR Judgment, Appl. No. 11170/84, 12876/87, 13468/87, August 28, 1991; see *Mantovanelli v. France*, ECtHR Judgment, Appl. No. 21497/93, March 18, 1997.

CHAPTER 8

Principles of Criminal Evidence before ICTs

1 Introduction

Pradel's remark that "of all branches of (international) criminal procedure, evidence is probably the most vital and certainly the most complex and, as a result, the least fixed,"[1] is self-explanatory. Criminal evidence attempts to balance two antagonistic elements, namely that of the (defense) rights of the accused on the one hand and the legal interests of society to suppress criminality on the other. The integrity of international criminal trials is especially challenged within the ambit of criminal evidence, which is complex in terms of its sources, content, presentation and application. This chapter will look into four major themes related to criminal evidence before ICTs, namely:

- the requisite standard of proof in the various statutes and RPE of ICTs throughout all stages of the proceedings (paragraph 2);
- disclosure of evidence (paragraph 3); the collection and admissibility criteria of said evidence, including the phenomena of hearsay evidence and anonymous witnesses and circumstantial evidence (paragraph 4); and
- the presentation and appreciation of evidence before ICTs; special attention will be paid to expert witnesses and forensic evidence at trials before ICTs (paragraph 5).

2 Requisite Standards of Proof before ICTs

2.1 *Introduction*

The obligation of the prosecution to prove all the facts in the indictment in order to establish guilt beyond reasonable doubt constitutes an important element for the legitimacy of trials before ICTs. In this context, this paragraph examines five subjects:

1 Jean Pradel, "Criminal Evidence," in *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, ed. J.F. Nijboer and W.J.J.M. Sprangers (Amsterdam: Thela Thesis, 2000), 411.

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(i) the standard of proof for issuing an arrest warrant within the Rome Statute (2.2);
(ii) evidentiary standard at the confirmation of the charges phase (2.3);
(iii) procedure for judgment of acquittal (2.3);
(iv) the standard of proof for conviction (2.4); and
(v) the standard of proof for defenses (2.5).

2.2 *Standard of Proof for Issuing an Arrest Warrant*

The proceedings before the International Criminal Court (ICC) reflect three evidentiary standards:

(a) Prior to issuing a warrant of arrest the Prosecution has to prove that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[2]
(b) At the confirmation of the charges stage – a special procedure during which the Prosecution seeks approval from the Pre-Trial Chamber to proceed to trial – the Prosecutor has to meet a higher burden of proof, i.e. it has to convince the Pre-Trial Chamber that sufficient evidence exists "…to establish that there are substantial grounds to believe that the person committed each of the crimes charged."[3]
(c) At the trial stage, the requisite burden of proof is that of "beyond reasonable doubt," i.e. the Court must be convinced of the guilt of the accused beyond reasonable doubt in order to convict the accused.[4]

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2 Article 58(1)(a) ICCSt. reads: "At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."

3 Article 61(7) ICCSt. reads: "The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed; (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; (c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court."

4 Article 66 (3) ICCSt.

Thus, a gradually higher standard of proof is required for each subsequent stage of the proceedings. The Trial Chamber will issue an arrest warrant pursuant to Article 58(1)(a) ICCSt. if there "are reasonable grounds to believe the person committed a crime within the jurisdiction of the Court" *and* if the arrest of the person appears necessary. Arrest may be necessary if one of the following three requirements of Article 58(1)(b) ICCSt. is met:

(i) To ensure the person's appearance at trial;
(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

This procedure differs from the procedure before the *ad hoc* tribunals, where no such separation between the issuance of an arrest warrant and the confirmation of the charges phase exists. At the ICTY/ICTR an arrest warrant may only be issued, after confirmation of the indictment by the Trial Judge. Unlike the ICC confirmation of the charges procedure (which inheres an adversary character), the ICTY judges did not hear the defense prior to issuing an arrest warrant. The Prosecutor, in seeking confirmation of an indictment by a Judge, has to be "satisfied…that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal."[5]

The Judge reviewing the indictment may:

(i) Request the Prosecutor to present additional material in support of any or all counts;
(ii) Confirm each count;
(iii) Dismiss each count;
(iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.[6]

5 Rule 47(B) ICTY/ICTR RPE: "The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material."

6 Rule 47(F) ICTY/ICTR RPE.

The Trial Judge will confirm the indictment, if satisfied that a *prima facie* case has been established by the Prosecutor.[7] The ICTY did not adopt a uniform definition of a *prima facie* case, however, the following definitions have been applied:

> whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[8]

As well as:

> a *prima facie* case for this purpose is understood to be a credible case which would (if not contradicted by the defense) be a sufficient basis to convict the accused on the charge.[9]

Only after confirmation of the indictment, the Judge may, upon request of the Prosecutor, issue an arrest warrant.[10] Similar as to the procedure before the ICC, the Prosecutor may refile an indictment when additional evidence arises.[11]

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7 Article 19(1) ICTYSt.: "The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

8 *Prosecutor v. Milošević, Milutinović, Šainović, Ojdanić and Stojiljković*, "Decision on Application to Amend Indictment and on Confirmation of Amended Indictment," Case No. IT-02-54, June 29, 2001, para. 3.

9 See for example *Prosecutor v. Slobodan Milošević*, "Decision on Review of Indictment," Case No. IT-02-54, November 22, 2001, para. 11, referring to *Prosecutor v. Kordić et al.*, "Decision on Review of the Indictment," IT-95-14-I, November 10, 1995; the ICTY Judges adopted the test formulated by the International Law Commission in its Draft Statute for the ICC.

10 Rule 47(H) ICTY/ICTR RPE: "Upon confirmation of any or all counts in the indictment, (i) the Judge may issue an arrest warrant, in accordance with Rule 55 (A), and any orders as provided in Article 19 of the Statute, and (ii) the suspect shall have the status of an accused."; Article 19 (2) ICTYSt.: "Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial."

11 Rule 47(I) ICTY/ICTR RPE: "The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence"; Article 61(8) ICCSt.: "Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded

Following the Statutes, the requisite burden of proof for the issuance of an arrest warrant seems higher at the ICTY/ICTR, compared to the ICC. Whereas the former systems require "sufficient evidence" in relation to *each particular charge*, the latter system only requires "a summary of the evidence and any other information which establish reasonable grounds to believe"[12] that the person committed a crime within the jurisdiction of the ICC. This is not surprising because there are no separate confirmation of the charges proceedings – with a higher requisite standard of proof – at the ICTY/ICTR.

2.3 *Evidentiary Standard at the ICC's Confirmation of the Charges Phase*

The most complex and discussed evidentiary burden is the standard applied at the confirmation of the charges stage. At the confirmation of the charges stage, the evidentiary standard of proof amounts to "substantial grounds to believe that the person committed the crime charged." Yet, the ICC judges pursue different opinions as to both the quantum and quality of the evidence required at this stage.

The evidentiary threshold of "substantial grounds to believe" serves as a kind of "gatekeeper function" of the Pre-Trial Chamber, meant to differentiate "…between cases that should go to trial and those that should not, thus ensuring, *inter alia*, judicial economy" and the prevention of miscarriages of justice.[13]

In the case against the former President of Ivory Coast Mr. Laurent Gbagbo, the ICC Pre-Trial Chamber formulated two other reasons for this gatekeeper function of Article 61(7) ICCSt.:

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from subsequently requesting its confirmation if the request is supported by additional evidence."

12 Article 58(2) ICCSt. lists the requirements of the Prosecutor's application for an arrest warrant. The application shall contain: "(a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) A concise statement of the facts which are alleged to constitute those crimes; (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; (e) The reason why the Prosecutor believes that the arrest of the person is necessary."

13 *Prosecutor v. Laurent Koudou Gbagbo*, "Decision Adjourning the Hearing on the Confirmation of the Charges pursuant to Article 61(7)(c)(i) of the Rome Statute," Pre-Trial Chamber I, Case No. ICC-01/11-01/11-432, June 3, 2013, para. 18 (hereinafter: "Adjournment Decision"); see also the Dissenting Opinion to this Decision of Judge Silvia Fernandez de Gurmendi, para. 26.

(i) To ensure that only these cases proceed to trial for which the Prosecutor has presently "sufficiently compelling evidence going beyond mere theory or suspicion";[14]
(ii) The suspect is protected against wrongful prosecution;[15]

When determining the exact nature of this evidentiary standard of Article 61(7) ICCSt., ICC case law portrays the following main features:

(i) In order to meet this evidentiary burden, the Prosecution must "offer concrete and tangible proof demonstrating a clear line of reasoning, underpinning the specific allegations."[16]
(ii) The Pre-Trial Chamber defines 'substantial' (as in "substantial grounds to believe") as being "'solid', 'material', 'well-built', 'real' rather than 'imaginary'."[17]
(iii) In the Gbagbo case, the Pre-Trial Chamber held this evidence to entail as much as forensic evidence as possible, while anonymous hearsay evidence will have less probative value. This implies that NGO and press reports as such are not sufficient to meet this burden. The Prosecution should not only rely on documentary or summary evidence.[18]
(iv) One of the contentious issues is whether the Prosecution should, at the confirmation hearing, present all of his evidence and its strongest possible case, while having to have largely completed its investigation. The Pre-Trial Chamber in the Gbagbo case answered this question in an affirmative way.[19]

The pivotal element of Article 61(6) ICCSt. revolves around the quality of the evidence. As the defense has the right to challenge the evidence of the Prosecution and is able to present its own (exculpatory) evidence, it is tenable that judicial review at the confirmation of charges hearing encompasses a stringent appreciation of the quality of the evidence adduced by the Prosecutor. If this was not the case, Article 61(6) ICCSt. would be illusory. The right to

14 *Prosecutor v. Gbagbo*, "Adjournment Decision," para. 18.
15 *Ibid.*
16 Id., para. 17.
17 *Ibid.* 17.
18 Id., paras. 27–29, 31, 34; see *infra*.
19 *Prosecutor v. Laurent Gbagbo*, Decision Adjourning the Hearing on the Confirmation of the Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-01/11-01/11, 3 June 2013, para. 37; see also the Dissenting Opinion to this Decision of Judge Silvia Fernandez de Gurmendi.

challenge the evidence presupposes a Pre-Trial Chamber assessing the evidence beyond merely a superficial review.

Indeed, as the Appeals Chamber of the ICC in the *Mbarushimana* case ruled:

> As previously indicated by the Appeals Chamber, the investigation should largely be completed at the stage of the confirmation of the charges hearing. Most of the evidence should therefore be available, and it is up to the prosecutor to submit this evidence to the Pre-Trial Chamber.[20]

The question arose as to whether the 'completion of the investigation' is a prerequisite to have the charges confirmed. The Appeals Chamber in the *Lubanga* case held that "…ideally, it would be desirable for the investigation to be completed by the time of the confirmation hearing…"[21] Yet, as the Appeals Chamber contemplated, this completion "…is not a requirement of the Statute" while "…the Prosecutor's investigation may be continued beyond the confirmation hearing."[22]

As Judge Silvia Fernández de Gurmendi contemplated in her Dissent of the *Gbagbo* Decision Adjourning the Hearing on the Confirmation of the Charges, a confirmation hearing should not be altered into a "trial before a trial" or a "mini-trial."[23] However, once one accepts the overarching purposes of a confirmation hearing being to prevent and even protect against wrongful (ICC) prosecutions, this notion could outweigh potential implications of judicial efficiency. After all, a wrongful prosecution revealed only at the end of a very extensive international criminal trial may also damage judicial economy.

From the reasoning of the Appeals Chamber which transpired in the *Lubanga* case, it is arguable that the issue of completion of the investigation by the time of the confirmation hearing, is only a policy objective rather than a legal requirement.[24] This view seems to be supported by the ICC Appeals Chamber ruling in the *Mbarushimana* case in which the Appeals Chamber

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20 *Prosecutor v. Callixte Mbarushimana*, "Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the Confirmation of the Charges,'" Case No. ICC-01/04-01/10-514, May 30, 2012, para. 44.

21 *Prosecutor v. Thomas Lubanga Dyilo*, "Appeals Chamber Judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the RPE'," Case No. ICC-01/04-01/06-568, October 13, 2006, para. 54.

22 Id., para. 2.

23 Dissenting Opinion of Judge Silvia Fernandez de Gurmendi to the *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, para. 28.

24 Dissenting Opinion of Judge Silvia Fernandez de Gurmendi to the *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, para. 15.

accepted that, pursuant to Article 61(5) ICCSt., the Prosecutor "…need not to submit more evidence than is necessary to meet the threshold of substantial grounds to believe."[25]

(v) The standard of proof for the confirmation of the charges needs to be applied equally to all facts and circumstances entailed in the charges, including to the individual crimes charged, the alleged criminal liability of the suspect and the contextual elements.[26] Only the facts and circumstances which are described in the charges must be proven in accordance with the threshold of article 61 (7), thus not the facts and circumstances which are not embedded in the charges, such as, for instance, background or other information contained in the document containing the charges (DCC).[27]

(vi) Another contentious issue is the type of evidence required pursuant to Article 61(7) ICCSt.

Firstly, in the Gbagbo case, the majority of the Pre-Trial Chamber, while acknowledging the Prosecutor's right to rely on documentary or summary evidence, ascertained the types of evidence it preferred, namely "…to have as much forensic and other material evidence as possible…duly authenticated and having dear and unbroken chains of custody."[28]

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25 *Prosecutor v. Mbarushimana*, "Judgment on Appeal against 'Decision on the Confirmation of the Charges'," May 30, 2012, para. 47.

26 *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, para. 19; see also *Prosecutor v. Gbagbo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'," Case No. ICC-02/11-01/11 OA 5, December 16, 2013, para. 46; see also *Prosecutor v. Gbagbo*, "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges," Pre-Trial Chamber, Case No. ICC-02/11-01/11, July 31, 2013, para. 22.

27 *Prosecutor v. Lubanga*, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'," Appeals Chamber, Case No. ICC-01/04-01/06-2205, December 8, 2009, footnote 163; *Prosecutor v. Germain Katanga*, "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'," Case No. ICC-01/04-01/07-3363, March 27, 2013, para. 50; Dissenting Opinion of Judge Silvia Fernandez de Gurmendi to the *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, para. 33.

28 *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, paras. 26–27.

Secondly, the Pre-Trial Chamber avers that "…whenever testimonial evidence is offered, it should to the extent possible, be based on first-hand and personal observations of the witness."[29]

Thirdly, the majority of the judges in the *Gbagbo* case contemplated that "… reliance upon hearsay evidence should be avoided…whenever possible."[30] The Court expressed the rationale for this as follows:

> [I]t is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence, because in such cases the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information.[31]

Fourthly, as the Court contemplated:

> NGO reports and press articles…cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with Article 54(1)(a) of the Statute…and they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of the charges.[32]

Fifthly, within the context of the confirmation of the charges, the Pre-Trial Chamber did reject allegations "…proven solely through anonymous hearsay in documentary evidence."[33] These evidentiary considerations should not be confused with the admissibility of types of evidence. Notwithstanding the Rome Statute containing no explicit restrictions thereto (except for a limited exclusion of certain types of evidence under Article 69(7) ICCSt.), whilst admitting direct, indirect and circumstantial evidence, the probative value will vary as per type of evidence and the facts underpinning it.[34]

Whether the Pre-Trial Chamber should commit itself to an intensified judicial review, most likely depends on the circumstances of the case, in particular

29 Id., para. 27.

30 Id., para. 28.

31 Id., para. 29.

32 Id., para. 35.

33 Id., para. 37.

34 Dissenting Opinion of Judge Silvia Fernandez de Gurmendi to the *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, para. 24, where these two concepts seem to collide.

the level of whether the Chamber is "thoroughly satisfied that the Prosecutor's allegations are sufficiently strong…"[35]

The ICC Pre-Trial Chamber has the authority to weigh the quality of the evidence of the Prosecution and to evaluate any ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of the witnesses. The Pre-Trial Chamber assesses both the relevance and the probative value of the evidence, regardless of the type of evidence and which party disclosed the evidence.[36] When evaluating and weighing the evidence, the Pre-Trial Chamber can impose a stricter appreciation of the evidence as to the quality of the evidence at the second part of the prolonged confirmation of charges hearing. When a Pre-Trial Chamber is of the view that the evidence is inconsistent, ambiguous or contradictory, this may result in a decision not to confirm the charges.[37]

The ICC Pre-Trial Chamber may, on the basis of the confirmation of the charges hearing, reach one of the following decisions:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person the a Trial Chamber for trial on the charges as confirmed;
(b) Decline to confirm those charges in relation to which it has determined that there is sufficient evidence;
(c) Adjourn the hearing and request the Prosecutor to consider:
    (i) Providing further evidence or conducting further investigation with respect to a particular charge;
    (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

In the *Gbagbo* case, the Pre-Trial Chamber decided for the first time since its inception, to adjourn the confirmation of the charges *and* recommended the Prosecutor to provide further evidence or to further investigate on specific aspects under of Article 61(7)(c)(i) ICCSt.[38] In the case against Thomas Lubanga

35 *Prosecutor v. Lubanga*, "Decision on the confirmation of charges," Case No. ICC-01/04 -01/06-803-tEN, January 29, 2007, para. 39.

36 *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," Case No. ICC-01/05-01/08, June 15, 2009, para. 44.

37 *Prosecutor v. Bahar Idriss Abu Garda*, "Decision on the Confirmation of Charges," Case No. ICC-02/05-02/09, February 8, 2010, para. 43.

38 On 12 June 2014, the ICC Pre-Trial Chamber confirmed the charges in the case against Laurent Gbagbo, see *Prosecutor v. Gbagbo*, "Decison on the confirmation of charges against Laurent Gabago," Case No. ICC-02/11-01/11-656-Red, June 12, 2014.

Dyilo the Pre-Trial Chamber ordered the amendment of the charges under Article 61(7)(c)(ii); yet, it determined that it was not necessary to actually adjourn the charges.[39] The objective of option (ii) underlying Article 61(7)(c) became evident in the *Lubanga* decision on the confirmation of the charges, namely:

> to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing.[40]

In the case against Jean-Pierre Bemba, the former leader of the *Mouvement de Libération du Congo* (MLC), suspected of crimes against humanity committed during the armed conflict in 2002–2003 in the Central African Republic, the Pre-Trial Chamber decided to adjourn the charges on the basis of Article 67(7)(c)(ii) ICCSt. In its decision, the Pre-Trial Chamber clearly distinguished between adjourning on the basis of option (i) and option (ii). The confirmation of the charges shall be adjourned under option (i) once the Prosecutor does not provide sufficient evidence required at this stage of the proceedings; the evidence that *has* been provided at this stage must be "not irrelevant and insufficient to a degree that merits declining to confirm the charges under article 61(7)(b) of the Statute."[41] If this is the case, the Pre-Trial Chamber can rule – as it did in the *Gbagbo* case – that more evidence is required. The process as to reaching such a decision demands a careful analysis and evaluation of the evidence at hand and the related documents thereto. The confirmation of charges can also be adjourned under option (ii) if the charge has to be amended because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.[42]

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39 *Prosecutor v. Lubanga*, "Decision on the confirmation of charges," Pre-Trial Chamber I, Case No. ICC-01/04-01/06-803, January 29, 2007, para. 204.

40 Id., para. 203.

41 *Prosecutor v. Bemba Gombo*, "Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii)," Pre-Trial Chamber III, Case No. ICC-01/05-01/08-388, March 4, 2009, para. 16.

42 *Prosecutor v. Katanga*, "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'," Appeals Chamber, Case No. ICC-01/04-01/07 OA 13, March 27, 2013; *Prosecutor v. Katanga*, "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons," Trial Chamber II, Case No. ICC-01/04-01/07-3319-tENG/FRA, November 21, 2012, in which the Trial Chamber *proprio motu* amended the liability mode to indirect complicity in the commission of a crime instead of solely on the basis of (indirect) co-perpetration.

In the *Mbarushimana* case, the Pre-Trial Chamber confirmed none of the charges and also the Prosecutor's appeal did not result in a confirmation of the charges.[43] The Appeals Chamber in the *Mbarushimana* case mentioned the option to adjourn the charges, though it did not opt for this legal avenue. The Prosecutor had based its case primarily on 'summary evidence'. This form of evidence could, according to the Appeals Chamber, imply that the Pre-Trial Chamber is not confronted with *all* available evidence at that time. In such cases adjourning the confirmation of the charges could be an option, as was pursued in the *Gbagbo* case, but not in the *Mbarushimara* case. Central to the Appeals of *Mbarushimana* was the question whether the Pre-Trial Chamber could evaluate ambiguities, inconsistencies and contradictions in the evidence at hand and not whether there existed sufficient evidence to establish 'substantial grounds to believe'. In *Mbarushimana* the Appeals Chamber explicitly held that it was not convinced of the Prosecutor's argument that the Pre-Trial Chamber was empowered to evaluate the evidence, despite not being provided with all the evidence. The Appeals Chamber ruled that "the investigations should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber."[44] This consideration seems contrary to the *Gbagbo* case, where the Pre-Trial Chamber reasoned:

> Despite these difficulties in the evidentiary record of the Prosecutor, the Chamber considers that this does not automatically have to lead to the immediate refusal to confirm the charges. Although the Chamber is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence, the Chamber notes that past jurisprudence, which predates the abovementioned decisions of the Appeals Chamber, may have appeared more forgiving in this regard. Therefore, the Prosecutor in this case may not have deemed it necessary to present all her evidence or largely complete her investigation, following all relevant incriminating and exonerating lines of investigation in order to establish

43 *Prosecutor v. Mbarushimana*, "Decision on the Confirmation of the Charges," Pre-Trial Chamber I, ICC-01/04-01-10-465-Red, December 16, 2011; *Prosecutor v. Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'," Appeals Chamber, Case No. ICC-01/04-01/10-514, May 30, 2012.

44 *Prosecutor v. Mbarushimana*, "Judgment on Appeal on Confirmation of the Charges," May 30, 2012, para. 44.

> the truth. The Chamber does not exclude that the Prosecutor might be able to present or collect further evidence and is therefore, out of fairness, prepared to give her a limited amount of additional time to do so. As the Appeals Chamber noted when discussing summary evidence, when the evidence is insufficient the 'Pre-Trial Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence'.[45]

Notably, in paragraph 25 of said decision, the Pre-Trial Chamber held that it must assume that the Prosecutor had presented her "strongest possible case."[46]

A Second Chance?

In the Gbagbo-case, the Pre-Trial Chamber did not just adjourn the confirmation of the charges. It requested the Prosecutor to provide further evidence or to conduct further investigation – a legal avenue available under Article 61(7)(c)(i) ICCSt. – while providing guidelines as to the scope of such an investigation. In paragraph 44 of the adjournment decision of 3 June 2013, the Pre-Trial Chamber recommended the Prosecutor to provide further evidence on, for example:

(1) The position(s), movements and activities of all armed groups opposed to the "pro-Gbagbo forces" (for example Commando Invisible and Forces Nouvelles) in Côte d'Ivoire (including particularly in and around Abidjan) between November 2010 and May 2011, including specific information about confrontations between those groups and the "pro-Gbagbo forces" between November 2010 and May 2011.
(2) The organizational structure of the "pro-Gbagbo forces," including how the different subgroups interacted within the overall structure and especially how the "inner circle" coordinated, funded and supplied the means for the activities of the different sub-groups; any changes or evolution in the aforementioned structure and/or operating methods, taking place between November 2010 and May 2011.[47]

The authority to provide such guidelines does not directly follow from Article 61(7)(c)(ii) of the Rome Statute. It can be questioned whether the Judge should provide such guidelines, since it is first and foremost the Prosecutor's

45 *Prosecutor v. Gbagbo*, "Adjournment Decision," June 3, 2013, para. 37.
46 Id., para. 25.
47 Id., para. 44.

responsibility to ensure that the evidence meets the requisite standard of 'substantial grounds to believe' in order to have the charges confirmed. Such guidelines are not axiomatic once a Pre-Trial Chamber holds that the materials are insufficient to sustain the requisite burden of proof pursuant to Article 61(7) ICCSt. Another reasoning could contradict the ratio of this standard of proof at the confirmation of the charges stage, namely ensuring that only cases are tried where the Prosecutor has presented sufficient evidence. This level of proof goes beyond a mere theory or suspicion, preventing miscarriages of justice and safeguarding the judicial economy.[48] The approach taken by the Pre-Trial Chamber in the Gbagbo case may lead to granting the Prosecution a 'second chance', with detailed instructions on how to conduct an investigation before the charges can be confirmed.

2.4 *Procedure for Judgment of Acquittal*

After closure of the Prosecution's case, the ICTY-ICTR system, unlike the Rome Statute and the ICC RPE, allows the defense to move for a judgment of acquittal. Such a motion is appropriate when the Trial Chamber may find "that the evidence is insufficient to sustain a conviction on one or more counts" as envisaged by Rule 98 *bis* ICTY-ICTR RPE. In that event the Chamber must order entry of judgment of acquittal in respect of those counts, which order may be issued by the Chamber also *proprio motu*.

The ICTY case law has adopted the following evidentiary standard to be met for refuting such a motion, namely, that the Trial Chamber must be satisfied that:

> ...there is evidence relating to each element of the offenses in question which, were it to be accepted, is such that a reasonable tribunal might convict.[49]

However, this criterion should be equated with establishment, to the satisfaction of the Chamber, of the charges beyond reasonable doubt. The latter criterion only surfaces at the end of the trial when determining guilt or innocence.[50] Therefore, it is possible for the Trial Chamber to find the Prosecution

48 Id., para. 18.

49 *Prosecutor v. Delalić, Mucić, Delić and Landžo* (Čelebići camp case), "Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case," Trial Chamber, Case No. IT-96-21, March 18, 1998.

50 *Prosecutor v. Kordić and Čerkez*, "Decision on Defence Motions for Judgment of Acquittal," Case No. IT-95-14/2, April 6, 2000, paras. 26–27; see also *Prosecutor v. Delalić et al.*

evidence sufficient to sustain a conviction by a reasonable Chamber at the end of its case-in-chief on the one hand, but still to acquit on the merits of *all* the evidence that has been given, even if no new facts are adduced, on the other hand.[51]

2.5 *Standard of Proof for Conviction*

Here, two major guidelines emerge from the law of the ICTs:

(i) First, both the ICTY-ICTR and ICC require that guilt of an accused in a case before its Trial Chambers must be proven beyond reasonable doubt in relation to each element of the particular offence charged. This finding must be accorded by a majority of the Trial Chamber.[52] On appeal, the Appeals Chamber, in determining whether the Trial Chamber's judgment should be upheld, must inquire whether the determination of guilt beyond reasonable doubt is a conclusion which no reasonable person could have reached (i.e. the standard of unreasonableness).[53]

(ii) Secondly, in addition to the burden on the Prosecution to prove the case beyond a reasonable doubt, the accused is entitled to the benefit of the doubt as to whether the offense has been proven.[54]

2.6 *Standard of Proof for Defenses*[55]

With respect to criminal law defenses to be invoked before ICTs, a different burden of proof is required. Within the ICTY-ICTR, as well as the ICC system, this test comprises the following parameters:

(Čelebići), Appeals Chamber Judgment, Case No. IT-96-21, February 20, 2001, para. 434; see further Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, 2002), 126–129.

51 *Prosecutor v. Jelisić*, Appeals Chamber Judgment, Case No. IT-95-10, July 5, 2001, para. 37.

52 Rule 87(A) ICTY-ICTR RPE and Article 66 (3) ICCSt.

53 *Prosecutor v. Tadić*, Appeals Chamber Judgment, Case No. IT-94-1, July 15, 1999, para. 64; see also *Prosecutor v. Delalić et al.* (Čelebići), "Appeals Chamber Judgment," February 20, 2001, para. 434.

54 See *Prosecutor v. Delalić et al.* (Čelebići), Trial Chamber Judgment, Case No. IT-96-21, November 16, 1998, para. 601; *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber Judgment, Case No. IT-96-23-T & IT-96-23/1-T, February 22, 2001, para. 560.

55 See in detail Geert-Jan Knoops, *Defenses in Contemporary International Criminal Law 2nd ed.* (Leiden: Martinus Nijhoff Publishers, 2008), 259–262.

i. The *onus* rests with the Prosecution to refute any defense set forth by the defense team. This notion is a derivative of the presumption of innocence enshrined in Article 21(3) ICTYSt., Article 20(3) ICTRSt. and Article 66(1) ICCSt. The latter provision prohibits any reversal of the burden of proof or any onus of rebuttal to the detriment of the accused.
ii. An exception to this first rule is that, according to ICTY case law, with respect to the insanity defense, it is up to the accused to prove this special defense 'on the balance of probabilities.' This means that, contrary to other defenses, the 'presumption of sanity' governs to the detriment of the accused.[56] In itself, such onus of establishing a defense seems not contrary to ECtHR case law, more especially when looking at its 1988 *Salabiaku* case.[57] In *Salabiaku v. France* the ECtHR held that Article 6 § 2 requires States to confine presumptions of fact "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[58]

3 Disclosure of Evidence

3.1 *Introduction: Modalities of Disclosure*

Disclosure of evidence affects the axis of criminal evidence in adversarial proceedings.[59] Two elements merit special attention in the practice of ICTs:

(i) the scope of disclosure obligations and rules for the parties as to several subject matters under ICT systems; and
(ii) the jurisprudential interpretation of these rules by the ICTY and ICTR.

Generally, under the ICTY and ICTR RPE the Prosecutor bears a greater responsibility to disclose evidence than the defense. The same applies to the ICC Prosecutor; yet, this is not surprising as the judges and prosecution are deemed to have an investigatory role, particularly in the Pre-Trial proceedings, modelled after the inquisitorial justice tradition.[60]

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56 *Prosecutor v. Delalić et al.* (Čelebići), "Trial Chamber Judgment," November 16, 1998, para. 1157.
57 *Salabiaku v. France*, ECtHR Judgment, Appl. No. 10519/83, October 7, 1988, para. 28; see also May and Wierda. *International Criminal Evidence*, 122.
58 *Salabiaku v. France*, ECtHR Judgment, October 7, 1988, para. 28; in the case of Salabiaku the ECtHR held that Article 6 § 1 and 2 had not been breached.
59 May and Wierda. *International Criminal Evidence*, 73.
60 See Section II, Rule 76 *et seq*. ICC RPE.

3.2 *Prosecutorial Disclosure under the ICTY-ICTR System*

A First Stage and Category

The first category and core of the Prosecution's duty to disclose under the ICTY-ICTR system is embodied in Rule 66(A) ICTY/ICTR RPE. According to this Rule the Prosecutor has two primary disclosure obligations, namely:

(i) Firstly, disclosure of supporting material pursuant to Rule 66(A)(i); this implies that the Prosecutor is required to reveal all material that supports the indictment to the accused within thirty days of the initial appearance; this duty includes all previous statements of the accused.[61]
(ii) Secondly, disclosure pursuant to Rule 66(A)(ii); this disclosure obligation requires the Prosecution to release to the accused copies of the full statements of witnesses that the Prosecutor intends to call at trial.

In *Prosecutor v. Nahimana*, the ICTR affirmed the procedural distinction between these obligations as follows: if the supporting material (sub (i)) only consists of excerpts, the duty to disclose is limited to such excerpts. If, however, a particular witness is called as a trial witness, the disclosure rule (sub (ii)) obliges the Prosecutor to reveal not merely the excerpt but the full statement of that witness.[62] As to the question of what constitutes a witness statement as meant by Rule 66(A) RPE, the ICTY Appeals Chamber held that this includes every statement which is "an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime" as well as trial testimony.[63] In line with this extensive prosecutorial disclosure obligation is the determination by the ICTY Trial Chamber holding this duty to be in principle continuous, i.e. it applies throughout the whole trial

61 *Prosecutor v. Blaškić*, "Decision on the Production of Discovery Materials," Case No. IT-95-14-T, January 27, 1997, para. 37.

62 *Prosecutor v. Nahimana, Ngeze and Barayagawiza*, "Decision on An Oral Application by Defense Counsel Concerning Witness X," Case No. ICTR-99-52-T, January 19, 2002, paras. 6–7; see also Daryl A. Mundis, "Current Developments at the *ad hoc* International Criminal Tribunals," *Journal of International Criminal Justice* 1 (2003): 214–215, mentioning the exception of Rule 66(B) ICTR RPE, allowing the defense to request full statements.

63 *Prosecutor v. Blaškić*, "Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings," Case No. IT-95-14-A, September 26, 2000, paras. 15–16 (hereinafter: "Appeals Chamber Decision on Production of Material").

in so far as new investigative developments emerge which affect the accused's rights.[64]

B Second Stage and Category

The second prosecutorial disclosure obligation surfaces in an ensuing stage of the ICTY-ICTR proceedings, namely the disclosure of its witness list pursuant to Rule 67(A)(i) RPE, which includes all particulars of the witnesses except for their addresses.[65] The rationale of this disclosure rule is clearly to enable the defense "…to have a clear and cohesive view of the Prosecution's strategy…" so that it can properly prepare its defense.[66]

C Third Stage and Category

The third prosecutorial disclosure category pertains to that of exculpatory evidence, which is, according to Rule 68 RPE, the existence of material known to the prosecutor, which in any way tends to "suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution evidence."[67] It includes not only witness statements, but also documentary and forensic evidence.[68]

In order to administer justice, the Prosecutor thus bears the responsibility of disclosing in good faith this kind of evidence as soon as possible to the defense.[69] The ICTY Trial Chamber in the *Kordić and Čerkez* case made it clear that this form of disclosure is not secondary, and should therefore be obligatory throughout the entire proceedings.[70] This continuous disclosure obligation by virtue of Rule 68 RPE even extends to the post-trial stage and the appeal

64 See *Prosecutor v. Delalić et al.* (Čelebići), "Decision on the Applications Filed by the Defence for the Accused Zejnil Delalic and Esad Landzo on 14 February 1997 and 18 February 1997 respectively," Trial Chamber, Case No. IT-96-21, February 21, 1997, para. 14; see further for this element May and Wierda, *International Criminal Evidence*, 75.

65 *Prosecutor v. Delalić et al.* (Čelebići), "Decision on the Defense Motion to Compel the Discovery of Identity and Location of Witnesses," Trial Chamber, Case No. IT-96-21, March 18, 1997, para. 19.

66 *Prosecutor v. Blaškić*, "Decision on the Production of Discovery Materials," January 27, 1997, para. 22.

67 Rule 68(i) ICTY RPE.

68 May and Wierda, *International Criminal Evidence*, 77.

69 *Prosecutor v. Blaškić*, "Appeals Chamber Decision on Production of Material," September 26, 2000, para. 47.

70 *Prosecutor v. Kordić and Čerkez*, "Decision on Motions to Extend Time for Filing Appellant's Briefs," Case No. IT-95-14/2, March 11, 2001.

stage, as the rationale of this rule is also to ensure a fair trial during appellate proceedings.[71] Rule 68 may therefore be considered as an important mechanism to prevent miscarriages of justice.[72] Regardless how extensive this Rule may be, it does not cast the Prosecutor as an assistant to the defense by recovering exculpatory evidence.[73] The Prosecutor at the ICTY-ICTR is not statutorily obliged to search for exculpatory evidence, which is in contrast with the procedure at the ICC, where the Prosecutor has to actively search for exculpatory evidence pursuant to Article 54(1)(a) ICCSt. Yet, prosecutorial disclosure obligations proved problematic in the case of Lubanga, which resulted in several stays of the proceedings.[74]

D Fourth Prosecutorial Disclosure Category

The fourth disclosure category pertaining to the Prosecution triggers also defense obligations, namely disclosure of all evidence to the case of the defense. The ICTY case law has dealt with this category by providing the following guidelines:

(i) The Prosecution must declare whether evidence retrieved is material or exculpatory for the defense. When disputed by the defense, the Trial Chamber arbitrates.[75]
(ii) The defense, when requesting access to prosecutorial materials, must, within limits, allow the Prosecutor to examine defense materials to be used at trial, albeit that the defense is not required to reveal its trial strategy in advance of its opening statement.[76]

Importantly, Rule 94 *bis* ICTR RPE provides that the full statement of any expert witness called by a party shall be disclosed to the opposing party

71 *Prosecutor v. Blaškić*, "Appeals Chamber Decision on Production of Material," September 26, 2000, para. 42.

72 For more information on this subject, please see: Geert-Jan Knoops, *Redressing Miscarriages of Justice: Practice and Procedure in* (*International*) *Criminal Cases 2nd ed.* (Leiden: Martinus Nijhoff Publishers, 2013).

73 May and Wierda, *International Criminal Evidence*, 78.

74 See for an overview of the major procedural events in Lubanga paragraph 10 of the Trial Chamber Judgment, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute," Trial Chamber I, Case No. ICC-01/04-01/06-2842, March 14, 2012; see also Chapter 7.

75 May and Wierda, *International Criminal Evidence*, 79–80.

76 *Ibid.*

"as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify." Furthermore, the opposing party is obliged to inform the Trial Chamber within 14 days of filing this statement whether it accepts or rejects the witness qualification as an expert, accepts or rejects the particular statement, or wishes to cross-examine the expert witness. This Rule is an important contribution to the disclosure system based on the principle of equality of arms.

3.3 *Defense Disclosure under the ICTY-ICTR System*

The ICTY-ICTR disclosure system for the defense is rather restricted compared to that of the prosecution. There are three major defense disclosure obligations:

First, disclosure of the defense of alibi or any special defense, including diminished or lack of mental responsibility, should be by means of filing a notification before the start of the trial pursuant to Rule 67(A)(ii) ICTY-ICTR RPE. With regard to the special defenses of diminished or lack of mental responsibility, an insanity defense must also disclose the names and addresses of expert witnesses or other forensic experts if such evidence is necessary to substantiate such a defense.

Secondly, disclosure of a list of defense witnesses pursuant to Rule 73 *ter* ICTY-ICTR RPE. This rule was promulgated for the purpose of:

a) maintaining the principle of equality of arms on both sides; and
b) promoting better comprehension of the trial subjects and thus more effective management of the trial.[77]

Thirdly, pursuant to trial management policy, applying to both defense and Prosecution, the duty to disclose prior to the pre-trial conference by means of a pre-trial brief, should entail the following details:

- the nature of the accused's defense;
- the elements of the prosecution's pre-trial brief which are contested and the motivation for such contest; and
- the list of witnesses and exhibits (prior to the defense case).

This third category of defense disclosure stems from Rule 65 *ter* (F) and 65 *ter* (G) ICTY RPE. Rule 65 *ter* (H) provides for the appointment of a Pre-Trial judge

77 May and Wierda, *International Criminal Evidence*, 82–83.

to supervise the course of pre-trial proceedings as well as content and factual-legal scope for purposes of trial management.

3.4 *Prosecution and Defense Disclosure under the ICC System*

Unlike the ICTY-ICTR framework, the ICC RPE includes a special section titled "Disclosure," which embraces nine rules on the subject of disclosure, covering, *inter alia*, the disclosure of names of witnesses the Prosecution intends to call, the possibility to inspect materials in the possession of the other party, defense disclosure obligations concerning its intent to raise certain defenses.[78] The disclosure system under the ICC introduces broader responsibilities for both parties as opposed to the ICTY-ICTR system.

Prosecutorial Disclosure Obligations

Next to obligations to disclose witnesses names and statements that the Prosecution intends to hear at trial, as well as books, documents, photographs and other objects it intends to present as evidence,[79] the Prosecutor bears the extensive obligation to disclose exculpatory evidence as soon as practicable pursuant to Article 67(2) ICCSt.[80]

Defense Disclosure Rules

Contrary to the ICTY-ICTR RPE, Rule 79 ICC RPE introduces a rather extensive disclosure obligation to the defense:

(i) the names of witnesses; and
(ii) the evidence on which the defense intends to rely to invoke an alibi, insanity or diminished mental capacity, intoxication, self-defense, or duress.[81]

In conclusion, it may be said that, compared to the *ad hoc* tribunals, under the ICC system both the Prosecutor and the ICC are able to anticipate to a certain extent a defense strategy prior to its presentation at trial.[82]

78 Section II, Rule 76 *et seq*. ICC RPE.

79 See Rules 76–78 ICC RPE.

80 Article 67(2) ICCSt.; Rule 83 ICC RPE provides that the "Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2."

81 See for the disclosure of other defenses Rule 80 ICC RPE; under the ICTY/ICTR system a notice to rely on an alibi defense should be submitted pursuant to Rule 68(B)(i)(a) ICTY RPE/ Rule 67(A)(ii)(a) ICTR RPE.

82 May and Wierda, *International Criminal Evidence*, 86.

3.5 *Disclosure Requirements under the ECHR*

In *Rowe and Davis v. the United Kingdom*, the ECtHR outlined the principles applicable to the disclosure of evidence to the defense in criminal proceedings, which were reiterated in *Donohoe v. Ireland* as follows:

> It is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party…In addition Article 6 § 1 requires…that the prosecution authorities disclose to the defence all material evidence in their possession for the accused…
>
> However,…the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security of the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused…In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1… Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities…
>
> In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them…Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.[83]

Thus, the ECtHR does not have strict disclosure requirements, but will balance defense rights against the public interest. It will examine whether limitations

83 *Rowe and Davis v. the United Kingdom*, ECtHR Judgment, Appl. No. 28901/95, February 16, 2000, paras. 60–62; *Donohue v. Ireland*, ECtHR Judgment, Appl. No. 19165/08, December 12, 2013, para. 74.

on the defense are sufficiently counterbalanced with appropriate safeguards. The failure to disclose certain evidence to the defense does not automatically imply an infringement of Article 6 § 1 of the ECHR.[84]

4 Admissibility of Evidence

4.1 *Different Types of Witness Evidence before ICTs*

Four of the most controversial issues surrounding witness evidence in international criminal trials are:

(i) the admissibility of hearsay evidence;
(ii) the assessment of the reliability of (eye)witness evidence;
(iii) the use of anonymous witnesses; and
(iv) the admissibility of circumstantial evidence.

This paragraph analyzes how these controversial evidentiary issues are dealt with by ICTs, as well as how they are regulated under the framework of the ECtHR, as ICTs have frequently relied upon ECtHR judgments.

4.2 *Hearsay Evidence before ICTs*

Hearsay evidence is a not an uncommon phenomenon; it is widely used in both inquisitorial and adversarial based justice systems and it arises not only in oral witness testimony but also in the form of written documents.[85]

According to the U.S. Federal Rules of Evidence, hearsay is to be considered as:

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the trough of the matter asserted.[86]

Based upon the rule of law,[87] according to common law, hearsay is subjected to an exclusionary rule of evidence. This means that in case no exception to a hearsay statement is justified, whilst considering the primary rationale that second-hand testimony (not subjected to cross-examination and not given

84 See also *Al-Khawaja and Tahery v. the United Kingdom*, ECtHR Judgment, Appl. Nos. 26766/05 and 22228/06, December 15, 2011, para. 145.

85 May and Wierda, *International Criminal Evidence*, 114.

86 See U.S. Federal RPE 801 (c).

87 the U.S. Federal RPE comprises several enumerated exceptions to this rule; see Rules 803 and 804.

under oath) is likely to be unreliable or distorted, the statement must be excluded from evidence.[88]

Thus, hearsay is deemed unreliable because it:

(a) is unsworn;
(b) is vulnerable to error in its oral transmission;
(c) is impervious to cross-examination; and
(d) does not permit observation of the declarant's demeanor while speaking.[89]

The underlying rationale for this exclusion is the protection of lay jurors from potentially misleading information.[90] This could imply that the application of this rule does not *eo ipso* extend to professional judges such as those of ICTs. It is probably for this reason that neither the ICTY nor the ICTR Statutes or their RPEs address the concept of hearsay evidence, so that hearsay, as part of the inquisitorial law systems, is not formally ruled out at ICTY and ICTR trials.[91] Yet, Rules 89(C) and 89(D) ICTY RPE may be considered as indicators or guidelines on how to evaluate also hearsay evidence. These Rules read:

– Rule 89(C): a Chamber may admit any relevant evidence which it deems to have probative value.
– Rule 89(D): a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

4.2.1 The Admissibility of Hearsay Evidence

The ICTs all accept hearsay evidence, as long as the evidence is relevant and has probative value. The following cases adjudicated by the ICTY, ICTR and ICC illustrate how these rules have been applied to hearsay evidence.

At the ICTY, several cases did raise the issue of admissibility of hearsay evidence. In the *Tadić* case, hearsay evidence was admitted through the testimony of lay witnesses. The ICTY Trial Chamber, in admitting this kind of evidence, considered that the tribunal was actually a fusion of civil and common law features and did not rule out either of these two systems. As a result, the Chamber held that in principle hearsay evidence was not to be excluded

88 See U.S. Federal RPE, 802; May and Wierda, *International Criminal Evidence*, 114.

89 See also Kelly L. Fabian, "Proof and Consequences: An Analysis of the *Tadic* and *Akayesu* Trials," *De Paul Law Review* 4 (2000): 1020.

90 *Ibid.*

91 *Ibid.*

beforehand.[92] It may be questioned whether the admission of this kind of hearsay evidence is more prejudicial to the accused's right to a fair trial than it is probative.[93]

In *Prosecutor v. Blaskić*, the Trial Chamber emphasized the fact that ICTY judges, due to their professionalism and training, are perfectly fit to assess the probative value of hearsay evidence, albeit that their determination must only be made post factum (i.e. after closure of the examinations by both parties).[94]

A third ICTY ruling issued by the Appeals Chamber admitting hearsay evidence was delivered in the *Prosecutor v. Aleksovski* on 16 February 1999.[95] The Appeals Chamber reiterated the criteria for the admission of hearsay evidence earlier established by ICTY case law, namely that its reliability (in order to establish the truth) must be assessed by the Trial Chamber based upon its:

(i) voluntarism;
(ii) truthfulness; and
(iii) trustworthiness.[96]

Additionally, the Appeals Chamber promulgated the following guidelines in order to determine the probative value of hearsay evidence:

(i) The Trial Chamber should consider the content, context and character of the evidence as well as the circumstances under which the evidence arose;[97]
(ii) the absence of opportunity to cross-examine does not *eo ipso* undermine the probative value of a hearsay statement, albeit that it can affect its evidentiary weight; and
(iii) the adverse party bears the burden of proof that admission of hearsay is prejudicial to the right to a fair trial.[98]

92 *Prosecutor v. Tadić*, "Decision on the Defense Motion on Hearsay," Case No. IT-934-1, August 5, 1996, para. 14.

93 See, for an analysis of hearsay evidence in the *Tadić* case and other cases, Fabian, "Proof and Consequences," 1030–1034.

94 *Prosecutor v. Blaškić*, "Decision on Standing Objection of the Defense to the Admission of Hearsay with no Inquiry as to its Reliability," Case No. IT-95-14-T, January 21, 1998, paras. 13–14.

95 *Prosecutor v. Aleksovski*, "Decision on Prosecutor's Appeal on Admissibility of Evidence," Case No. IT-95-14/1-AR73, February 16, 1999, paras. 15–19.

96 *Ibid.*

97 Id., para. 15.

98 Id. para. 17.

In the case of the *Prosecutor v. Haraquija and Morina*[99] (a contempt case), the ICTY Appeals Chamber adopted the 'sole and decisive' rule set by the ECtHR, in ruling that the right to a fair trial is violated if a conviction is based solely or to a decisive degree on hearsay evidence. The Appeals Chamber furthermore held that hearsay evidence or circumstantial evidence is not automatically untested or unreliable, but such evidence must be treated with caution.[100] A conviction which rests decisively on untested evidence, can be regarded as unfair.[101] Consequently, all untested evidence underpinning a conviction, must be sufficiently corroborated. One of the factors to take into consideration when evaluating the untested evidence, may be the consistency of the witness, yet, consistency alone "does not make the untested evidence inherently more reliable."[102] The Appeals Chamber did not impose specific legal requirements as to the sources of corroboration.[103]

The Appeals Chamber contemplated that the Trial Chamber is endowed with a rather extensive discretion in admitting hearsay evidence; yet, "establishing the reliability of this type of evidence is of paramount importance when hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents."[104]

In the case against *Sredoje Lukić*, the ICTY Appeals Chamber departed from the principles established in ICTY case law on hearsay evidence. In 2009, the Trial Chamber found Mr. Lukić guilty on charges of war crimes and crimes against humanity related to incidents that occurred in 1992 at the Uzamnica camp and Pionirska street in Bosnia.[105] In 2012, the majority of the Appeals Chamber overturned Sredoje Lukić's conviction in relation to the Uzamnica camp incident; yet it upheld his conviction in relation to the Pionirska street incident.[106] Sredoje Lukić's sentence was reduced from 30 years to 27 years. Lukić was found to be present and armed at the Memić House on 14 June 1992 when crimes were committed and he was also said to be involved in the

99 *Prosecutor v. Haraquija and Morina*, Appeals Chamber Judgment, Case. No. IT-04-84 -R77.4-A, July 23, 2009.

100 Id., para. 62; see also *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, June 28, 2013, para. 34.

101 *Prosecutor v. Haraquija and Morina*, "Appeals Chamber Judgment," July 23, 2009, para. 63.

102 Id., para. 64.

103 Id., para. 62.

104 Id., para. 52.

105 *Prosecutor v. Milan Lukić and Sredoje Lukić*, Trial Chamber Judgment, Case No. IT-98 -32/1-T, July 20, 2009.

106 *Prosecutor v. Milan Lukić and Sredoje Lukić*, Appeals Chamber Judgment, Case No. IT-98 -32/1-A, December 4, 2012.

transfer of a group of men from the Memić House to the Omeragić House (the 'transfer') on the evening of June 14, 1992. Sredoje Lukić was 'identified' at the Memić House and later during the transfer and this led to his conviction on charges of war crimes and crimes against humanity.[107] The evidence that was relied upon by the Trial Chamber – and subsequently approved by the Appeals Chamber – consisted of three anonymous witnesses, VG018, VG038 and VG084, and one witness, Huso Kurspahic, testifying on the basis of his father's recollections, who had died before the commencement of the trial. The testimony of one of the anonymous witnesses, VG018, was very weak, uncorroborated and contradicted the other witnesses' statements; yet, it was deemed reliable by the Trial Chamber.[108] Other weaknesses in the identification evidence were the physical descriptions of the perpetrators by the witnesses, which did not match with Sredoje Lukić's appearance.

Hearsay evidence is, in principle, admissible, but the weight and probative value of this kind of evidence "will usually be less than that accorded to the evidence of a witness who has given it under oath and who has been cross-examined."[109] In its assessment of the probative value of hearsay evidence, a Trial Chamber should consider the following indicia of reliability: the source of information,[110] the precise character of the information[111] and whether there is other evidence that corroborates the hearsay evidence.[112] Hearsay evidence is

107 Dissenting Opinion Judge Morrison to the *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 2.

108 Id., para. 51; see also *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, June 28, 2013, para. 37.

109 *Kalimanzira v. the Prosecutor*, Appeals Chamber Judgment, Case No. ICTR-05-88-A, October 20, 2010, para 96, citing *Karera v. the Prosecutor*, Appeals Chamber Judgment, Case No. ICTR-01-74-A, February 2, 2009, para 39; see also *Prosecutor v. Zlatko Aleksovski*, "Decision on Prosecutor's Appeal on Admissibility of Evidence," Case No. IT-95-14/1-AR73, February 16, 1999, para. 15; see also *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, June 28, 2013, para. 28.

110 *Prosecutor v. Karera*, Appeal Judgment, Case No. ICTR-01-74-A, February 2, 2009, para. 39; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Appeal Judgment, Case No. ICTR-99 -52-A, November 28, 2007, para 831; *Prosecutor v. Ndindabahizi*, Appeal judgment, Case No. ICTR-01-71-A, January 16, 2007, para 115 (about "unverifiable hearsay" evidence); *Prosecutor v. Semanza*, Appeal Judgment, Case No. ICTR-97-20-A, May 20, 2005, para. 159; *Prosecutor v. Rutaganda* Appeal Judgment, Case No. ICTR-96-3-A, May 26, 2004, paras. 154, 156, 159.

111 *Prosecutor v. Karera*, Appeal Judgment, Case No. ICTR-01-74-A, February 2, 2009, para 39; *Prosecutor v. Ndindabahizi*, Appeal Judgment, January 16, 2007, para. 115.

112 *Prosecutor v. Karera*, Appeal Judgment, February 2, 2009, para 39; *Prosecutor v. Nahimana et al.*, Appeal Judgment, November 28, 2007, para. 473 (for an illustration of hearsay

often accepted if there is strong corroborating evidence; yet, if this is lacking, one should be cautious before basing a conviction solely on hearsay evidence.[113] In the case against Sredoje Lukić, the ICTY judges accepted hearsay evidence, that was "corroborated" by an underlying anonymous source. This was, in view of the absence of any historic precedent thereto at that time, insufficiently foreseeable and accessible.[114]

Judge Morrison appended a dissenting opinion to the Appeal Chamber's judgment. He opined that the Appeals Chamber erred in upholding Mr. Lukić's conviction in relation the Pionirska street incident, because the identification evidence that was relied upon consisted primarily of uncorroborated hearsay evidence.[115] Judge Morrison argued that:

> By consequence of the errors found on appeal, there was only one piece of direct identification evidence locating Sredoje Lukić at the Memić House. This evidence, VG018's testimony that one of the perpetrators introduced himself as Sredoje Lukić upon entry into the house was prima facie weak, uncorroborated and directly contradicted by the evidence of other witnesses deemed reliable by the Trial Chamber. As VG038 and VG084's hearsay identification evidence lacked any indicia of reliability and considering the other inadequacies in the identification evidence that have been raised on appeal, it is my firm opinion that the finding that Sredoje Lukić was identified at the Memić House should have been overturned.[116]

Judge Morrison contended in his dissent:

> Never before has hearsay evidence with so little way of substantive indicia of reliability been accepted as reliable, and the Majority's conclusion,

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testimonies corroborating each other); *Prosecutor v. Gacumbitsi*, Appeal Judgment, Case No. ICTR-2001-64-A, July 7, 2006, para. 115.

113 *Kalimanzira v. the Prosecutor*, Appeal Judgment, October 20, 2010, paras 99, 199; *Muvunyi v. the Prosecutor*, Appeal Judgement, Case No. ICTR-00-55A-A, August 29, 2008, para. 70; see also *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, June 28, 2013, para. 28.

114 *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, June 28, 2013, para. 71; see also Dissenting Opinion Judge Morrison to the *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 38.

115 Dissenting Opinion Judge Morrison to *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 1.

116 Id., para. 6.

> as well as its failure to explain its significant divergence from historic jurisprudence in this regards, is, with respect, unfathomable.[117]

With regard to the "divergence from historic jurisprudence," judge Morrison contemplated that the majority had only considered "one prior judgment on hearsay evidence" (i.e. the *Rukundo* Appeal Judgment).[118] Yet, the *Rukundo* case pertained to an "isolated incident where reliance on anonymous hearsay evidence was accepted," and, moreover, it could be distinguished from the *Lukić* case on the basis of the existence of "a subjective nexus between the persons who identified the accused, and the accused himself."[119] Judge Morrison also recalled the *Rutaganda* case, in which case the ICTR Appeals Chamber had allowed the reliance on anonymous hearsay evidence. Yet, again, this case differed from the *Lukić* case in that there was "greater evidence going to the reliability of the evidence, and, further, the hearsay evidence did not go to a material fact in the case."[120]

Judge Morrison recalled the standard set in international criminal law:

> Absent any findings or evidence establishing subjective indicia of reliability [*vis-à-vis* hearsay evidence], it is in my view that, on the basis of precedent and reason, the Appeals Chamber should clearly have found that this evidence had no probative weight as an independent source of identification.[121]

Clearly, it is well settled in ICTY law practice that hearsay evidence is accepted. However, to definitively resolve the jurisprudential hearsay discussion, the judges of the ICTY promulgated Rule 92 *bis*, allowing for the admission, subject to conditions, of written statements or transcripts of evidence in lieu of oral evidence.[122] In 2006, Rule 98 *bis* ICTY RPE was further amended, and adopted the sentence that a Trial Chamber – while accepting written evidence – may "dispense with the attendance of a witness in person."[123]

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117 Id., para. 34.

118 Emphasis added, see footnote 74 of Dissenting Opinion Judge Morrison to *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012.

119 Id., referring to *Rukundo v. Prosecutor*, Appeal Judgment, Case No. ICTR-2001-70-A, October 20, 2010, para. 196.

120 Id., referring to *Prosecutor v. Rutaganda*, "Appeal Judgment," May 26, 2004, para. 156.

121 Id., para. 38.

122 May and Wierda, *International Criminal Evidence*, 219–220.

123 Rule 92 *bis* (A) ICTY RPE, as amended on September 13, 2006.

Even though the ICTY and the ICTR have similar Statutes and RPE, there are some difference as to the admissibility of hearsay evidence before these ICTs. Prior to adding a similar Rule 92 *bis* to the ICTR RPE, two major judgments on hearsay were rendered by ICTR Trial Chamber:

Prosecutor v. Akayesu

In this case, hearsay evidence was admitted through lay testimony.[124] Lay testimony is proof or confirmation that is given by a witness, based on their own knowledge, opinions or experience.

Prosecutor v. Musema

The approach taken by the ICTY in the *Blaskić* case – not to exclude hearsay beforehand but to hear the evidence and only assess its probative value *a posteriori* – was also adopted by the ICTR in *Prosecutor v. Musema*.[125] The ICTR emphasized that, absent to corroborating direct evidence, hearsay evidence should be determined with caution and subject to the tests of:

(i) relevance;
(ii) probative value; and
(iii) reliability.

Notably, the case law of both the ICTY and ICTR indicate that hearsay evidence does not necessarily need corroboration, so that the civil law principle of *unus testis, nullus testis* ("one witness is no witness") does not apply.[126] The same approach is taken by the ICC in Rule 63(4) ICC RPE.

In the Rome Statute, as well as in its RPE, a general rule excluding hearsay evidence or otherwise indirect evidence is absent, albeit that admission of hearsay could be disallowed by virtue of:

(i) Article 69(3) ICCSt., which provides that the presented evidence must be "relevant and necessary for the determination of the truth"; or
(ii) Article 69(4) ICCSt., which states that the ICC may rule on the relevance or admissibility of any evidence as long as it takes into account, *inter alia*, (a) its probative value; and (b) any prejudice that it may cause to a fair trial or fair assessment of the testimony.

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124 *Prosecutor v. Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, September 2, 1998.

125 See *Prosecutor v. Musema*, Judgment and Sentence, Trial Chamber I, Case No. ICTR-96 -13-A, January 27, 2000, para. 51.

126 *Prosecutor v. Delalić et al.* (Čelebići), "Appeals Chamber Judgment," February 20, 2001, para. 506; *Prosecutor v. Kunarac, Kovač and Vuković*, Appeals Chamber Judgment, Case No.

It is tenable that the element of *prima facie* reliability as a precondition to admissibility of evidence is an implicit component of the criteria specified in Article 69 (3) and (4) ICCSt.[127]

4.4 *The European Court on Human Rights on Hearsay Evidence*

As demonstrated in the case of the *Prosecutor v. Haraquija and Morina,*[128] ECtHR case law is an accepted source applied by judges of ICTs. For this reason, a section on case law of the ECtHR on the use of hearsay evidence has been included.

Article 6(1) ECHR enshrines the principle that "everyone is entitled to a fair and public hearing" and Article 6(3)(d) ECHR dictates that everyone charged with a criminal offense has the *minimum 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 witnesses against him." This implies that, as a general rule, all evidence must be produced in presence of the accused at a public hearing under the 'adversarial principle' that both sides are endowed with the same rights. Exceptions to this general rule are allowed; yet, only if the rights of the defense have been respected.[129] The ECtHR ascertains whether the proceedings as a whole were fair. Unfairness under Article 6(3)(d) ECHR will arise if the conviction is based solely or in a decisive manner on the basis of witness testimony, while the defense was unable to examine the witness during the investigations or at trial.[130] As to hearsay evidence, the ECtHR om *Al Tahery and Kawaja v. the United Kingdom* of 15 December 2011 introduces three criteria to assess hearsay evidence:

> Hearsay evidence is any statement of fact other than one made, of his own knowledge, by a witness in the course of oral testimony (…). As a general rule it is inadmissible in a criminal case unless there is a common

IT-96-23 & IT-96-23/1-A, June 12, 2002, para. 268; *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, May 7, 1997, paras. 537–539; *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, paras. 132–136.

127 Helen Brady, "The System of Evidence in the Statute of the International Criminal Court," in *Essays on the Rome Statute of the International Criminal Court*, ed. Flavia Lattanzi and William A. Schabas (Rome: Editrice il Sirente, 1999), 286.

128 *Prosecutor v. Haraquija and Morina*, Appeals Chamber Judgment, Case No. IT-04-84 -R77.4-A, July 23, 2009.

129 *Solakov v. the former Yugoslav Republic of Macedonia*, ECtHR Judgment, Appl. No. 47023/99, January 31, 2002, para. 57; see also *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, June 28, 2013, para. 23.

130 *Solakov v. the former Yugoslav Republic of Macedonia*, ECtHR Judgment, Appl. No. 47023/99, January 31, 2002, para. 57.

> law rule or statutory provision which allows for its admission. The relevant statutory provisions applicable to each applicant are set in the following section…Those statutory provisions are supplemented by three common law principles. First, there is an additional discretion at common law for a trial judge to exclude any evidence if its prejudicial effect outweighs its probative value. (…) Second, if hearsay evidence is admitted and the jury have heard it, the trial judge, in his summing up, must direct the jury as to the dangers of relying on hearsay evidence. Third, in a jury trial, the jury must receive the traditional direction as to the burden of proof i.e. that they must be satisfied of the defendant's guilt beyond reasonable doubt.[131]

In the case of *Solakov v. the former Yugoslav Republic of Macedonia*, the ECtHR recalled that Article 6(3)(d) ECHR does not require that every witness on the accused's behalf must be present and examined at trial; national courts have to assess whether it is appropriate to call witnesses. In principle, all evidence against the accused must be produced in presence of the accused at a public hearing with a view on cross-examination. The essential aim of Article 6(3)(d) ECHR lies in the words "under the same conditions," which means "a full 'equality of arms' in the matter." As a rule, the accused must be provided with the adequate and proper opportunity to challenge and examine witnesses against him, either at the time the statements are made or at a later stage of the proceedings.[132]

In the case of *Ajdaric v. Croatia* the ECtHR found that Croatia had violated Mr. Ajdaric's fair trial rights under Article 6(1) ECHR.[133] Mr. Ajdaric had been convicted in Croatia for three murders committed in 1998 and sentenced to 40 years imprisonment, solely on the basis of hearsay evidence. In December 2005, when Mr. Ajdaric was in prison on the suspicion of a car theft in Croatia, Mr. Ajdaric fell ill and was placed in a prison hospital where he shared a room with seven other inmates, among which M.G. and S.S. Shortly after their stay in the hospital, S.S., a former policeman who had been convicted to seven years imprisonment for attempted murder but whose conviction had not yet become final, informed the police department that he had knowledge of the triple murder. S.S. said he overheard a conversation between M.G. and Mr. Ajdaric, in

131 *Al-Khawaja and Tahery v. the United Kingdom*, Judgment, Applications nos. 26766/05 and 22228/06, December 15, 2011, para. 40.

132 *Solakov v. the former Yugoslav Republic of Macedonia*, ECtHR Judgment, Appl. No. 47023/99, January 31, 2002, para. 57.

133 *Ajdarić v. Croatia*, ECtHR Judgment, Appl. No. 20883/09, December 13, 2011.

which they spoke about the crime. This statement was the basis for the prosecution and subsequent conviction of Mr. Ajdaric for the triple murder. Mr. Ajdaric challenged the reliability of S.S.'s statements by pointing at discrepancies in his statements, a lack of logic in his statements and the lack of any connection between himself and the murders, while S.S. was allegedly mentally ill. The ECtHR reiterated that, in principle, the Court will not intervene "unless the decisions reached by domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Article 6 § 1."[134] The rights under the Convention must be "practical and effective" instead of "theoretical or illusory" and the right to a fair trial cannot be deemed "effective" if the requests and observations of the parties are not truly heard (i.e. "properly examined by the tribunal").[135] The ECtHR concluded that Mr. Ajdaric had been deprived of his fair trial rights. All discrepancies should have called for a careful assessment by the national court instead of a lack of adequate reasoning, as was now the case.[136]

The ECtHR primarily assesses whether the proceedings as a whole, including the way evidence was taken, were fairly conducted and not so much whether a particular witness statement was properly admitted into evidence. Decisive in this assessment is whether defense rights were fairly balanced against rights of witnesses or victims who are called upon to testify.[137]

In conclusion, the ECtHR examines the overall fairness of the proceedings, while taking into account defense rights, as well as interests of the public and victim's rights. As a general rule, it is a matter for national courts to regulate the admissibility of evidence, as well as to assess the evidence before them.

4.5 *Assessing the Reliability of (Eye) Witness Evidence before ICTs*

Next to to the discussion of accepting certain pieces of (hearsay) evidence, is how to ascertain the reliability of certain (eye)witness evidence. The issue of witness reliability surfaced on several occasions in the *Lukić* case before the ICTY.

One of the issues in the *Lukić* case was the distinction between "identification" and "recognition" witnesses. Identification witnesses were defined as witnesses to whom the accused was "previously unknown by sight."[138] Recognition witnesses, on the other hand, had prior knowledge of the accused, which

134 Id., para. 32.

135 Id., para. 33.

136 Id., para. 51.

137 *Lüdi v. Switzerland*, ECtHR Judgment, June 15, 1992, para. 53.

138 *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 118.

enabled them to recognize the accused at the time of the alleged crimes.[139] The Trial Chamber should outline on which basis it is satisfied that the witness had prior knowledge of an accused and, is thus able to recognize the accused at the crime scene.[140] In the *Lukić* case, the Trial Chamber determined that a witness who had "acquired sufficient knowledge" of an accused, could be considered as a "recognition witness," which determination was approved by the Appeals Chamber.[141] Such determination of prior knowledge is relevant for the assessment of the identification evidence.[142]

Another issue pertained to the Trial Chamber's use of identification witnesses; the Trial Chamber had relied on in-court identifications by several witnesses, while one of the witnesses had failed to identify the accused during a pre-trial identification exercise. The Appeals Chamber held that in-court identifications must be treated with caution, as the accused can be identified "aside from prior acquaintance."[143] Among eyewitness scientists it is well-established that mistaken identifications "taint the witness' memory toward the identified person."[144] Moreover, it is assumed that in-court identifications that take place after a mistaken identification prior to trial, are likely to be replicated due to transference and commitment effects.[145] The ICTY Appeals Chamber enumerated the following situations where reliance upon identification evidence was deemed unsafe:

> [I]dentifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with

139 *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 118, referring to, *inter alia*, *Lukić* Trial Judgment, para. 31; *Tadić* Trial Judgment, para. 545.

140 *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 118.

141 Id., para. 119.

142 Id., para. 118.

143 Id., para. 120.

144 Gary L. Wells and Deah S. Quinlivan, "Suggestive Eyewitness Identifications and the Supreme Court's reliability Test in Light of Eyewitness Science: 30 Years Later," *Law and Human Behavior* 33 (2009): 1–24 at 15. doi: 10.1007/s10979-008-9130.

145 Id., p. 8.

> the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.[146]

Next to identification and recognition witnesses, the Trial Chamber is also allowed to rely on "accomplice witnesses" (i.e. witnesses who were alleged accomplices of the accused). As an accomplice might have a motive to implicate the accused in light of his or her own case, the Trial Chamber is bound to "carefully consider the totality of the circumstances in which it was tendered."[147] Yet, corroboration of the accomplice witness's statement is not required.[148]

If the defense intends to challenge witness testimony on appeal, it will not suffice to merely state that the Trial Chamber accrued different weight to two witnesses, who testified about separate events, as this will not meet the requisite threshold for appeal.[149] Furthermore, the Appeals Chamber held that the Trial Chamber is permitted "to rely on the uncorroborated evidence of a single witness when making its findings, even it is related to a material fact."[150]

Discussions pertaining to the reliability of (eye)witness evidence also surfaced in the case against *Thomas Lubanga Dyilo*, the former leader of the Union Congolese Patriots, before the ICC. In December 2010, the defense sought a permanent stay of the proceedings, because four of the intermediaries (i.e. persons who act as a link between the prosecutor and the witnesses in the field) deployed by the prosecution had allegedly prepared false evidence, while the Prosecutor was aware of the untruthfulness of the evidence attached to these individuals. Moreover, the Prosecutor had failed to investigate the reliability of the evidence.[151] The defense request was rejected, because the Trial Chamber had already heard 30 witnesses and 3 intermediaries relevant to

146 Id. para. 137, citing *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Appeals Chamber Judgement, Case No. IT-04-84-A, July 19, 2010, para. 156, referring to *Prosecutor v. Kupreškić et al.*, Appeals Chamber Judgement, Case No. IT-95-16-A, October 23, 2001, para. 40.

147 *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 128.

148 *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 128.

149 *Prosecutor v. Lukić and Lukić*, "Appeals Chamber Judgment," December 4, 2012, para. 112.

150 Id., para. 375, referring to: *Haradinaj et al.* Appeal Judgement, July 19, 2010, para. 219; *Kupreškić et al.* Appeal Judgement, October 23, 2001, para. 33; *Aleksovski* Appeal Judgement, March 24, 2000, para. 62; *Tadić* Appeal Judgement, July 15, 1999, para. 65.

151 *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06-2842, March 14, 2010, para. 10, referring to: *Prosecutor v. Lubanga*, Requête de la Défense aux fins d'arrêt définitif des procédures, Case No. ICC-01/04-01/06-2657-tENG-Red (translation of public redacted version filed on 12 August 2011).

the issue.[152] In its final judgment, however, the Trial Chamber made several considerations related to the reliability of witness evidence.

In each instance where the prosecution had violated its statutory obligations, the Trial Chamber scrutinized as to whether this undermined the reliability of the evidence and, more particularly, whether the accused was not deprived of his right to a fair trial.[153] With regard to oral witness testimony, the Chamber considered, *inter alia*:

> …the entirety of the witness's account; the manner in which he or she gave evidence; the plausibility of the testimony; and the extent to which it was consistent, including as regards other evidence in the case. The Chamber has assessed whether the witness's evidence conflicted with prior statements he or she had made, insofar as the relevant portion of the prior statement is in evidence. In each instance the Chamber has evaluated the extent and seriousness of the inconsistency and its impact on the overall reliability of the witnesses.[154]

Different from the *Lukić* case, not the identification or recognition of the accused by witnesses was at stake, rather the witness statements in and of itself. When assessing the content of the witness statements the judges will take into account the "overall context of the case and the circumstances of the individual witnesses."[155] In *Lubanga*, the Trial Chamber acknowledged that witness's evidence may be flawed due to the fact that memories fade, or because witnesses who were children at the time of the events, or who suffered a trauma, may have difficulties in providing a coherent story of the events.[156] Other factors that were considered included:

> the witness's relationship to the accused, age, vulnerability, any involvement in the events under consideration, the risk of self-incrimination,

152 *Prosecutor v. Lubanga*, "Judgment pursuant to Article 74 of the Statute," March 14, 2010, para. 10, referring to: *Prosecutor v. Lubanga*, "Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings'," Case No. ICC-01/04-01/06-2690-Conf, February 23, 2011, and public redacted version issued on March 7, 2011 (notified on8 March 2011), ICC-01/04-01/06-2690-Red2.

153 *Prosecutor v. Lubanga*, "Judgment pursuant to Article 74 of the Statute," March 14, 2010, para. 123.

154 *Prosecutor v. Lubanga*, "Judgment pursuant to Article 74 of the Statute," March 14, 2010, para. 102.

155 Id., para. 103.

156 *Ibid*.

> possible prejudice for or against the accused and motives for telling the truth or providing false testimony.[157]

The Trial Chamber in *Lubanga* accepted to use parts of certain witness's evidence, while rejecting other parts.[158] Thus, on the one hand the Chamber deemed particular witness statements unreliable; yet, it accepted their statements for other parts.

Reliability issues might also arise with reliance on documentary evidence. The Trial Chamber in *Lubanga* took the authenticity and origin of the documents into consideration and held that even though a document may be authentic, it is not necessarily reliable.[159]

The ICC judges determine on a case-by-case basis whether certain pieces of evidence are to be accepted as proof of a certain fact. This approach follows from the ICC RPE, which do not require that evidence is corroborated; in fact, Rule 63(4) ICC RPE, explicitly provides that:

> ...a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court...[160]

Reliance on circumstantial evidence is permitted under the Rome Statute framework.[161]

In conclusion, it can be said that ICTs are aware of the particular difficulties that might arise from witnesses accounts, such as the laps of time between the events and the account, traumatic memories, inconsistent accounts, (young) age of the witness at the time of the events, incentives to lie, etc. Difficulties that might arise from certain witnesses or witness accounts, have been identified in a vast body of research by eyewitness scientists; at its surface, the ICT's judges seem aware of such difficulties. On the one hand, judges took notice of situations where reliance upon identification evidence was deemed unsafe, while, on the other hand, uncorroborated witness statements have been a widely accepted practice, even if the witness proved fallible on earlier occasions. Despite the fact that certain parts of witness accounts were deemed

157 Id., para. 106.

158 Id., para. 104.

159 Id., para. 109.

160 Rule 63(4) ICC RPE.

161 *Prosecutor v. Lubanga*, "Judgment pursuant to Article 74 of the Statute," March 14, 2012, para. 111.

unreliable, other parts of the same witness's evidence could still be admitted into evidence. Overall, the judges examine on a case-by-case basis whether certain pieces of evidence are to be accepted, while taking into account the "totality of circumstances" and trying to safeguard the accused's fair trial rights.

4.6 *Use of Anonymous Witnesses before ICTs*

Because neither the ICTY nor ICTR RPE explicitly allows the testimony of anonymous witnesses, the early case law of these tribunals was necessary to resolve this evidentiary controversy. However, the ICTY applied a less advanced approach with regard to the use of anonymous witnesses than the ICTR.

The notion of anonymous witnesses before the ICTY was already relevant in the first ICTY trial, namely in *Prosecutor v. Tadić*. In this case, the Prosecution presented a motion seeking to keep several victims and witness' identities not only from the police and media but also from the accused and his counsel. It reasoned that this measure was necessary to protect these witnesses and victims from "re-traumatization" caused by "confrontation with the accused."[162] The defense held that withholding the identity of any witness from the accused and his counsel would infringe the accused's right to a fair trial by virtue of Article 20 ICTYSt.

The evidentiary problem faced by the ICTY arose from its Statute being silent on what exact limitations may be permitted when it concerns curtailing defense rights in view of the need to protect victims or witnesses and their rights[163] and, if so, under which exact circumstances such limitations apply. Furthermore, the ICTY RPE do not explicitly contemplate anonymity for the accused him-or herself.[164]

In the *Tadić* case, the ICTY Trial Chamber set forth that it would exclude anonymous testimony if "the need to assure a fair trial substantively [outweighed] this testimony."[165] The Chamber found that its duty to assure a fair trial, which in this case was "substantially obviated by procedural safeguards," was not outweighed by the need to protect "genuinely frightened" witnesses.[166]

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162 *Prosecutor v. Tadić*, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses," Case No. IT-94-1-T, August 10, 1995, paras. 4–5 (hereinafter: "Decision on Protective Measures").

163 See Article 22 ICTYSt., which governs the protection of victims and witnesses.

164 See Rules 69(A) and 75(A), 75(C) leave this matter open.

165 *Prosecutor v. Tadić*, "Decision on Protective Measures," August 10, 1995, para. 84.

166 Id., para. 85; Among the "procedural safeguards" referred to, the Chamber also outlined the following guidelines to insure fairness for the defendant: (1) the "judges must be able to observe the demeanor of the witnesses, in order to assess the reliability of the testimony";

To arrive at its decision, the ICTY applied five criteria:

(i) First, it decided, in paragraph 62, that there must be a "real fear for the safety of the witness or her or his family." To meet this part of the test, the Chamber applied an objective standard to determine whether a witness's "fear for safety" was "legitimate and reasonable."

(ii) Secondly, it held that "the evidence must be sufficiently relevant and important to make it unfair to the Prosecution to compel the Prosecutor to proceed without it."[167] The Prosecution was able to fulfill this part of the test because many of its witnesses would not testify without a concession of anonymity. Without these witnesses, the Prosecution would have no case because it relied almost exclusively on eyewitness testimony. This portion of the test also raises the question as to how the judges can determine the relevance and quality of future testimony before hearing it. The judges must determine the importance of a witness's testimony based on what the Prosecution tells them that testimony will entail.

(iii) Thirdly, the Chamber "must be satisfied that there is no prima facie evidence that the witness is untrustworthy."[168] Under this part of the test, the Chamber required the Prosecution to establish that the particular witness in question was veracious. One of the problems with this requirement is that because the Prosecution often lacks the resources to fully investigate a witness' background and to determine whether any "ulterior motives exist," prejudice to the defendant may result if evidently questionable motives are not discovered.

(iv) Fourthly, there must be an "ineffectiveness or non-existence of a witness protection programme."[169] This criterion can perhaps be considered as the most compelling reason to allow anonymous testimony in the *Tadić* case because the witness protection program offered by the ICTY was in fact insufficient. Therefore, as noted by the ICTY, releasing the witnesses'

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(2) the "judges must be aware of the identity of the witnesses, in order to test the reliability of the witness" (3) "the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable"; (4) "the identity of the witness must be released when there are no longer reasons to fear for the security of the witness," see *Prosecutor v. Tadić*, "Decision on Protective Measures," August 10, 1995, para. 71.

167 Id., para. 63.

168 Id., para. 64.

169 Id., para. 65.

identities may compromise their testimony before the Tribunal and deter others from testifying.[170]

(v) Fifthly, the Chamber found that "any measures taken should be strictly necessary" so that if "a less restrictive measure can secure the required protection, that measure should be applied."[171] This criterion implies that anonymity will only be granted under "exceptional circumstances." The Chamber stated that:

> the situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees.[172]
>
> Therefore, under the Chamber's reasoning, derogation from a defendant's right to confront his accusers was deemed appropriate in light of the exceptional circumstances in which the *Tadić* trial was taking place.

The ICTR seems to follow a somewhat more advanced approach on this field. In the *Akayesu* case, the ICTR Trial Chamber allowed the vast majority of witnesses to testify behind screens so that their identities would be kept from the public.[173] Witnesses for both the Prosecution and the defense (many of whom were refugees living in other countries) testified this way.[174] However, no witnesses testified anonymously to the defendant or his counsel.[175] It can be said that one of the reasons of this more advanced approach is that the ICTR had better protective measures than the ICTY had in the beginning. When witnesses were heard by the ICTR, accommodations were provided so they could stay in "safe houses where medical and psychiatric assistance was available."[176] This seems decidedly different from the minimal protections offered by the ICTY. There, each witness was on his or her own in terms of physical safety and the psychological stress of testifying. While the obvious surmise can be made, it is in fact unclear whether the ICTR's additional protective measures were

170 Id., para. 65.

171 Id., para. 66.

172 Id., para. 61.

173 *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, para. 12.

174 Fabian, "Proof and Consequences," 1016.

175 *Prosecutor v. Tadić*, "Decision on Protective Measures," August 10, 1995, para. 12.

176 *Prosecutor v. Akayesu*, "Trial Chamber Judgment," September 2, 1998, para. 143.

implemented in order to circumvent the dilemma with respect to anonymous witnesses which surfaced in the *Tadić* case.

At first sight, the Rome Statute seems to introduce the same language that was relied upon by the Trial Chamber in *Tadić*. Article 67(1)(e) ICCSt. provides that the defendant is entitled "to examine, or have examined, the witness against him or her…"[177] When reading this section of Article 67 in conjunction with paragraph 5 of Article 68, entitled "protection of the victims and witnesses and their participation in the proceedings," it seems that anonymous testimony may be admitted.

This provision leaves open the possibility that the testimony of a victim or witness may be presented in summary form by the Prosecution, and thus not subject to cross-examination by the defense. The tension between the protection of victims and witnesses and the defendant's right to a fair trial arises in the ICC system in the same way as it arose in the ICTY-ICTR law systems, again without acceptable solutions. Articles 67 and 68 seem to be in direct conflict with each other, one protecting the defendant's right to confront the witnesses against him or her, the other one allowing for no cross-examination. Although the Statute cannot be changed other than through a formal amendment, the Rules of Procedure and Evidence could provide specific protection against anonymous witness testimony. Perhaps the ICC Rules should include a provision which explicitly confronts the tensions the ICTY provided for in *Tadic*: "To ensure a fair trial, no witness' identity shall remain anonymous to the defendant or his counsel," for example.[178]

4.7 *Comparison with ECtHR View on Anonymous Witnesses*

This paragraph has shown that the question of how far witness protection and other prosecution interests can restrain the accused's right to a fair trial is addressed by the ICTY-ICTR and ICC by means of a rather "contextual approach" based on a case-by-case evaluation, presupposing that the latter fair trial notion is not an absolute right but subject to derogation in exceptional circumstances.[179] Four main criteria emerge from ICTY-ICTR case law for the admission of anonymous evidence:

(i) The existence of real, concrete fear for the wellbeing of the witness or his or her relatives;
(ii) the relevance of the witness to the Prosecutor's case;

177 Article 21 ICTYSt.

178 Fabian, "Proof and Consequences," 1037.

179 May and Wierda, *International Criminal Evidence*, 282–283.

(iii) the absence of *prima facie* indications of ulterior motives regarding the witness affecting his or her credibility; and
(iv) the absolute necessity of the protective measures.[180]

The European Court of Human Rights (ECtHR) seems to follow a more strict approach to the use of anonymous witnesses, as evidenced by, *inter alia*, its ruling in *Kostovski v. The Netherlands* of 20 October 1989, where it was decided that:

> 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…The right to a fair administration of justice holds so prominent a place in a democratic society…that it cannot be sacrificed to expediency…The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous witnesses as sufficient evidence to found a conviction, as in the present case, is a different matter. It involves limitations on the rights of the defense which are irreconcilable with the guarantees contained in Article 6.[181]

In *Birutis and others v. Lithuania*, the ECtHR concluded that, while emphasizing that criminal evidence must normally be produced at a public hearing in the presence of the accused, Article 6 of the European Convention was violated. It considered that the Lithuanian domestic court only read statements of anonymous witnesses, recorded during the pre-trial stage, without determining *proprio motu* their credibility. Furthermore, the ECtHR observed that the applicant's conviction was based mainly on this type of evidence, whereas the procedural handicaps for the accused were not sufficiently counterbalanced by the local judicial authorities.[182] The latter criterion,

180 *Prosecutor v. Tadić*, "Decision on Protective Measures," August 10, 1995, paras. 62–66; May and Wierda, *International Criminal Evidence*, 283.

181 *Kostovski v. the Netherlands*, ECtHR Judgment, Appl. No. 11454/85, November 20, 1989, paras. 42, 44; See also *Van Mechelen and others v. The Netherlands*, ECtHR Judgment, Appl. No. 21363/93, 21364/93, 21427/93, 22056/93, April 23, 1997.

182 *Birutis and others v. Lithuania*, ECtHR Judgment, Appl. No. 47698/99, 48115/99, March 28, 2002; see also Stéphane Bourgon, "Judgments, Decisions and Other Relevant Materials Issued by International Courts and Other International Bodies on Human Rights," *Journal of International Criminal Justice* 1/1 (2003): 245–255 at 250–251. doi: 10.1093/jicj/1.1.245.

namely the obligation of national courts to ensure that these handicaps are sufficiently and procedurally compensated as a precondition to the use of anonymous witnesses' statements, is in line with earlier case law of the ECtHR.[183]

If the conviction is based solely, or to a decisive degree, on statements of witnesses whom the defense was unable to examine, either during the investigation or at trial, the defense rights are deemed to be infringed in such a manner that it is incompatible with the requirements of Article 6 of the Convention.[184] In the case of *Kostovski v. the Netherlands*, two anonymous witness statements were used as evidence in court. The witnesses, who had made incriminating statements against the accused to the police, were examined by the magistrate without the presence of the defense and the Prosecutor. The defense was not allowed to submit certain questions to examine the reliability and sources of information and the anonymous witnesses were not heard at trial. Mr. Kostovski complained that his fair trial rights had been violated because he was not given the opportunity to examine the anonymous witnesses and to challenge their statements.[185] The ECtHR unanimously held that Mr. Kostovski's fair trial rights under Article 6 of the Convention had been breached, emphasizing that:

> Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defense 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.[186]

In *Al-Khawaja and Tahery v. the United Kingdom* the question arose whether statements of absent witnesses could be introduced into evidence, while being the "sole and decisive" evidence against the accused. The ECtHR concluded that this would not automatically constitute a breach of Article 6(1) of the Convention; yet, the Court required the following parameters:

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183 See *Doorson v. the Netherlands*, ECtHR Judgment, Appl. No. 20524/92, March 26, 1996; *Kostovski v. the Netherlands*, "ECtHR Judgment," November 20, 1989, emphasizing that the accused should be able to examine the reliability of the anonymous witness.

184 *Van Mechelen and others v. The Netherlands*, "ECtHR Judgment," April 23, 1997, para. 55.

185 *Kostovski v. the Netherlands*, "ECtHR Judgment," November 20, 1989, para. 42; see also *Amicus Curiae* Brief professor Knoops and professor Zwart in the case of Sredoje Lukić, 28 June 2013, para. 24.

186 *Kostovski v. the Netherlands*, "ECtHR Judgment," November 20, 1989, para. 42.

– Whether it was necessary to introduce the witness statements into evidence;
– Whether the conviction was based solely or decisively on the untested evidence.

Once the latter question is answered in the affirmative, the Court requires the presence of sufficient counterbalancing factors, including sufficient procedural safeguards in order to ensure that the trial, as a whole, would be fair within the meaning of Article 6 of the Convention.[187]

To summarize: as no conclusive solution to the dilemma of the antagonistic interests of the defense and victims' rights with respect to anonymous witnesses seems to exist, it is judicious to admit anonymous testimony only with caution and under exceptional circumstances, without allowing a conviction on the mere basis of anonymous witness statements.

4.8 *Circumstantial Evidence before ICTs*

The ICTY Trial Chamber defined circumstantial evidence as "being evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonably inferred."[188] Like hearsay, circumstantial evidence is admissible before the ICTY and the ICTR. This is not surprising in light of the ICTY case law which in general has required neither direct corroboration of the evidence nor the exclusion of the civil law maxim *unus testis, nullus testis*, meaning that a conviction may not be founded on the testimony of only one witness. In the ICTY *Tadić* Opinion and Judgment of May 7, 1997, the Trial Chamber held:

> The final challenge made by the defense in regards to the *unus testis, nullus testis* rule is a question of law. This principle still prevails in the civil law system, according to the defense, and should be respected by the international tribunal; therefore, because only one witness testified in support of paragraph 10, the accused cannot be found guilty. This principle is discussed elsewhere in this Opinion and Judgment but suffice it to say that the Trial Chamber does not accept this submission, which in

187 *Al-Khawaja and Tahery v. the United Kingdom*, ECtHR Judgment, Appl. Nos. 26766/05 and 22228/06, December 15, 2011, para. 145; *Donahue v. Ireland*, ECtHR Judgment, Appl. No. 19165/08, December 12, 2013, para. 76.

188 See for example, *Prosecutor v. Milan Martić*, "Decision on Adopting Guidelines on the Standards Governing the Admission of Evidence," Case No. IT-95-11-T, January 19, 2006, para. 10.

effect asserts that corroboration is a prerequisite for acceptance of testimony.[189]

In addition, the Trial Chamber concluded that "…there is no ground for concluding that this requirement of corroboration is any part of customary international law and should be required by this international tribunal."[190]

The following rulings of the *ad hoc* tribunals illustrate how this category of evidence is dealt with:

(i) In the *Prosecutor v. Krnojelac*, the ICTY Trial Chamber affirmed the definition of circumstantial evidence as adopted in the *Čelebići* Appeals Chamber judgment of 20 February 2001, by saying that it requires "…evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused persons depends because they would usually exist in combination only because a particular fact did exist."[191] In addition, the Trial Chamber holds the opinion that, for circumstantial evidence to be admissible, such a conclusion must be the *only* reasonable conclusion available. As it observes in paragraph 67: "If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion cannot be drawn."

(ii) Also relevant is the *Čelebići* Appeals Chamber judgment of 20 February 2001, on which the *Krnojelac* decision draws. In paragraph 458, the Appeals Chamber pronounced five requisite elements for the admissibility of circumstantial evidence:
   a. the existence of evidence of a number of different circumstances;
   b. the linkage of these circumstances to the guilt of the accused, in that these circumstances can only be explained because the accused did what is alleged against him;
   c. the drawing of this conclusion beyond reasonable doubt;
   d. the fact that it is a reasonable conclusion that can be deduced from the evidence is insufficient – it must be the only reasonable conclusion available;
   e. the possibility of such another reasonable conclusion, which is consistent with the accused's innocence, must lead to an acquittal.[192]

189 *Prosecutor v. Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, May 7, 1997, para. 256.

190 Id., paras. 256, 539.

191 *Prosecutor v. Krnojelac*, Trial Chamber Judgment, Case No. IT-97-25-T, March 15, 2002, para. 67.

192 *Prosecutor v. Delalić et al.* (Čelebići), "Appeals Chamber Judgment," February 20, 2001, para. 458.

(iii) Circumstantial evidence has also been allowed to prove command responsibility or other secondary forms of criminal participation. In the *Čelebići* case, the ICTY Trial Chamber found that the knowledge of a superior may be deduced from general circumstances, albeit that it "cannot be presumed, but must be established by way of circumstantial evidence."[193]

(iv) Circumstantial evidence may also be admitted into evidence presupposed it is the only reasonable inference. In the case of *Renzaho*, the ICTR Appeals Chamber recalled that "ordering [of genocide, GJK], as a mode of responsibility, can be inferred from circumstantial evidence, so long as it is the only reasonable inference."[194] In this case, the Appeals Chamber, by majority, found that the Trial Chamber failed to explain how the combination of factors (*inter alia* Renzaho's authority, his order to distribute weapons and his actions in support of roadblocks) necessarily resulted in the conclusion that Renzaho ordered the killings.[195]

A conclusion of guilt by inference deriving from circumstantial evidence also surfaced in the Pre-Trial Chamber's determination to issue an arrest warrant for Omar Al Bashir. The Pre-Trial Chamber relied upon the ICTR Appeals Chamber judgment in the *Kerera* case, holding that:

> It is well established that a conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available from the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, it must reach such a conclusion beyond a reasonable doubt. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the nonexistence of that fact, the conclusion of guilt beyond a reasonable doubt cannot be drawn.[196]

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193 *Prosecutor v. Delalić et al.*, "Trial Chamber Judgment," November 16, 1998, para. 386; see also *Prosecutor v. Kordić and Čerkez*, Trial Chamber Judgment, Case No. IT-95-14/2-T, February 26, 2001, para. 427.

194 *Renzaho v. the Prosecutor*, Appeals Chamber Judgment, Case No. ICTR-97-31-A, April 1, 2011, para. 318.

195 Id., para. 319.

196 *Prosecutor v. Karera*, Appeals Chamber Judgment, Case No. ICTR-01-74-A, February 2, 2009, para. 34.

The case of *Omar Al Bashir* was, however, different, as the burden of proof for issuing an arrest warrant is distinct from the burden of proof at trial ("reasonable grounds to believe" vs. satisfied "beyond reasonable doubt" that the accused committed the crimes charged in the indictment).[197] Consequently, the Pre-Trial Chamber held that:

> …requiring the Prosecution to establish that genocidal intent is the only reasonable inference available on the evidence is tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt, a threshold which is not applicable at this stage, according to article 58 of the Statute.[198]

The ICC embracing the admissibility of circumstantial evidence, was demonstrated in the *Lubanga* case. The Trial Chamber applied the following standard:

> Nothing in the Rome Statute framework prevents the Chamber from relying on circumstantial evidence. When, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the Chamber has concluded that they have been established beyond reasonable doubt.[199]

By way of closing remark it may be said that recourse to circumstantial evidence should only be admitted in the event no direct evidence is available, pursuant to the "best evidence" rule.

5 Presentation and Appreciation of Evidence by ICTs

5.1 *Forensic Evidence before ICTs*

5.1.1 The Function of Forensic Evidence before ICTs

Both the collection and presentation of evidence at ICTs is predominantly dependent on forensic scientific methods and descriptions, such as exhumation and analyses of mass graves, migration patterns, and indicia drawn from

197 *Prosecutor v. Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," Pre-Trial Chamber I, Case No. ICC-02/05-01/09-3, March 4, 2009, para. 31.

198 *Ibid.*

199 *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber Judgment, Case No. ICC-01/04-01/06, March 14, 2012, para. 111, the standard applied was derived from the ICC Appeals Chamber

anthropology, pathology, psychology and psychiatry. The latter two disciplines could also be invoked by the defense in substantiating, for instance, a mental insanity or intoxication defense.

Most forensic disciplines arise from the mainstream of professional activity. In fact, they are applications of forensic research and scientific development, of expert work used in a variety of non-forensic contexts.[200] (The major exceptions are the discipline of dactyloscopy – examination of hairs and fibers – and DNA profiling). The relationship between forensic evidence and criminal evidence is not a simple one and, at least as far as its use in European legal systems is concerned, is a relatively recent phenomenon.[201] Both in the common law and civil law systems "the problem for the defense lawyer is how to find qualified forensic expertise, how to determine the expertise needed and how to assess expertise as qualified."[202]

To a certain extent, ICTs face the same problems. Perhaps these problems are sometimes intertwined with a misconception of the function of forensic analysis. In *Prosecutor v. Akayesu*, the Trial Chamber of the ICTR rejected a defense motion for forensic research into the remains of three alleged victims, as (the Court said) such evidence would have been inappropriate and would not have contributed to the truth. In holding so, the Trial Chamber noted that the arguments raised by the defense in its motion were aimed merely to contest the credibility of witness statements and, in the view of the ICTR Judges, did not show the necessity for any forensic analysis.[203] This ruling merits a question as to the functionality of forensic expertise as a means of controlling non-forensic evidence, such as witness evidence, in the law-finding process of the ICTs.

Without doubt, some forensic science evidence – DNA evidence is an obvious example – can be extremely probative of guilt or innocence, and the application of such evidence can adequately contribute to a balanced criminal

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in *Prosecutor v. Al Bashir*, "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir'," Case No. ICC-01/05-01/09-OA, February 3, 2010, para. 33.

200 Ian Freckelton, "Institutionalization of Forensic Expertise," in *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, ed. J.F. Nijboer and W.J.J.M. Sprangers (Amsterdam: Thela Thesis, 2000), 114.

201 Sytze Wiersma, "Introduction," in *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, ed. J.F. Nijboer and W.J.J.M. Sprangers (Amsterdam: Thela Thesis, 2000), 167.

202 *Ibid*.

203 *Prosecutor v. Akayesu*, "Decision on the Defense Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis," Case No. ICTR-96-4-T, February 17, 1998. See also May and Wierda, *International Criminal Evidence*, 254.

justice decision process.[204] The practice of the ICTs thus far, seems to express caution toward any extensive application of forensic expertise and evidence at trial. Aside from the mentioned *Akayesa* case, reference can be made to the ICTR Trial Chamber reasoning in *Prosecutor v. Musema*. In this case, the Trial Chamber opined that:

> the absence of forensic or real evidence shall in no way diminish the probative value of the evidence which is provided to the Chamber; in particular, the absent witness testimony shall *in no way* [emphasis added; GJK] affect the assessment of those testimonies.[205]

The ICTR thus apparently takes the position that the absence of forensic evidence of, *inter alia*, killings will "in no way" be decisive in cases where convincing eye-witness testimony of international crimes exist.[206] Such an absolute view can, given the potential unreliability of even convincing witness statements, endorse miscarriages of justice.[207] Indeed, as the ICTY Trial Chamber considered in the *Tadić* case, it is not always reasonable "…to apply rules of some national systems, that require the production of a body as a proof of death."[208] However, both the validity and legitimacy of a guilty verdict regarding international crimes and, as a result, the major interests of both sides (prosecution and defense) could, in particular cases, be strengthened by the use of forensic expertise and evidence.

Two additional arguments emerge for this approach:

(i) The criminal process is somewhat sequential in nature: judicial and investigative decisions made at an early stage of the proceedings may affect decision makings in this process "downstream." With the advent of forensic sciences, such early investigative decisions may influence and affect both subsequent decisions and their decision makers.[209]

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204 Mike Redmayne, "Quality and Forensic Science Evidence: An Overview," in *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, ed. J.F. Nijboer and W.J.J.M. Sprangers (Amsterdam: Thela Thesis, 2000), 300.

205 *Prosecutor v. Musema*, Trial Chamber Judgment and Sentence, Case No. ICTR-96-13-A, January 27, 2000, para. 52.

206 May and Wierda, *International Criminal Evidence*, 252.

207 See the famous Dutch criminal case of *Prosecutor v. J. Verbroekken* of 1996, in which case the "*most reliable*" crown witness of an alleged murder turned out to be a person suffering from schizophrenia.

208 *Prosecutor v. Tadić*, "Trial Chamber Judgment," May 7, 1997, para. 240.

209 Redmayne, "Quality and Forensic Science Evidence," 301.

(ii) The criminal evidence and the decision-making process before ICT should be based on accurate knowledge of the facts to which the decision relates. As noted by Redmayne, "forensic science in general has almost unlimited potential to contribute to this end."[210]

In conclusion, it may be said that protecting criminal trials from miscarriages of justice and preventing unreliable evidence from prejudicing an accused are not new ideas and are not limited to national criminal trials. These evidentiary problems and controversies (see (i) and (ii) above) arise in trials before ICTs as well. The assessment of criminal evidence in international criminal trials, however, has perhaps been unduly influenced by the strong emphasis on eyewitness testimony, as forensic evidence is particularly susceptible to destruction and erosion.[211] As Wagenaar opines, "witness statements are nearly always about what the witness can remember. Nevertheless, memory is fallible. The Judge cannot unquestioningly assume that witness statements are true."[212] Likewise, Garret detected that in many of the wrongful conviction cases due to false eyewitness evidence, "the police engaged in the kind of suggestion that the Supreme Court has said is impermissible, although nevertheless excusable if there is enough evidence that the identification is 'reliable'."[213] Addressing the invocation of forensic expertise on this area, Wagenaar also observes that "the contribution of experts is not insignificant, merely confirming what everybody already knows. To the contrary, public opinion holds many misconceptions about the functioning of human memory and about the *indicators of reliability*" (emphasis added; GJK).[214]

These observations on the functionality of forensic expertise in evaluating and assessing the credibility of witness statements may culminate in a more expanded view on the engagement of such expertise in international criminal trials. Indeed, in doing so, "the trial judge will be helped only by a systematic (and forensic; GJK) exploration *of all relevant circumstances* (emphasis added; GJK) even though this will be a painful experience for the witness."[215]

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210 Id., 313.

211 May and Wierda, *International Criminal Evidence*, 252.

212 Willem-Albert Wagenaar, "Witness Statements Based on 'Recovered Memories': A Further Examination," in *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, ed. J.F. Nijboer and W.J.J.M. Sprangers (Amsterdam: Thela Thesis, 2000), 277.

213 Brandon L. Garret, *Convicting the Innocent* (Cambridge: Harvard University Press, 2011), 62.

214 Wagenaar, "Witness Statements Based on 'Recovered Memories'," 282.

215 *Ibid.*

5.1.2 Practical Application of Forensic Expertise before ICTs

After having analyzed the principal arguments for a more frequent invocation and application of forensic expertise in international criminal trials, this subparagraph offers some practical examples. There are several scientific areas of forensic examination which may monitor the credibility of criminal evidence in international criminal trials and may be of importance for the law-finding process as to substantive elements of law (e.g. some criminal law defenses) as well.[216] Two practical examples, one from the ICTY and one from the ICTR, are pertinent here:

(i) In *Prosecutor v. Kayishema,* two expert witnesses, a forensic anthropologist and a pathologist, gave evidence before the ICTR regarding the cause of death of numerous persons whose remains were discovered in mass graves near a Catholic Church in Rwanda. Notwithstanding the fact that the exact cause of death could not be established in 33 percent of these victims, the forensic experts estimated that around 36 percent of the victims had died from force trauma, caused by the impact of a sharp object. This led the experts to the conclusion, in conjunction with the gender and ages of the victims, that these persons were victims of a massacre rather than of an armed conflict.[217]

(ii) An example from ICTY practice stems from *Prosecutor v. Ojdanić*, who was sentenced to 15 years of imprisonment on the 26th of February 2009.[218] In this case the defense requested to appoint a migration expert in order to determine the validity of forensic expertise in this area produced by the Prosecutor to prove the allegations of the indictment. This request was accepted by the Trial Chamber.

These examples indicate the relevance of forensic evidence within the law of the ICTs. One of the major questions for a defense lawyer, acting before ICTs, is where to find the forensic expertise needed in a particular case.[219] Not only

216 Melanie Klinkner, "Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution," *International Journal of Evidence and Proof* 13 (2009): 102–129.

217 *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, May 21, 1999, paras 325–326; see also May and Wierda, *International Criminal Evidence*, 253.

218 *Prosecutor v. Šainović, Ojdanić, Pavković, Lazarević, Lukić and Milutinović*, Trial Chamber Judgment, Case No. IT-05-87, February 26, 2009.

219 See also Livia E.M.P. Jakobs and W.J.J.M. Sprangers, "A European View on Forensic Expertise and Counter-Expertise," in *Harmonisation in Forensic Expertise: An Inquiry into*

must he or she adequately determine what kind of expertise is required, but also he or she must find a particular expert.[220] Another defense problem is that of convincing the Prosecutor or (Pre-) Trial Chamber of the necessity for additional forensic expertise or counter-expertise, considering the expense involved. The defense is also entitled to directly apply to the Registry of the ICTY and ICTR in order to obtain leave for a defense expert to work based on a fixed sum, which can be extended in certain cases.

5.2 *Appraisal of the Defense of Alibi*

The evidentiary requirements for the defense of alibi merits separate attention. In *Prosecutor v. Vasiljević*, the ICTY Trial Chamber observed that once such a defense is raised by an accused, the accused bears no onus of establishing that alibi. According to the ICTY, referring to its previous case law, the onus is on the Prosecutor to eliminate any reasonable possibility that the evidence of alibi is true.[221] Furthermore, it is not sufficient for the Prosecution merely to establish beyond reasonable doubt that the alibi is false in order to conclude that guilt has been established beyond reasonable doubt. This means that acceptance by the ICTY of the falsity of an alibi cannot establish the opposite of what it asserts. By way of example: In the *Vasiljević* case, the accused was partly acquitted because the Trial Chamber was not satisfied that the Prosecution had eliminated the reasonable possibility that the accused was not at the scene of the crime at the time of the particular events.[222]

The defense is under the obligation to indicate whether it has the intent to introduce an alibi defense whilst providing the prosecution with specificities.[223] This notification shall include (1) the place or places at which the accused claims to have been present at the time of the alleged crime; (2) the names and addresses of witnesses; and (3) any other evidence upon which the accused intends to rely to establish the alibi.[224] Depending on the nature of the alleged crime, for instance dependent on the liability mode, an accused

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the Desirability of and Opportunities for International Standards, ed. J.F. Nijboer and W.J.J.M. Sprangers (Amsterdam: Thela Thesis, 2000), 215.

220 *Ibid.*

221 *Prosecutor v. Vasiljević*, Trial Chamber Judgment, Case No. IT-98-32-T, November 29, 2002, para. 15; see also *Prosecutor v. Delalić et al.* (Čelebići), "Appeals Chamber Judgment," February 20, 2001, para. 581; *Prosecutor v. Kunarac et al.*, "Appeals Chamber Judgment," June 12, 2002.

222 *Prosecutor v. Vasiljević*, "Trial Chamber Judgment," November 29, 2002, para. 166.

223 See Rule 67 (A) and (B)(i)(a) ICTY RPE.

224 *Prosecutor v. Zdravko Tolimir*, "Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defense," Case No. IT-05-88/2-T, December 1, 2010, para. 16.

has to establish the causal link between the place he supposedly was and his argument of not having been able to have committed the offence.[225] According to the Chamber, the notice does not create an onus for the Accused to establish the alibi, nor does it entail a shift of the burden of proof.[226]

The ICTY Trial Chamber has held that failure to provide the Prosecution with the necessary specificities of Rule 67 (B)(i)(a) would not prevent the accused of testifying about his alibi. Yet, it could nonetheless lead the Chamber to prohibit the Accused to provide other evidence of the alibi and it might affect the Chamber's evaluation of the alibi defense.[227]

225 Id., paras. 18–19.

226 Id., para. 27.

227 Id., para. 29.

CHAPTER 9

Due Process Principles before ICTs

1 Introduction

International criminal tribunals that fall short of international standards of due process are deemed to be contrary to the very existence of international criminal trials.[1] This notion already transpired in the dissenting opinion of Justice Murphy of the U.S. Supreme Court in the famous criminal trial against General Yamashita:

> An uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit.[2]

The implementation of principles of due process into the law systems of ICTs is thus of pre-eminent importance as:

> …the immutable rights of the individual…belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color, or beliefs… No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights…[3]

This chapter examines how due process standards have found their way into the Statutes and practice of ICTs, as well as their influence on ICT law-making processes.

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1 Richard May and Marieke Wierda, *International Criminal Evidence* (Leiden: Transnational Publishers, 2002), 260.

2 *In re Yamashita*, 327 U.S. 1, per J. Murphy (1946), 41. Yamashita, a Japanese General, had been tried by an American Military Commission for crimes committed in the Philippines. He appealed to the U.S. Supreme Court.

3 Id., 26.

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2 Definition of Due Process Rights Relevant to ICTs

Prior to examining the influence of due process rights on trials before ICTs, it is pertinent to ascertain what 'due process' entails. Rather than defining it, the principle of due process may be explained by reference to a body of inalienable rights for an accused. There are a number of due process rights that are non-derogable under the widely adopted human rights and humanitarian treaties and other international instruments. Accordingly, these due process rights may even qualify as *jus cogens* norms. These rights are the right of protection from *ex post facto* laws,[4] and the right to legal personhood.[5] For example, the American Convention of Human Rights (ACHR) acknowledges, most importantly, that non-derogable rights include "the judicial guarantees essential for the protection" of the enumerated non-derogable rights, which include Articles 3 (right to juridical personality), 4 (right to life), 5 (right against inhuman treatment), 6 (freedom from slavery), 9 (freedom from *ex post facto* laws), 12 (freedom of conscience and religion), 17 (rights of the family), 18 (right to a name), 19 (rights of the child), 20 (right to nationality), and 23 (right to participate in government).[6] Accordingly, the ACHR embraces the list of possible non-derogable due process rights. Furthermore, the Inter-American Court of Human Rights held that "the judicial nature of these guarantees implies 'the active involvement of an independent and impartial body having the power to pass on the lawfulness of measures adopted in a state of emergency'."[7] Such emergency measures must be proportionate to the needs arising from the state of emergency and cannot exceed the strict limits imposed by the Convention or derived from it.[8] In interpreting the right to judicial protection under Article 25 ACHR, the Court ruled that the right of *habeas corpus* cannot be suspended. The Inter-American Court of Human Rights affirmed that Article 25 guarantees not only the due process rights contained in the ACHR but also those rights recognized by domestic law (such as the writ of *habeas*

4 Article 15 ICCPR, Article 7 ECHR, Article 9 ACHR.

5 Article 16 ICCPR, Article 3 ACHR.

6 Article 27 ACHR.

7 "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)," Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987), para. 20; see also "Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)," Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987), para. 30.

8 "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)," Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987), para. 21.

corpus under U.S. federal law) that are suitable for protecting the due process rights contained in the ACHR.[9] From this view of the ACHR it emerges that even if a government does not suspend some rights that are derogable under the ACHR during a state of emergency, the judicial guarantees essential for the protection of these rights cannot be suspended.[10] In conclusion, the Court contemplated that:

> It is neither possible nor advisable to try to list all the possible essential judicial guarantees that cannot be suspended under Article 27 (2). Those will depend in each case upon an analysis of the juridical order and practice of each State Party, which rights are involved, and the facts which give rise to the question. For the same reasons, the Court has not considered the implications of other international instruments (Art. 27 (1)) that could be applicable in concrete cases.[11]

In conclusion, (regional) human rights treaties turn out to be an important source for the proliferation of the concept of due process, providing additional procedural guarantees and rights to an accused facing trial at ICTs.[12]

3 The Influx of Common Standards of Due Process to ICTs

3.1 *Introduction*

With the advent of ICTs, an additional and challenging venue was created to further proliferate a consistent body of due process norms in international criminal law.[13] ICT's systems such as the ICTY and ICTR law systems and the law of the ICC have the potential and aspiration to serve as models for improving national criminal law systems and systems operating in states recovering from war.[14] Yet, political factors may countervail such processes. For instance, the Office of the Prosecutor could monitor the proceedings against Mr Saif

9 Id., paras. 22–29.

10 Id., para. 39.

11 Id., para. 40.

12 Jordan J. Paust, M. Cherif Bassioui, Michael Scharf, Jimmy Gurulé, Leila Sadat and Bruce Zagaris, *International Criminal Law – Cases and Materials 1st ed.* (Carolina Academic Press, 1996), 734.

13 Donald Piragoff and Paula Clarke, *The Emergence of Common Standards of "Due Process" in International and Criminal Proceedings* (Romonville Saint Agne: Erès, 2004), 363–396 at 364.

14 Id.

al-Islam in Libya. However, as the Rome Statute does not explicitly provide for this procedure, it is questionable whether the OTP could successfully monitor the proceedings, in light of the apparent animosity between the Libyan government and the ICC.

The experience and systems of these tribunals could accelerate the establishment of other new ICTs. An example was the UN Special Court for Sierra Leone, which was framed on the RPE of the ICTR.[15] As noted in Chapter 1, the creation of the ICC was a result of multilateral negotiations leading to a *sui generis* law system that is composed of civil and common law features, elements of other systems, and entirely new features and novel procedures such as that of a Pre-Trial Chamber, primarily based on a civil law tradition.[16] As a result, the ICC, unlike the IMT at Nuremberg, encompasses a more comprehensive international set of procedures and an extensive body of due process rights, promulgated in both the Rome Statute and RPE. These due process rights comply with international human rights treaties and customary international law. Instead of serving the efficiency of the trial, the ICC RPE primarily aim to afford human rights protection.[17] The starting point of the due process rights within the ICC system are the safeguards of Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

This paragraph provides an overview of due process rights to date within the various ICT systems. To this end, six judicial phenomena which are strongly intertwined with due process rights, are determined:

(i) The notion of a fair trial (para. 3.2);
(ii) the *habeas corpus* writ (para. 3.3);
(iii) admissibility of evidence (para. 3.4);
(iv) trial rights (para. 3.5);
(v) pre-trial proceedings (para. 3.6); and
(vi) supervisory mechanisms against abuse of process (para 3.7).

3.2 *Fair Trial as Exponent of Due Process before ICTs*

3.2.1 ICTY-ICTR

The minimum due process rights outlined in the ICTY and ICTR Statutes reflect those embodied in Article 14 ICCPR.[18] The ICTY and ICTR judges, being the

15 See Chapter 1.
16 Piragoff and Clarke, "The Emergence of Common Standards," 364, 369.
17 Ibid.
18 Article 21 ICTYSt. and Article 22 ICTRSt.

drafters of the RPE, bear responsibility to afford the accused with all the due process rights to which he or she is entitled by virtue of international human rights law.[19] Although the principle of fair trial within the realm of ICTs has not yet been crystallized into an overall definition and connotation, as it is still evolving,[20] the ICTY and ICTR were able to interpret this principle on several occasions:

(i) In *Prosecutor v. Tadić*, the ICTY Appeals Chamber held that "the fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute."[21]

(ii) In the *Čelebići* case, ICTY Trial Chamber II observed in paragraph 19 that:

> ...the operative phrase in the Article [Article 21], 'adequate time', is flexible and begs of a fixed definition outside the particular situation of each case. It is impossible to set a standard of what constitutes adequate time to prepare a defense because this is something which can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons.[22]

(iii) With regard to procedural equality and preparation for trial pursuant to Article 21(4)(b) and (d) ICTYSt., due process dimensions emerged in *Prosecutor v. Kovačević*. In that case the Prosecutor requested an amendment of the indictment which resulted in an increase of the charges from one to fifteen counts. The Trial Chamber rejected this request for amendment as this would amount to delay of the trial and, accordingly, a violation of Articles 21(4)(b) and (d) ICTYSt., under which the accused has the right to an expeditious trial.[23] Notably, at the time of the disputed request, the accused had been in custody for seven months; in view of the need of the

19 Secretary-General's Report on Aspects of Establishing an ICTY, UN SCOR 48th Session, Annex UN Doc. S/25704 (1993), para. 106.

20 Piragoff and Clarke, "The Emergence of Common Standards," 369.

21 *Prosecutor v. Duško Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," Case No. IT-94-1-T, October 2, 1995, para. 46.

22 *Prosecutor v. Delalić, Mucić, Delić and Landžo* (Čelebići case), "Decision on the Applications for Adjournment of the Trial Date," Case No. IT-96-21-T, February 3, 1997, para. 19.

23 *Prosecutor v. Kovačević*, "Decision on Prosecutor's Request to File an Amended Indictment," Case No. IT-97-24-T, March 5, 1998; see also May and Wierda, *International Criminal Evidence*, 272.

defense to prepare his defense on the fourteen additional counts, it requested an additional preparation period of seven months.[24] The Trial Chamber did not find this unreasonable in order to ensure a fair trial; however, it reasoned that the delay was not attributable to the accused and thus would violate the right to an expeditious trial.[25] The Appeals Chamber disagreed – judging upon the Prosecutor's appeal – saying that considering the facts of the case the extension and delay of the proceedings by a period of seven months would not amount to undue delay and would not infringe the accused's right to a fair trial.[26] The ICTR Chambers held similar approaches, by dismissing motions based on undue delay by referring to the complexity of the case, the need to take the totality of the situation into account and the assessment that the length of the delay suffered could not *ipso facto* render a delay undue.[27] It should be emphasized, however, that untimely procedural conduct of the Prosecutor is only allowed under exceptional circumstances.[28] As the ECtHR case law indicates, in this situation the fact of the accused's detention can be a decisive factor to the detriment of the Prosecutor.[29]

(iv) A fourth example is *Prosecutor v. Kupreskić et al.* In this case, the ICTY Trial Chamber, in its Decision on Communication Between Parties and their Witnesses, opined that:

> The Prosecutor of the Tribunal is not, or not only, a party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the chamber to discover the truth in a judicial setting.[30]

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24 Id., para. 12.

25 Ibid.

26 *Prosecutor v. Kovačević*, "Decision Stating Reasons for Appeal Chamber's Order of 29 May 1998," Case No. IT-97-24-A, July 2, 1998, paras. 28–31.

27 See for instance, *Prosecutor v Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, "Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay," Case No. ICTR-99-50-T, May 29, 2007.

28 May and Wierda, *International Criminal Evidence*, 273.

29 See *Lala and Pelladoah v. The Netherlands*, ECtHR Judgment, September 22, 1994, Series A, Vol. 297-B.

30 *Prosecutor v. Kupreškić* et al. (Lašva Valley case), "Decision on Communications Between the Parties and their Witnesses," Case No. IT-95-16-T, September 21, 1998.

Thus, the Prosecutor's obligation to present both inculpatory and exculpatory evidence emerges, according to the ICTY, from due process principles.

Finally, it can be asserted that what exactly constitutes a potential infringement of due process, and to what extent it does so, depends on the circumstances of the case. The ICTY and ICTR are empowered, in evaluating the facts of the case, to set limitations to the accused's fair rights. This may be well illustrated in, *inter alia*, the Trial Chamber's interpretation of Article 21(4)(e) ICTYSt. in the *Čelebići* case.[31] In general, Article 21(4)(e) has been interpreted as an affirmation of the accused's right to confront the witnesses against him, a right recognized in many jurisdictions, notably the 'confrontation clause' of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor…[32]

In line herewith, in the *Čelebići* case the ICTY held it to be important to "re-emphasize the general rule requiring the physical presence of the witness."[33] This presence is vital to ensure confrontation between the witness and the accused, and to "enable the Judges to observe the demeanor of the witness when giving evidence."[34] In this same Decision, however, the Trial Chamber acknowledged exceptions to the general rule requiring the physical presence of the accused, saying that "there are exceptions to this general rule where the right of the accused under Article 21(4)(e) is not prejudicially affected",[35] including videoconferences:

> It is, however, well known that video-conferences not only allow the Chambers to hear the testimony of a witness who is unable or unwilling to present their evidence before the Trial Chamber at The Hague, but also allows the Judges to observe the demeanour of the witness whilst giving

31 *Prosecutor v. Delalić* et al. (Čelebići case), "Decision on the Motion to Allow Witnesses K, L and M to Give their Testimony by Means of Video-Link Conference," Case No. IT-96-21-T, May 28, 1997.

32 Sixth Amendment to the United States Constitution.

33 *Prosecutor v. Delalić* et al. (Čelebići case), "Decision on the Motion to Allow Witnesses," May 28, 1997, para. 15.

34 Ibid.

35 Id., para. 14.

> evidence. Furthermore, and importantly, counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given during testimony. Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Article 21(4)(e) is in no sense violated.[36]

Notably, Rule 90(A) was amended on 25 July 1997 at the thirteenth plenary session, making explicit reference to "videoconference link."

3.2.2 ICC

Within the ICTY-ICTR system, due process evolved through judicial interpretations rather than arising from a uniform codified approach.[37] Article 21 ICCSt. instructs the Chambers of the ICC to apply the following sources of law:

(i) The Statute and RPEs;
(ii) the next source of law, pertains to "applicable treaties and the principles and rules of international law", such as the ECHR, ICCPR, ACHR and judgments of other ICTs applying these conventions as regards due process rights; and
(iii) "general principles of law derived by the court from national laws of legal systems of the world…."[38]

Article 67 ICCSt., which embodies nine minimum fair trial guarantees, exponents of due process rights, is similar to its counterpart in the ICTY and ICTR Statutes.[39] Yet, Article 67 ICCSt. sets forth one additional due process guarantee, namely the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal."[40]

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36 Id., para. 15.
37 Piragoff and Clarke, "The Emergence of Common Standards,", 369.
38 Article 21(1) ICCSt.
39 Article 21 ICTYSt. and 20 ICTRSt.
40 Article 67(1)(i) ICCSt.

3.3 Habeas Corpus *as Due Process Right under ICTs*[41]

3.3.1 Introduction

The writ of *habeas corpus* is meant to protect the personal freedom of those who have been illegally detained in personal, hospital, or private custody. The Latin words 'habeas corpus' mean 'you must have the body'. The writ is therefore addressed to the detainer and commands him to 'have the body' of the detainee before the court on the stipulated day and time. Although originally exercised by the Monarch him/herself, this authority is now in the power of the courts.[42] Significantly, in modern times the power to issue a *habeas corpus* writ surfaces in order to secure a release from unlawful detention in both criminal and civil cases, the former including police custody, pre-trial detention and even post-trial detention. Initially, *habeas corpus* was not considered a discretionary remedy but an available right, provided that good cause was shown.

This paragraph will address various elements of this phenomenon, starting with its foundation in international human rights conventions, the influx of this human-rights-led notion into both the substantive and procedural law of the ICTR, the approach of the ICTR to the appropriate remedies stemming from *habeas corpus* writs, and, finally, its interpretation in the Rome Statute.

3.3.2 *Habeas Corpus* Writs under International Human Rights Conventions

The right to a habeas corpus writ is codified in several international and regional human rights conventions. Article 8 Universal Declaration of Human Rights (UNDHR) promulgates that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", which is considered to be an implicit guarantee. Furthermore, it was codified in Article 9(4) ICCPR, saying that:

> [a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[43]

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41 This paragraph is derived from a commentary by this author on this topic contributed to: *Annotated Leading Cases of International Criminal Tribunals, Volume VI: The International Criminal Tribunal for Rwanda 2000–2001*, eds. Andre Klip and Göran Sluiter (Antwerp: Intersentia, 2003), 216–221.

42 Terence Ingman, *The English Legal Process* (Oxford: Oxford University Press, 1983), 115–116.

43 Article 9(4) ICCPR.

The United Nations Human Rights Committee held that:

> [J]udicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.[44]

The right to *habeas corpus* was also codified in the regional human rights mechanism of the European Convention on Human Rights (ECHR).[45] Article 5(4) ECHR contains the *habeas corpus* clause, recognizing that the deprivation of an individual's liberty may well be disputed and requires such disputes to be resolved speedily by national courts.[46] The overall theme in Article 5 is that an act interfering with individual liberty must not only be for one of the stated reasons but must also be 'lawful'. It requires at least that such an act must be authorized in national law, both as to the grounds and as to the procedure involved. In case someone has been deprived of his or her liberty, he or she is entitled by Article 5(4) ECHR to a *speedy* decision by a national court as to whether the deprivation is lawful and to an order for his or her release if this deprivation is deemed not lawful. Of course, it is one thing for a national constitution to contain rules of individual liberty; it is another thing for any legal system to provide a prompt and effective judicial remedy against any official body that deprives someone of his/her liberty. Most major legal systems have resolved this apparent dilemma as to finding the appropriate remedy by means of the writ of *habeas corpus*. The words of the 19th century legal scholar A.V. Dicey are illustrative:

> There is no difficulty, and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The *Habeas Corpus* Acts have achieved this end, and have

44 *Baban* et al. *v. Australia*, United Nations Human Rights Committee, Communication no. 1014/2001, views adopted on August 6, 2003, para. 7.2; see also *F.K.A.G.* et al. *v. Australia*, United Nations Human Rights Committee, Communication No. 2094/2011, views adopted on July 26, 2013, para. 9.6.

45 Even though the European Convention on Human Rights is a regional human rights mechanism, it still yields significant weight as the *ad hoc* tribunals and the ICC often apply ECtHR case law as well for an answer to their legal queries.

46 Article 8 UDHR, Article 9(4) ICCPR, and Article 7(6) ACHR.

> therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights.[47]

It is therefore that the *habeas corpus* writ, as Dicey advocated, is a fundamental exponent of the rule of law and defines no rights "but (is) for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[48]

Article 5(4) ECHR requires a state to make available a right of recourse to a court. However, in case the initial decision is itself taken by a court, the requirements of Article 5(4) ECHR may be embedded in that decision, presupposing that an adequate procedure, respecting the rights of the individual, has been ensured.[49] The case law of the ECtHR indicates that, even if judicial procedure appears to have been respected initially, a decision by a lower court affecting individual liberty must be subject to possible review and supervision by a superior court, which review in addition, must be made *speedily* (i.e. without excessive delay).[50]

Article 5(4) ECHR, according to the ECtHR, does not guarantee a right to judicial control of all aspects or details of the detention.[51] In the view of the ECtHR, Article 5(4) ECHR requires only a review of the essential grounds of a detention. As will be observed in paragraph 3.3.4[52] of this chapter, the jurisprudence of the ICTR as to the scope of *habeas corpus* writs is clearly influenced by this apparent limitation endorsed by the ECtHR.

3.3.3 The Right to *Habeas Corpus* Writs under the ICTR System: Substantive and Procedural Aspects

Substantive Elements

Although neither the ICTR Statute nor its Rules of Procedure and Evidence specifically deal with the topic of *habeas corpus* applications and relief, the

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47 Albert V. Dicey with introduction by E.C.S. Wade, *An Introduction to the Study of the Law of the Constitution 10th ed.* (London: Wildy & Sons Ltd, 1959), 221.

48 Ibid.

49 *De Wilde, Ooms and Versyp v. Belgium*, ECtHR Judgment, Appl. Nos. 2832/66, 2835/66, 2899/66, June 18, 1971, para. 73.

50 *Luberti v. Italy*, ECtHR Judgment, Appl. No. 9019/80, February 23, 1984, paras. 34, 41; the Court held that undue delay occurred where in an urgent case involving deprivation of liberty, it took the superior courts over 18 months to review the decision of committal.

51 *Ashingdane v. the United Kingdom*, ECtHR Judgment, Appl. No. 8225/78, May 28, 1985, para. 52.

52 This part was adopted from *Annotated Leading Cases of International Criminal Tribunals, Volume VI: The International Criminal Tribunal for Rwanda 2000–2001*, eds. Andre Klip and Göran Sluiter (Antwerp: Intersentia, 2003), 216–221.

ICTR Appeals Chamber in 1999 contemplated that the possibility for a detained individual to have recourse to an independent judicial body as to review the lawfulness of his or her detention is "well established by the Statute and Rules."[53] By way of clarification, the Trial Chamber explained that the purpose of the *habeas corpus* writ is to test the legality of the detention or imprisonment, "not whether he is guilty or innocent."[54] As will be observed in this subparagraph below, this reasoning is not without procedural ramifications. In *Semanza v. Prosecutor*, the Appeals Chamber – influenced by the mentioned Article 5(4) ECHR, Article 9(4) ICCPR and Article 7(6) ACHR – reinforced its earlier case law on this subject, saying that this review possibility constitutes a fundamental right enshrined in international human rights law, seemingly elevating this writ to an almost absolute right.[55] The nature of *habeas corpus* as a right was already illuminated by the ICTR Appeals Chamber decision in *Barayagwiza v. Prosecutor,*[56] as well as by the decision of the ICTR Trial Chamber II in *Prosecutor v. Joseph Kanyabashi* of 23 May 2000,[57] both holding that the remedy of *habeas corpus* is a fundamental right and enshrined in international human rights norms.

As a matter of positive law, the case law of the ICTR adopts the view that *habeas corpus* extends to all "constitutional challenges," i.e. is to be used when an accused is deprived of his/her constitutional right during the course of the proceedings.[58] There can be no question that this interpretation embodies, *inter alia*, the following rights which can be framed within a *habeas corpus* writ:

(i) the right to protection from unlawful detention and unlawful arrest warrant;[59]

53 *Jean-Bosco Barayagwiza v. the Prosecutor*, Appeals Chamber Decision, ICTR-97-19-AR 72, November 3, 1999, para. 88; see also *Semanza v. Prosecutor*, Appeals Chamber Decision, Case No. ICTR-97-23-A, May 31, 2000, para. 112.

54 *Prosecutor v. Kanyabashi*, "Decision on Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings," Trial Chamber II, Case No. ICTR-96-15-I, May 23, 2000, para. 24.

55 *Semanza v. Prosecutor*, "Appeals Chamber Decision," May 31, 2000, para. 112.

56 *Barayagwiza v. the Prosecutor*, "Appeals Chamber Decision," November 3, 1999, para. 88.

57 *Prosecutor v. Kanyabashi*, "Decision on Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings," May 23, 2000, para. 27.

58 Id., para. 24.

59 Id., paras. 31–38.

(ii) the right to be promptly informed of the applicable charges and rights pursuant to Rule 42;[60] and
(iii) the right to be tried without undue delay.[61]

Procedural Elements

By way of preliminary remark, it may be said that the ICTR considers Rule 73(A) ICTR RPE as the legal basis to review *habeas corpus* writs before the Chamber.[62]

As regards the most relevant procedural exponents of *habeas corpus* writs, the Appeals Chamber judgment in *Semanza v. Prosecutor* delivered the first important consideration in the corpus of ICTR jurisprudence on *habeas corpus* writs. Although the Appeals Chamber did not explicitly frame these writs among the stages of ICTR proceedings, it prescribed as a guideline that, if the accused files a *habeas corpus* writ, the Trial Chamber "…must hear it and rule upon it without delay," again referring to the principal instruments of international human rights law.[63] In addition, the Appeals Chamber contemplated that "if such a writ is filed but not heard, the Chamber will find that a fundamental right of the accused has been violated,"[64] posing the intriguing question as to the judicial consequence or remedy pertaining to such a breach in a rather pragmatic manner.[65]

A second procedural, and above all practical, aspect of *habeas corpus* writs relates to the requisite burden of proof and whether it should be imposed on the accused or prosecutor. Two ICTR decisions reveal the following guidelines:

(i) In *Prosecutor v. Semanza*, Trial Chamber III, in its decision of 27 September 2001, stipulated that both in the pre-trial and trial phase "all that is required of the prosecution is to establish a prima facie case against the accused."[66] In that case the defense moved for a judgment of acquittal

60 Id., paras. 39–47.
61 Id., paras. 54–64.
62 *Prosecutor v. Rwamakuba* et al., "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused," Trial Chamber II, Case No. ICTR-98-44-T, December 12, 2000, paras. 13–14.
63 *Semanza v. Prosecutor*, "Appeals Chamber Decision," May 31, 2000, para. 113.
64 Ibid.
65 See *infra*.
66 *Prosecutor v. Semanza*, "Decision on the Defence Motion for a Judgment of Acquittal in Respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment (Article 98*bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence

pursuant to Rule 98 *bis* arguing, *inter alia,* that the evidence produced by the Prosecutor was not credible or reliable as to the available testimonies, and raising the issue of the alibi of the accused. The Trial Chamber, in denying this motion, reasoned that once the Prosecutor has established a *prima facie* case against the accused, it is incumbent on the Trial Chamber to require the accused to answer the charges against him. Moreover, it felt that pleas to quash the indictment cannot be raised under Rule 98 *bis*.[67] From this decision, it may be deduced that *habeas corpus* writs that amount to quashing the indictment due to the absence of sufficient evidence will share the same outcome.

(ii) Matters change, however, in the case of an acquittal of the accused by a Trial Chamber. The burden of proof shifts then "on the party requesting continued detention to demonstrate the necessity for such an order…"[68] The Trial Chamber took this position with regard to the former accused, Mr Bagilishema, who was unanimously acquitted by a judgment delivered on 7 June 2001, after which the Prosecutor appealed and requested a warrant of arrest and the continued detention of the accused pursuant to Rule 99(B), pending the outcome of the appeal. Although a Rule 99(B) request as such is not to be equated to a *habeas corpus* writ, this decision underlines guideline (i) above.

Another procedural element relevant to *habeas corpus* writs is to be found, once again, in the decision of Trial Chamber III of 27 September 2001 in *Prosecutor v. Semanza*. Although repeated petitioning based on *habeas corpus* by the defense is not excluded, the Chamber was not prepared to look at such a repeated writ when no new facts or elements are provided to substantiate it. Moreover, the Chamber may consider such procedural behavior improper. In paragraph 22 of said decision, the defense was admonished for repeating a *habeas corpus* writ based on alleged unlawful arrest and detention of the accused without having provided new facts, albeit that no contempt of court qualification was attached to this behavior.[69]

Motion for a Judgment of Acquittal," Trial Chamber III, Case No. ICTR-97-20-T, September 27, 2001, para. 15.

67 Id., paras 16–19.

68 See *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Decision Trial Chamber I of 8 June 2001, para. 8.

69 Chrisje Brants-Langenaar, "The Prosecutor v. Niyitegeka and The Prosecutor v. Semanza: contempt of court, misconduct of counsel and wasting the court's time," in *Annotated Leading Cases of International Criminal Tribunals Volume VI: The International Criminal Tribunal for Rwanda 2000–2001*, eds. Andre Klip and Göran Sluiter (Antwerp: Intersentia, 2003), 458–468; *Prosecutor v. Semanza*, "Decision on the Defence Motion," September 27, 2001, para. 22.

Seemingly, ICTR case law is influenced by the common law principle that where a criminal or civil application for the writ of *habeas corpus* has been made, no further application can be made on the same grounds, whether to the same or another court or judge, unless "fresh evidence is adduced."[70] The Chamber's reprimand of the defense in this case should therefore be positioned within the context of common law judgments. In *R. v. Governor of Brixton Prison* (*ex parte Osman*), the Divisional Court held that even if the application for the writ of *habeas corpus* is made on a new ground or supported by fresh evidence, the Court still retains its inherent jurisdiction to dismiss the application for reason of "abuse of process of the Court."[71] It remains to be seen whether other ICTs will further take up this common law doctrine.

3.3.4 ICTR *Habeas Corpus* Restrictions *Ratione Materiae*

Notwithstanding human rights treaties not restricting the scope of *habeas corpus* motions as regards the subject matter,[72] the ICTR Trial Chamber basically limited *habeas corpus* relief to a review of the legality of detention, as analyzed in paragraph 3.[73] Two ICTR cases illustrate this confinement:

(i) This substantive law constraint was reinforced by the Trial Chamber's elaboration on the defense motion on *habeas corpus* and for stoppage of proceedings in *Prosecutor v. Kanyabashi*.[74] The Trial Chamber held that writs of *habeas corpus* as such are only applicable in case of alleged violations of right to protection from unlawful detention, and therefore in principle not in the event of alleged lack of jurisdiction of the Tribunal.[75] Apart from this principal limitation inherent to *habeas corpus* writs before the *ad hoc* tribunals, the Trial Chamber – apparently led by the extensive application of these writs in common law[76] – was prepared to uphold the admissibility of *habeas corpus* writs regarding various subject

70 Ingman, *The English Legal Process*, 117; see also the UK Administration of Justice Act 1960, Section 14; see also *Re Hastings* Nos. 1–3.

71 *R. v. Governor of Brixton Prison* (*ex parte Osman*) No. 4, 1992, 1 ALL ER 579, DC; in that case, the applicant had filed five previous unsuccessful petitions.

72 See Article 9 (4) ICCPR, Article 5(4) ECHR, and Article 7 (6) ACHR.

73 *Prosecutor v. Kanyabashi*, "Decision on Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings," May 23, 2000, para. 28.

74 Id.

75 Id., paras. 19 and 28–29, referring to *Prosecutor v. Brdanin*, "Decision on Petition for a Writ of Habeas Corpus on behalf of Radoslav Brdanin," Case no. IT-99-36-T, December 8, 1999, paras. 5–6.

76 Ingman, *The English Legal Process*, 116.

matters in so far as they may be qualified as Rule 73 motions. The Chamber did so on a case-by-case basis. According to the Trial Chamber, this adjudicatory leniency was warranted in the event the motion at stake raises potential violations of fundamental rights of the accused,[77] such as those raised in *Prosecutor v. Kajelijeli* (i.e. lack of probable cause, right to be promptly informed about charges, right to initial appearance without delay[78]), and is to be covered by Rule 73.

(ii) Another *habeas corpus* restriction may be read in *Prosecutor v. Rwamakuba*.[79] From the Trial Chamber's denial of the *habeas corpus* writ with respect to detention of the accused in Namibia in 1995–1996, prior to any formal request of the ICTR Prosecutor pursuant to Rule 40,[80] it follows that a Trial Chamber may in principle be prevented from ruling on the asserted illegality of detention by means of a *habeas corpus* writ. Particularly once such a violation took place during the 'pre-provisional measures' phase pursuant to Rule 40.

3.3.5 Effects of *Habeas Corpus* Writs: Relativism and Material Prejudice

The most difficult procedural question worthy of debate is perhaps whether and to what extent remedies are to be imposed in case of grant of a *habeas corpus* writ. This controversial issue, although at first sight a seemingly simple procedural request, is illustrated by two rather complex ICTR judgments.

(i) The Appeals Chamber in *Semanza v. Prosecutor* introduced a criterion of "defense interest" while redressing an infringement of *habeas corpus* rights, to be set in the perspective of the procedural attitude of the accused and his counsel in presenting such writ.[81] In paragraph 118, the Appeals Chamber observed that the accused, who was transferred to the Tribunal on 19 November 1997, filed a *habeas corpus* writ on 27 September 1997

77 *Prosecutor v. Kanyabashi*, "Decision on Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings," May 23, 2000, para. 30.

78 *Prosecutor v. Kajelijeli*, "Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing," Trial Chamber II, Case No. ICTR-98-44-I, May 8, 2000, paras. 32–45.

79 *Prosecutor v. Rwamakuba* et al., "Decision Concerning Illegal Arrest and Illegal Detention," December 12, 2000, paras. 22–27.

80 *Prosecutor v. Rwamakuba* et al., "Decision Concerning Illegal Arrest and Illegal Detention," December 12, 2000, paras. 22–27.

81 *Semanza v. Prosecutor*, "Appeals Chamber Decision," May 31, 2000, paras. 122–125.

challenging the legality of his detention, which writ was not heard by a Trial Chamber. Although the Appeals Chamber found this to be a *habeas corpus* violation,[82] it held that the remedy sought by the Defense, namely release, was disproportionate in the instant case. As the accused became interested in the fate of his (first) *habeas corpus* writ only after the 1999 Appeals Chamber's decision in the *Barayagwiza* case, the Appeals Chamber related the appropriate *habeas corpus* remedy to its finding that "Counsel for the Appellant failed in his duty of diligence by not carrying through to conclusion the (*habeas corpus*) matter…"[83] Therefore the criterion of non-compliance with the Rules, having caused material prejudice to the party in question,[84] is linked to an apparent defense interest in a certain remedy. This interest functions thus as an indicator of the degree of prejudice caused to the accused. Consequently, the classification of the appropriate remedy is subjected to factual and judicial relativity on the one hand[85] and the protection of international public order on the other.[86]

(ii) The interpretation of the 'prejudice' criterion based on defense interest and attitude also emerged in *Prosecutor v. Rwamakuba*.[87] The accused asserted that his initial appearance amounted to undue delay. However, the accused's *habeas corpus* writ was denied, as the Trial Chamber concluded that this delay was mainly attributable to the difficulties in having a counsel assigned to him, which difficulties were caused by the accused himself.[88]

3.3.6 ICTR and ICC *Habeas Corpus* Remedies Compared

The fundamental character of *habeas corpus* relief is envisaged by the drafters of the Rome Statute of the ICC.[89] Despite the ICTR Statute and Rules being silent on the appropriate remedy in the event of *habeas corpus* writs based on inexcusable undue delay in the proceedings before it, attributable to the

82 Id., paras. 114 and 128.

83 Id., para. 121.

84 Rule 5(A) ICTR RPE.

85 *Semanza v. Prosecutor*, "Appeals Chamber Decision," May 31, 2000, para. 125.

86 Id., para. 126.

87 *Prosecutor v. Rwamakuba* et al., "Decision Concerning Illegal Arrest and Illegal Detention," December 12, 2000, paras. 22–27.

88 *Prosecutor v. Rwamakuba* et al., "Decision Concerning Illegal Arrest and Illegal Detention," December 12, 2000, paras. 35–44.

89 Article 59 (3) and Article 60(3) ICCSt.

Prosecutor, the ICTR Appeals Chamber has held that such delay, in extreme circumstances, entitles the accused to have the charges dismissed "with prejudice" to the Prosecutor (i.e. without the possibility of retrial, or, alternatively, in less severe situations, if the individual is acquitted, to be allocated financial compensation or, in case of conviction, to receive a reduction in sentence).[90] For these situations, the Rome Statute stipulates a statutory remedy in Article 60(4), namely release from custody and not a stay of the ICC proceedings. This option seems to exclude the more rigorous remedy and nuanced view endorsed by the ICTR Appeals Chamber in both *Prosecutor v. Barayagwiza* and *Prosecutor v. Semanza*.[91] Considering the various subject matters to be addressed through *habeas corpus* writs address as to the legality of detention, the 'sliding scale' approach of the Appeals Chamber seems more favorable.

3.3.7 Conclusion: *Habeas Corpus* Writs before ICTR: Distinct Nature?

The question arises as to whether the writ of *habeas corpus* merits a distinct adjudicatory scope or approach at the level of ICTs, where the most heinous crimes are being prosecuted. Two remarks can be made:

(i) Firstly, the right to liberty is recognized as a *jus cogens* norm and therefore deemed to be a so-called non-derogable right during states of emergency. The Inter-American Court of Human Rights specifically held that the right to *habeas corpus* relief is a non-derogable right (even) during states of emergency.[92]

(ii) Secondly, Additional Protocol I to the Geneva Conventions recognizes the right to release from detention after circumstances that had required detention ceased to exist.[93]

Lending support from these international instruments, one may conclude that the *habeas corpus* remedy is to be endorsed in a non-restrictive (and in principle non-derogable) manner in the realm of proceedings before international

90 *Barayagwiza v. the Prosecutor*, "Appeals Chambers Decision," November 3, 1999; see also *Barayagwiza v. the Prosecutor*, "Appeals Chamber Decision (Prosecutor's Request for Review or Reconsideration)," Case No. Case No. ICTR-97-19-AR72, March 31, 2000.

91 William A. Schabas, *An Introduction to the International Criminal Court 3rd ed.* (Cambridge: Cambridge University Press, 2007), 272.

92 "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)," Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).

93 Article 75(3) of Protocol I to the Geneva Conventions.

criminal courts, including those before the ICTR. In this sense the functioning of *habeas corpus* writs to seek remedy for deprivation of constitutional rights should not be perceived as applicable merely in "exceptional circumstances where it is the only means of preserving such rights," as the Trial Chamber in *Prosecutor v. Kanyabashi* contemplated.[94]

3.4 *Due Process and Admissibility of Evidence before ICTs*

The emergence of more widespread common standards of due process in trials before ICTs surfaces also with respect to the admissibility criteria of criminal evidence.[95] This development can be well illustrated by examining the differences between the ICTY approach and that of the Rome Statute:

(i) In the *Čelebići* case, the ICTY Trial Chamber indicated that its standards of admissibility and exclusion of evidence were independent of national law and practice, stating that the standards of the ICTY *vis-à-vis* the interrogation of a suspect were higher than those of the Austrian criminal justice system. In this case, the defendants, Esad Landžo and Zdravko Mucić, were unable to exclude statements made to the ICTY Prosecutor after their transfer to The Hague. Mucić, however, was successful in excluding an interview by the Austrian police, who had apprehended him, because the Trial Chamber found that "the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and rules as to render the statement inadmissible."[96]

(ii) While drafting the Rome Statute, however, the drafters took the view that "relevancy" should not be the sole determinant of the admissibility of evidence. Rather, other criteria should be included, such as:
   - the securing of a fair trial;
   - the rights of the defense; and
   - a fair evaluation of the witness testimony.[97]

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94 *Prosecutor v. Kanyabashi*, "Decision on Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings," May 23, 2000, para. 26.

95 See in more detail Chapter 8.

96 *Prosecutor v. Delalić* et al. (Čelebići case), "Decision on Mucić's Motion For The Exclusion of Evidence," Case No. IT-96-21, September 2, 1999, para. 52.

97 Report of the Preparatory Commission on the Establishment of the International Criminal Court, Volume II, UN GAOR, 50th Session, Supp. No. 22, UN Doc A/51/22 (1996), 214–217; Piragoff and Clarke, "The Emergence of Common Standards," 380.

Accordingly, the Rome Statute was enriched with a general principle expressing that "relevance" was not to be construed as an exclusive criterion of evidence admissibility. This principle is laid down in Article 69(4) ICCSt., which provides that the ICC "may rule on the relevance and admissibility of any evidence…" A compromise between common law and civil law concepts, Article 69(4) may thus be seen as a merger of due process rights and international criminal justice goals.[98] As noted by Piragoff and Clarke, Article 69(4) empowers the ICC to:

(i) assess whether evidence possesses sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in Article 69(4), and subsequently evaluate the weight of any admitted evidence as part of the evaluation process; and/or
(ii) admit evidence and consider relevance, admissibility and weight together as part of the assessment of the admitted evidence, considering the same factors.[99]

Interestingly, contrary to the ICTY-ICTR approach,[100] the ICC takes the view that it is preferable for the Court to rule on the relevance or admissibility of any evidence before assessing its weight. This (civil law) approach seemingly matches with a due process emphasis. The drafters of the Rome Statute implemented a second due process mechanism as regards the admissibility of evidence, namely Article 69(7) ICCSt., which promulgates that:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> (a) The violation casts substantial doubt on the reliability of the evidence; or
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[101]

This provision may be seen as a *specialis* of the general principle as enshrined by Article 69(4) ICCSt., albeit that law practice will have to clarify their exact relationship. Here, the Rome Statute is once again more explicit on how to understand the influence of due process rights than Rule 89(D) ICTY RPE,

98 See for the latter Chapter 2.
99 Piragoff and Clarke, "The Emergence of Common Standards," 380–381.
100 See Chapter 8 on criminal evidence.
101 Article 69(7) ICCSt.

which merely states that the Tribunal may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

3.5 *Due Process and Pre-Trial Proceedings before ICTs*

Based on experiences at the ICTY and ICTR, which law systems did not codify a prosecutorial obligation to investigate both incriminating and exonerating evidence equally and at the same time in order to establish the truth,[102] the Rome Statute drafters opted for a Pre-Trial Chamber with specific powers. Article 57 ICCSt. governs this institution endowing it with extensive supervisory power to ensure due process even at the investigatory stage. The influence of common standards of due process at the pre-trial stage of ICC proceedings is evidenced by the fact that not only the Prosecutor but also the ICC Pre-Trial Chamber have special responsibilities that permit them to ensure and control the preservation and the securing of exculpatory evidence in order to enable a proper preparation of the defense.

This influence is also reflected in the rationale for this novel institution. The ICC Pre-Trial Chamber was constituted as a result of a compromise and general agreement on:

- the desire for the independence of the prosecutor in investigation and drafting of charges;
- common law distrust of inquisitorial judicial investigation, which was seen as antithetical to independent prosecution;
- civil law desire to incorporate some judicial checks and balances on the broad power of the Prosecutor; and
- general consensus on the need for some judicial review and confirmation of the charges.

The creation of the Pre-Trial Chamber was primarily framed on the basis of the continental tradition of investigative judges. Nevertheless, many of its functions are congruent with those of magistrates in common law systems, who issue warrants and other legal processes, review the sufficiency of the evidence, and confirm the charges.[103] Furthermore, due process standards are embedded within the ICC Pre-Trial Chamber's structure. As a supervisory body, it can issue warrants and other orders upon the application of the Prosecutor, in some cases even making orders on the application of the accused and reviewing the

102 See, however, the *Prosecutor v. Kupreškić* et al. (Lašva Valley case), "Decision on Communications Between the Parties and their Witnesses," September 21, 1998 (see para. 3.2.1. of this Chapter); see also Rule 68 ICTY/ICTR RPE.

103 Piragoff and Clarke, "The Emergence of Common Standards," 382–383.

charges to confirm their sufficiency.[104] The Pre-Trial Chamber, however, does not possess any independent investigative function, except in the context of Article 56(3)(a) ICCSt. This provision allows the Pre-Trial Chamber, albeit in very limited exceptional circumstances, to take measures on its own initiative to preserve evidence that it deems to be essential for the defense at trial. Finally, the ICC Prosecutor was not left untouched by the influx of the due process policy at the pre-trial stage: Article 54 ICCSt. introduces an inquisitorial element, namely the Prosecutor's own obligation and responsibility to investigate both incriminating and exculpatory circumstances and facts equally. Hence, the ICC Prosecutor's role has some resemblance to that of an investigating judge.[105]

In conclusion, it may be observed that the ICC Pre-Trial Chamber's powers include the power to issue orders and warrants as required by investigation, and also to provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of national security information, and the protection of those who have been arrested. Therefore, while the pre-trial powers of the Prosecutor are extensive and independent, they are subject to some supervision in order to protect the rights of the accused, victims and witnesses. Additionally, the powers of the Prosecutor are checked by the confirmation hearing, as set out in Article 61 ICCSt. This enables ICC judges to assess whether there is sufficient evidence to confirm the charge and enables the accused to challenge the evidence. The creation of an ICC Pre-Trial Chamber is clearly indicative that the ICC drafters learned from the experience of the tribunals in attempting to expedite trial proceedings, while trying to safeguard the due process rights of the accused.[106]

3.6 *Due Process and Supervisory Mechanisms before ICTs*

How precisely are common standards of due process ensured at the level of ICTs? Paragraph 3.5 examined one mechanism for this protection, namely, the supervisory body of the ICC Pre-Trial Chamber. Other supervisory safeguards that have been guided by due process rights are reflected in the following characteristics of ICT proceedings:

Provisions on Pre-Trial Detention and Supervision on Non-Arbitrary Arrest or Detention

Contrary to the ICTY-ICTR systems, the Rome Statute includes specific safeguards of such a supervisory role for the ICC by virtue of Article 59(4) and Rule 117 ICC RPE. Article 59(4) ICCSt. and Rule 117 provide that an accused,

104 Article 57(3)(a) and (b) ICCSt.

105 May and Wierda, *International Criminal Evidence*, 49.

106 Piragoff and Clarke, "The Emergence of Common Standards," 382.

who may be detained by national authorities pursuant to an ICC arrest warrant, can challenge the issuance of the arrest warrant only before the ICC. The accused can, however, apply to the competent judicial authority in the custodial State for interim release and for a determination whether his or her rights relating to the arrest procedures under the national law have been respected. The national judicial authorities, however, are specifically precluded from considering whether the arrest warrant was properly issued by the ICC.[107] The need for greater emphasis on due process rights seems to have convinced the drafters of the Rome Statute to be wary of the case law of the ICTY and ICTR. As remarked in paragraph 3.3 with respect to *habeas corpus* writs, in the *Barayagwiza* case the ICTR Trial Chamber initially allowed pre-trial detention to last for much longer than considered justifiable by international human rights conventions. Accordingly, the ICC drafters preferred pre-trial delay control to be best be dealt with by a special rule (i.e. Rule 118 ICC RPE). This provision empowers the ICC Pre-Trial Chamber to review its ruling on release or detention of an individual surrendered to the ICC every 120 days or at any time on request of any party. However, this pre-trial delay control is not applicable to pre-trial detention in the custodial state.

Supervision over Pre-Trial Behavior of National Authorities

Unlike the Statutes and case law of the ICTY-ICTR, which in principle afford no weight to abuse of process or violations of due process rights at the domestic level, the Rome Statute provided for, at least theoretically, the possibility that the judges may indirectly exercise a supervisory role over actions of national authorities, in so far as such actions affect the ICC process. Such may be the case in the event of an excessive and non-excusable delay occurring during detention in the custodial state prior to surrender to the ICC.[108] Yet, when the former President of Ivory Coast, Mr Laurent Gbgabo, complained about the deplorable circumstances surrounding his detention in Ivory Coast (*in casu*: the custodial State prior to surrender to the ICC), the ICC Pre-Trial Chamber found that the Prosecutor had no duty to care in this regard. The Pre-Trial Chamber held that: "the powers of the prosecutor may only be exercised in the context of, or in relation to, proceedings before the Court."[109] Herewith the

107 See further Chapter 7 with respect to provisional release; see also Geert-Jan Alexander Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Ardsley, NY: Transnational Publishers, 2002), 141–143, 221.

108 Piragoff and Clarke, "The Emergence of Common Standards," 383.

109 *Prosecutor v. Laurent Gbagbo*, "Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55

Pre-Trial Chamber seemed to overlook that Gbagbo had already been detained by the Ivorian authorities for over half a year, while the authorities had been in contact with the ICC Prosecutor the entire time.[110] The Pre-Trial Chamber held, however, that "the mere fact that the prosecutor was in contact with Ivorian authorities does not suggest that there was any involvement."[111] Here, due process influence may well overturn the present practice of the ICTY with regard to the surrendering of accused to its ICC seat.

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and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)'," Pre-Trial Chamber, Case No. ICC-02/11-01/11-212, August 15, 2012, para. 111; see also *Prosecutor v. Laurent Gbagbo*, "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings," Case No. ICC-02/11-01/11-321, December 12, 2012, para. 94; the Appeals Chamber rejected the appeal of Mr. Gbagbo, see para. 106.

110 Tom Zwart and Alexander Knoops, "Who is Persecuting Laurent Gbagbo?" *New African*, April 4, 2013; see also G.J. Alexander Knoops, "The Achilles Heel of ICC Prosecutions: The Principle of Evenhandedness," *Justice* 53 (2013): 10–15 at 13–14.

111 *Prosecutor v. Laurent Gbagbo*, "Decision on the Corrigendum of the challenge to the jurisdiction," August 15, 2012, para. 109, referring to *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," Appeals Chamber, Case No. ICC-01/04-01/06-772, December 14, 2006, para. 42.

CHAPTER 10

International State Cooperation with ICTs

Obtaining Evidence Abroad

1 Introduction

Enforcement of international criminal law (ICL) essentially relies on an indirect system in which States carry out enforcement duties through extradition, mutual legal assistance in penal matters, transfer of prisoners, seizure and forfeiture of illicit proceeds of crime, recognition of foreign penal judgments, and transfer of penal proceedings.[1] Parallel to this indirect enforcement system, which relies on national legal enforcement mechanisms, is the direct enforcement system which now exists at the ICTY and ICTR, as these tribunals are equipped with their own investigatory and adjudicatory bodies to enforce ICL.

This chapter will address some of the cooperation elements within the law of ICTY-ICTR and ICC.

2 Cooperation Distinctions Between the ICTY-ICTR and ICC Systems

States have a general obligation to cooperate with the ICTY and ICTR, both in the investigation and prosecution of the accused, pursuant to Article 29 ICTYSt. (Article 28 ICTRSt.). Accordingly, States must comply with any request for assistance or an order issued by a Trial Chamber. Two forms of assistance merit special attention:

(i) *The production of documents*. Here, the ICTY case law is still evolving and it apparently depends on the circumstances of each particular case. According to the ICTY, international organizations, unlike States, cannot be subjected to the binding character of the cooperation system. In *Prosecutor v. Kovačević*, the ICTY concluded that, under Article 29 ICTYSt., it had no authority to issue a binding order on the Organization for Security and Cooperation in Europe (OSCE) Mission in Bosnia. The OSCE

1 See for this system in general Geert-Jan Alexander Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Leiden: Martinus Nijhoff Publishers, 2002), 9–11.

 | DOI 10.1163/9789047429012_011

is not a State but an international organization.[2] In the *Kordić* case, however, the ICTY made a request to the presidency of the Council and the Commission of the European Community to provide documents. This decision was apparently based on the mandate of the European Community Monitoring Mission (ECMM).[3] The uncertainty of the ICTY case law on this point follows also from the *Simić* case, in which the ICTY clearly extended the interpretation of Article 29 to include international organizations.[4] Based on an extensive interpretation, the ICTY concluded that it was competent to issue a binding order to disclose information to SFOR under this provision.

Rule 54 *bis* ICTY RPE promulgates that a party who requests a binding order, to be issued by a Trial Chamber, regarding the production of documents is required to explain "the steps that have been taken by the applicant to secure the State assistance." If no reasonable steps have been taken to procure the documents or information from the State, the ICTY may reject the request. This means that both prosecution and defense are obliged to invoke all cooperative means prior to any mandatory orders.

In the *Blaskić* case, the ICTY formulated four criteria which are mandatory and cumulative and which must be fulfilled to obtain an order for production of documents under Article 29(2) ICTYSt. A request for such an order must:

- identify specific documents and not broad categories;
- set out succinctly the reason why such documents are deemed relevant to the trial;
- not be unduly onerous; and
- give the requested State sufficient time for compliance.[5]

The moving party is not under an obligation to prove the existence of the requested documents but it does have to make a reasonable effort to

2 See *Prosecutor v. Milan Kovačević*, Decision Refusing Defense Motion for Subpoena, Case No. IT-97-24-PT, June 23, 1998, para. 2.

3 *Prosecutor v. Kordić,* Decision on Ex Parte Application for the Issuance of an Order to the European Community Monitoring Mission, Case No. IT-95-14/2, May 3, 2000.

4 See *Prosecutor v. Simić*, Decision on Motion for Judicial Assistance to be provided by SFOR and others, Case No. IT-95-9-T, October 18, 2000, para. 58.

5 *Prosecutor v. Blaškić*, Decision on the Objection of the Republic of Croatia for the Issuance of Subpoenas Duces Tecum, Case No. IT-95-14-AR/108*bis*, July 18, 1997, para. 32.

demonstrate their existence, for requiring the moving party to prove the existence would be unreasonable and could impinge upon the right to a fair trial.[6] Any decision to issue an order to produce documents or information is within the discretion of the Chamber.[7]

(ii) *Execution of arrest warrants*. Pursuant to Article 29(2)(d) ICTYSt., States have to comply with the request for assistance or an order to arrest or detain a person. Specific international organizations, such as the former NATO-led Stabilization Force (SFOR) and the United Nations Transitional Authority (UNTAES), were in principle not obliged to comply with the execution of ICTY arrest warrants. However, whether or not they had to comply was dependent on the particular mandate of these forces and the competence given to them by (for instance) the UN. In the *Dokmanović* case, for example, the ICTY concluded that UNTAES had an obligation to cooperate with the Tribunal, since SC Resolution 1037, which founded UNTAES, imposed this obligation. On the other hand, the Dayton Peace Agreement, according to the ICTY, does not require SFOR to operate as the ICTY's police force, albeit that SFOR has authority (but no obligation) to arrest persons charged by the ICTY.[8]

Within the ICTY-ICTR system, state cooperation is obligatory due to the origin of these tribunals, namely a Security Council (SC) Resolution based on Chapter VII of the UN Charter. The obligatory status of cooperation is thus based on the fact that these *fora* are subsidiary organs of the SC. Although the relationship between these tribunals and states as such is not precisely supranational, in its judgment of 29 October 1997, the ICTY-Appeals Chamber stated in paragraph 47 in this context that "clearly, a vertical relationship was thus established."[9] Contrary to the common horizontal model of state cooperation, the vertical approach relies on international community interest as an independent basis for international cooperation in penal matters, abstracted from traditional inter-state relations.[10]

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6 *Prosecutor v. Gotovina et al.,* Decision on Prosecution's Application for an Order Pursuant to Rule 54 bis directing the Government of the Republic of Croatia to Produce Documents or Information, Case No. IT-06-90-T, July 26, 2010.

7 Id. para. 17.

8 *Prosecutor v. Brđanin and Talić*, Decision on Motion by Momir Talic for provisional release, Case No. IT-99-36-PT, March 2001, 28, para. 29.

9 *Prosecutor v. Blaškić*, Trial Chamber Judgment, Case No. IT-95-14-T, March 3, 2000.

10 Knoops, *Surrendering to International Criminal Courts*, 215–217.

ICC cooperation is only mandatory for member states. The reason for this is the fact that the ICC is established by a treaty and is definitely not a supranational organization (see Chapter 1).[11]

3 The State Cooperation System Under the Rome Statute

3.1 *Treaty-Based Cooperation*

Part 9 of the Rome Statute (Articles 86–102) codifies States parties' obligations regarding international cooperation and judicial assistance. Article 86 ICCSt. obliges States Parties to fully cooperate with the Court both as to investigation and prosecution of crimes within the jurisdiction of the Court. The nature of this part of the Statute is clearly distinct from the ICTY-ICTR system is characterized by the following features:

(i) The ICC's cooperation system is merely that of an international treaty, which means that it must compete with other treaties in case of conflicting obligations. This situation is anticipated in Article 90 ICCSt. with respect to competing extradition requests; in all situations of competing requests, Article 90(1) requires States Parties to notify the ICC of this situation (see also Article 96 with respect to surrender in the event of persons protected against extradition by other treaties, such as diplomats).
(ii) Contrary to the ICTY and ICTR, which are vested on a Security Council Resolution, the obligation for States to cooperate does not automatically prevail over other treaty obligations.
(iii) A principal cooperation mechanism is the obligation of States Parties to arrest and surrender an indictee to the ICC.[12] The principle underlying this obligation is that the duty to comply with an ICC request for surrender is not made subject to any of the exceptions which are common in extradition law and practice.
(iv) Similar to extradition practice, Articles 86 and 89 ICCSt. prohibit States Parties from refusing surrender when this refusal is based on the nature of the offence (political or military character) or on the personal status of the indicted person (nationality or diplomatic status).
(v) In line herewith, Articles 86 and 89, in principle, do not allow states to invoke human rights objections against ICC surrender requests

11 Id., p. 14–15.

12 Article 89(1) ICCSt.

based on national laws and constitutions, although exceptions are possible.[13]

(vi) Furthermore, the ICC's complementary jurisdiction implies that, once a case is admissible before the ICC by virtue of Article 17 ICCSt., a request for surrender may not be rejected. In this context, the issue of *ne bis in idem* is addressed in Article 89(2) ICCSt., which essentially imposes an obligation on States Parties to consult with the ICC.

In conclusion, it can be said that the ICC Statute, being a treaty, only imposes obligations as to State cooperation (such as arrest and surrender) on States who are party to it. This system therefore may not be as effective as that of the ICTY-ICTR, as no sanctions can be imposed on non-State parties who undermine the ICC cooperation system.[14]

State Parties that fail to execute arrest warrants issued by the ICC are in violation of their obligations under the Rome Statute. However, the case of Omar al Bashir, President of Sudan, illustrates the shortcomings of the current ICC system in regard to the execution of arrest warrants.[15] In his case, several ICC member States proved to be reluctant to surrender Al Bashir to the ICC. In December 2011, Mali and Chad were reprimanded by the UN Security Council and the Assembly of States Parties to the Rome Statute, because they failed to arrest and surrender President Al Bashir to the ICC during Al Bashir's State visit to these countries.[16] In 2011, Malawi and Djibouti, as well as Kenya and Chad in 2010, have been reprimanded for the same reason.[17] In April 2014, the ICC Pre-Trial Chamber reprimanded the Democratic Republic of Congo (DRC) for its non-cooperation in the arrest and surrender of Al Bashir.[18] However, the reprimands of the Assembly of States Parties and the Security Council do not seem to result in an incentive to cooperate with the execution of ICC arrest warrants.

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13 See also Bert Swart, "Arrest and Surrender," in *the Rome Statute of the International Criminal Court*, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 1684–1685.

14 Id., p. 1686.

15 See also Chapter 6: International Criminal Law Defenses, paragraph 2.2. Immunities of Former Heads of State and other State Officials as Defenses before ICTs.

16 Geert-Jan Knoops, "The International Criminal Court in 2011," in *The Global Community Yearbook of International Law & Jurisprudence* 2012 (I), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2012), 383–388.

17 *Ibid.*

18 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, Case No. ICC-02/05-01/09-195, April 9, 2014.

3.2 *ICC-UN Mutual Cooperation: Comparison with ICTY-ICTR*

Given the treaty-based nature of the ICC,[19] one of the most interesting tests that the ICC will face as an independent judicial institution will be its evolving relationship with the UN.[20] The ICC-UN Agreement "defines the terms on which the United Nations and the Court shall be brought into relationship"[21] and seeks to anticipate many of the problems that may arise in their relations. Different from the ICTY and ICTR, the UN was not involved in drafting the Rome Statute. The International Law Commission (ILC) drafted a Statute, presented it to the UN General Assembly, and recommended the General Assembly to organize a conference of plenipotentiaries to negotiate a treaty and enact the Statute.[22] The General Assembly appointed an *ad hoc* Committee on the Establishment of the ICC. After two meetings of the *ad hoc* Committee, the Preparatory Committee on the Establishment was created to prepare a consolidated draft text.[23] Thus, the UN General Assembly's role can be characterized as organizational instead of substantive.

Similar to the EU Framework Decision of 13 June 2002 on the European Arrest Warrant, the underlying principle of the ICC-UN Agreement, is mutual respect: the United Nations recognizes the ICC as "an independent permanent judicial institution" and the Court recognizes the "responsibilities of the United Nations under the Charter."[24] The Agreement seeks to elaborate on this general principle, adding that the parties agree to cooperate and to "consult each other on matters of mutual interest."[25] The most important provisions relate to cooperation and judicial assistance and are governed by Part III of the Agreement.[26] As observed by Mundis:

> The most likely scenario in which these provisions may be seriously strained involves prosecution of the crime of aggression, arguably one of

19 See Chapter 1.

20 See for this topic Daryl A. Mundis, "Relationship Agreement Between the Court and the United Nations," *American Journal of International Criminal Law* 2 (2003): 22–36.

21 See Draft Relationship Agreement Between the ICC and UN, ASP Report, UN Doc. ICC-ASP/1/3, Article 1.

22 "History of the ICC," ICC Now Website, accessed May 1, 2014, http://www.iccnow.org/?mod=icchistory.

23 Id.

24 "Negotiated Relationship Agreement between the International Criminal Court and the United Nations," Article 2, accessed May 1, 2014, http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf.

25 Id., Article 3.

26 Id., Articles 15–20.

the most serious offences over which the Court will ultimately have jurisdiction. As the primary organ responsible for international peace and security, the Security Council plays a major role in identifying aggression, though it rarely did so in the past because of the Cold War. Once the crime of aggression is defined[27] and the ICC is seized of a case concerning that crime, the Security Council may invoke Article 16 of the ICC Statute, forcing the Court to defer to the Council for a period of twelve months. Other situations, however, may also test these principles. For example, the Security Council may be seized of a conflict in which the leadership of one of the parties is under investigation by the ICC. If the Security Council were discussing its options with respect to the issue, it might not want the court to indict those leaders for fear of hindering its efforts to resolve the conflict. This situation could also lead the Council to trigger the mechanism set forth in Article 16 of the ICC Statute, in which case no provision of the ICC-UN Agreement would prevail.[28]

Concerning the system of (state)cooperation with the ICC, the ICC-UN Agreement will have the following major ramifications:

(i) Firstly, the UN agreed to cooperate with the ICC, under Article 15(1) of the Agreement, by providing information or documents and the parties agreed to make every effort to achieve maximum cooperation to avoid "undesirable duplication in the collection, analysis, publication and dissemination of information relating to matters of mutual interest," as mentioned in Article 5(2). Furthermore, according to Article 16(1), such cooperation will include facilitation of the testimony of officials of the UN and its programs and agencies. To effectuate this provision and permit its officials to testify, the UN has agreed to waive the officials' obligation of confidentiality if necessary, having due regard for the responsibilities and competence of the UN under its Charter.[29] Notably, the ICTY-ICTR follow a different system. These *ad hoc* Tribunals cannot use this evidence without first seeking the permission of the UN on a case-by-case, witness-by-witness basis, a process that can be time-consuming.[30]

(ii) Secondly, the ICC-UN Agreement in Articles 4–14 also covers "institutional relations." For example, it provides in Article 4 for reciprocal representation:

27 See Chapter 3.

28 Mundis, "Relationship Agreement Between the Court and the United Nations," 23.

29 Id., 24.

30 *Ibid.*

either party may attend proceedings of the other, subject to the rules and practice of the bodies concerned, when matters relating to the other party arise. According to Article 5 the parties may exchange information concerning matters of mutual concern and coordinate their activities to avoid unnecessary collection and dissemination of information relating to such matters. A further difference with regard to the systems of ICTY-ICTR is that unlike the ICTY-ICTR Prosecutor (Article 15(3) ICTR Statute), the ICC Prosecutor, by virtue of Article 54(1)(a) ICCSt., is obliged to "investigate incriminating and exonerating circumstances equally." Thus, the ICC Prosecutor will have to search, among other places, UN archives for information that may be incriminatory or exculpatory. On the basis of Article 5 of the ICC-UN Agreement, the United Nations must not only permit such searches, but also share pertinent documents with the Prosecutor. These documents would be made available to the defense pursuant to the Court's Rule 77.[31]

(iii) Thirdly, the ICC-UN cooperation system envisions a potential convergence with regard to that of the *ad hoc* Tribunals on the topic, of the issue of confidential documents. The Prosecution's disclosure obligations under the Rome Statute[32] are fairly broad, and care must be taken to avoid even the appearance of running afoul of these carefully crafted rules.[33] This provision resembles Rule 70(B) ICTY/ICTR RPE. The practice of the *ad hoc* Tribunals shows that, pursuant to this rule, the prosecution seeks the approval of the originator for the disclosure (and even the use in court) of information.[34] The issue becomes more difficult when a "Rule 70 document" contains information that may otherwise be discoverable under Rule 68 ICTY/ICTR RPE, but whose originator refuses to consent to disclosure. In this circumstance, the Prosecution is faced with three choices: (1) it may petition the Trial Chamber for an *ex parte in camera* hearing under Rule 66 ICTY/ICTR RPE; (2) it may violate its confidentiality agreement with the source of the information; or (3) if the "Rule 70 information" is the sole information in its possession, it may seek to dismiss the charges. The ICC may face this same dilemma when confronted with information provided by the United Nations pursuant to Article 18(3) ICC-UN Agreement:

31 Mundis, "Relationship Agreement Between the Court and the UN," 25.

32 Rules 76–84 ICC RPE.

33 Mundis, "Relationship Agreement Between the Court and the UN," 26.

34 Id.

> The United Nations and the prosecutor may agree that the United Nations provide documents or information to the prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.[35]

(iv) The last major ramification relates to the principle of equality of arms. In this context, Mundis remarks quite aptly that:

> The higher the degree of cooperation between the Court and the United Nations, the greater the portent of an "inequality of arms" between the prosecution and the defense at trial. Once the Court is up and running, the prosecution will have enormous resources at its disposal. If the entire UN system is effectively made a potential long-arm investigator of the Court, thanks to confidentiality agreements permitting the United Nations and its programs to supply information to the prosecutor, the perception may arise that the defense cannot compete fairly, given the resources available to the Court.[36]

It may thus be concluded that the ICC-UN cooperation system, similar to that of the ICTY-ICTR, still does not adequately accommodate the underdeveloped element in international criminal law on the issue of balancing equality of arms between Prosecution and defense.

4 Surrendering to ICTs: Practical Implications

This paragraph will address questions related to the process of surrendering to ICTs. In this connection, two topics seem of particular importance for the law practice of ICTs:

(i) Is the judicial translation/metamorphosis of the term "extradition" into "surrender" merely a semantic and political operation, or does it imply a strict dogmatic distinction? And does this provide for procedural and substantive defenses to quash ICC surrender orders?

35 Id.

36 Mundis, "Relationship Agreement Between the Court and the UN," 27.

(ii) Are States or the international community as such entitled to construe a direct obligation to surrender individuals and military personnel to the ICC based upon certain bilateral or multilateral extradition treaties?

Ad (i)

Put simply, extradition is the transfer of a person by State A to State B. Surrender means delivering a person by State A to an International Court. The rationale underlying this change is quite simple: namely, to endorse a transfer and facilitate delivery of a person to an international criminal court. The reason for the distinction is obviously to overcome constitutional obstacles of states relating to the prohibition of extradition of their own nationals. National courts have accepted this apparent artificial distinction. It is not unlikely that (despite the clear distinction between extradition and surrender in Article 102 ICCSt.) a national court could indeed distance itself from such a distinction, branding it as a result of artificial legal policy. Hence, several procedural and substantive defenses against ICC surrender orders remain realistic instruments for the accused and their defense lawyers. For example: in view of, *inter alia*, the principle of non-*refoulement*, is it possible to surrender a person who requested political asylum in the requested State? What if a person was lured or kidnapped to the territory of the requested State by State officials or even UN peacekeepers, in order to surrender him to the ICC? Based on extradition principles, these defenses would stand a good chance of success, if applied by courts to surrender orders by way of analogy.

But what about a situation in which the accused is able to prove his or her innocence during a *habeus corpus* motion (for instance, proof that the accused at the time of the alleged crime in country A was actually in country B) before a domestic court called upon to reject an ICC surrender order? This actually occurred in a 2001 case before the District Court of The Hague in which an ICTR surrender order was issued against a Rwandan musician accused of complicity to commit genocide who was able to prove his absence from the crime scene at the time the crimes were committed. Is the State Party allowed to refuse the surrender of this person? Or should that particular court of the state party abstain from judging on this alibi defense and based on this argument, surrender the accused to the ICC?

It is possible that a serious alibi defense is admissible before the court of the requested state party. Indeed, what matters to the ICC is whether or not the evidence produced by the ICC in support of its request for a person's arrest and surrender satisfies the domestic standards of the requested state.[37]

37 Article 58(1) ICCSt.

Although the evidentiary standard applied by the requested state with regard to a surrender order should in no event be more burdensome than those applicable to extradition requests,[38] the state party has some leeway to refuse a surrender order in case of a conclusive alibi defense.[39] This view is supported by the fact that the ICC is merely based on a treaty, which is less mandatory compared to the ICTY/ICTR legal foundation, namely a Security Council Resolution. Such a resolution restricts the right of states to refuse surrender orders of an international court.

Ad (ii)

In line with the first issue, a second interesting question emerges: namely, are States Parties, confronted with possible surrender obstacles (like the one just mentioned above), allowed to indirectly surrender a person to the ICC via the mechanism of extradition law instead of through a surrender order? Could this mechanism provide an alternative means of surrendering persons to the ICC for states which do not wish to become parties to the Rome Statute?

Indeed, being a treaty, the Rome Statute does not impose obligations to arrest and surrender persons on States which decided not to ratify the Rome Statute. The following three examples may define the extent of these obligations.

Example 1

This example relates to a situation of surrender from State A to State B to the ICC. In case state A (which is not a party to the Statute) chooses not to surrender a person to the ICC, would it amount to abuse of international due process if State B (a party to the Statute) used an extradition treaty or, for instance the 1948 Genocide Convention (which embodies the principle of *aut dedere aut judicare*), as a basis for requesting a person's extradition from State A to State B with the ultimate purpose of subsequently surrendering that person to the ICC? Virtually all extradition treaties in the world require the consent of the requested state (in this example State A) to surrender the accused to a third state (in this example the ICC). This principle remains untouched under the Rome Statute.

Example 2

This example relates to extradition treaties which provide for the obligation to extradite or prosecute for international crimes which also fall within the ICC jurisdictional scope, as well as for the establishment of an international

38 Article 91(2)(c) ICCSt.

39 Article 59(2) and (3) ICCSt.

criminal tribunal. An example of such a treaty is the UN Genocide Convention of 1948 (see also the UN Apartheid Convention). The question arises whether the surrender of an accused to the ICC may be granted in case a state, which is a party to the Genocide or Apartheid Convention but not to the Rome Statute, arrests a person based on a UN Convention and not on the Rome Statute? It may be held that such mechanism can be considered a form of abuse of international due process. First of all, the UN Conventions have a different goal than that of surrendering a person to an international court; and, secondly, a state may not, without explicit acceptance, be confined to obligations imposed by the ICC.

Example 3

This approach seems also important given peacekeeping interventions and other multinational military operations. Soldiers of states are bound by the core principles of the four Geneva Conventions or directly by these Conventions themselves. State parties to the Geneva Conventions (treaties) have the obligation to extradite or to prosecute alleged offenders of these Conventions. But not all of these states have ratified the Rome Statute. This may give rise to the following problem. Suppose Soldier A of the United States (which has not ratified the Rome Statute) violates the Geneva Conventions in Afghanistan (which has ratified the Rome Statute in February 2003). It is widely held that the relevant provisions of the Geneva Conventions do not exclude the surrender of an accused to an international criminal court. In fact this surrender follows, some assert, from the obligation to extradite or prosecute according to the Geneva Conventions. Could therefore soldier A, the US private, through the mechanism of the Geneva Conventions be surrendered to the ICC, notwithstanding the fact that the US does not acknowledge its standing? There are some valid arguments that would not allow such practice. After all, treaties are based on consent by states, like the treaty-based Rome Statute. However, a non-state party to the ICC is empowered under the Statute to surrender a person to this court on an *ad hoc* basis.[40] Therefore, the US could, in certain extreme situations, surrender private A to the ICC.

40 See Articles 12 and 87 ICCSt.

CHAPTER 11

The International Criminal Court within the Geopolitical World Order

1 Introduction

The advent of the modern international criminal tribunals has been legitimized in that they contribute to peace and security within the geopolitical spectrum.[1] This geopolitical aspiration echoes in the preamble of the Rome Statute of the ICC, reading that "all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time," while "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 and by enhancing international cooperation." The ICC preamble sets forth that "the Purposes and Principles of the Charter of the United Nations, and in particular 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."[2]

Empirically it seems impossible to measure the feasibility of this pretext. The same counts for the penal aims of general and special prevention that underpin the foundation of tribunals: political and military leaders should refrain from committing or becoming involved in international crime(s).

The geopolitical reality displays, however, a rather diffuse picture. Based on several examples, this chapter discerns the contribution of international criminal tribunals to and within the world order. It will also address potential pitfalls of these tribunals which have led States such as Russia, the United States, China, Syria, Pakistan and Israel to abstain from ratifying the Rome Statute.

2 Geopolitical Effect of ICC Prosecutions

A recurring question is whether criminal prosecutions of political and military leaders before an international criminal court advance peace and security

1 See also William A. Schabas, *An Introduction to the International Criminal Court, 3rd ed.* (Cambridge: Cambridge University Press, 2007).

2 Preamble to the Rome Satute.

 | DOI 10.1163/9789047429012_012

more than trials before domestic courts or alternative national justice mechanisms, such as truth and reconciliation commissions.

The truth is: we do not know. Some examples suggest a positive effect of ICC prosecutions on establishing peace in a certain region. The Lord Resistance Army (LRA) in North Uganda was drawn to the negotiation table in 2006 due to the issuance of the ICC arrest warrants against LRA leaders Joseph Kony and Vincent Otti.[3] The arrests warrants, which followed from the first State referral to the ICC by Uganda, resulted in a military-operational isolation of the LRA since the Sudanese Armed Forces were no longer willing to support the LRA militarily or logistically.[4] It is tempting to say that the ICC delivered a positive contribution to peace and security in Uganda for the following four reasons. Firstly, the issuance of arrest warrants against the LRA-leaders resulted in an incentive for the LRA be drawn to the negotiating table and to conclude a settlement.[5] Secondly, the ICC's investigation deterred Sudan – the LRA's key foreign ally – from supporting the LRA by means of supplying weapons, infrastructure and training. In 2005, the Government of Sudan signed a memorandum of understanding with the ICC in which it agreed to cooperate with the ICC's arrest warrants against the LRA leaders. Regardless of the standing of such a memorandum, it deterred Sudan from supporting the LRA.[6] Thirdly, the ICC's investigation contributed to international awareness for the conflict in Uganda and (strong) external support is key to the success of peace initiatives.[7] Fourthly, the interests of victims have been embedded in the peace process after the ICC's initiatives to hold the LRA leadership accountable for the atrocities taking place in Uganda.[8] Prior to the issuance of said arrest warrants, the LRA was adamant to prolong its war against the Ugandan forces.

Yet, this effect is contrasted by the response of the president of Sudan, Omar Al Bashir, after the ICC Pre-Trial Chamber issued an arrest warrant against him

3 Ted Dagne, "Uganda: Current Conditions and the Crisis in North Uganda," *Congressional Research Service*, June 8, 2011, accessed March 3, 2014, https://www.fas.org/sgp/crs/row/RL33701.pdf; the ICC unsealed arrest warrants for five top LRA leaders in October 2005, which were issued under seal on 8 July 2005.

4 Nick Grono and Adam O'brien, "Justice in Conflict: The ICC and Peace Processes," in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark (Royal African Society, 2008), 13–19; next to the ICC, the signing of the Sudanese Comprehensive Peace Agreement and the improved performance of the Ugandan Army also contributed to the LRA's isolation.

5 Grono and O'brien, "Justice in Conflict," 15.

6 Id. at 16.

7 Id. at 16.

8 Id. at 16.

in 2009 for crimes against humanity and war crimes allegedly committed against three ethnic groups in Darfur. Rather than solidifying Al Bashir's commitment to negotiations, he decided to block humanitarian aid delivered to the refugees in Darfur by international organizations.[9] It is striking that several ICC member states such as Mali, Malawi, Chad, Djibouti and Kenya were not willing to execute the ICC arrest warrant against Al Bashir because – as asserted – it infringed their constitutional principle on the immunity of heads of State.[10]

These sentiment(s) also played a role in 2013 when the vast majority of the African Union took a strong position against the ICC prosecution of the incumbent president of Kenia, Mr Uhuru Kenyatta, and the Vice President William Ruto. In September 2013, the Kenyan Parliament and Senate voted to withdraw from the Rome Statute after the ICC Prosecutor proved unwilling to cease its case against the Kenyan leadership; a case built on crimes against humanity concerning the electoral violence in 2007.[11] Shortly thereafter, in October 2013, the African Union adopted a resolution holding that prosecutions against incumbent heads of State must be ceased from ICC prosecution during the office term.[12]

The sensitivity of ICC prosecution(s) in terms of potential interference with domestic notions of justice was further evidenced in 2011 when the Security Council adopted a resolution, calling for intervention in Libya, which included

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9 Terence Burke, Barbara Starr and Phillip Warrington, "Sudan orders aid agency expulsions," *CNN*, March 4, 2009, accessed March 3, 2014, http://edition.cnn.com/2009/WORLD/africa/03/04/sudan.expel/.

10 According to Article 98(1) ICCSt. "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity," said States had thus reason not to extradite Al Bashir; Anthony Dworkin and Katherine Iliopoulos, "The ICC, Bashir, and the Immunity of Heads of State," *Crimes of War*, accessed March 4, 2014, http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of-state/; see also Geert-Jan Knoops, "The International Criminal Court in 2011," in *The Global Community Yearbook of International Law & Jurisprudence* 2012 (I), ed. Giuliana Ziccardi Capaldo (Oxford: Oxford University Press, 2012), 383–388.

11 Henry Ridgwell, "Kenya Votes to Withdraw From ICC," *VoA News*, September 5, 2013, accessed March 3, 2014, http://www.voanews.com/content/kenya-may-vote-to-withdraw-from-icc/1743641.html.

12 Aaron Maasho and Edmund Blair, "AU calls for halt to ICC cases against Kenyan and Sudanese leaders," *Reuters*, October 12, 2013, accessed March 3, 2014, http://www.reuters.com/article/2013/10/12/us-africa-icc-idUSBRE99A0YT20131012.

a referral of the Libyan situation to the ICC.[13] It has been argued that political motives underpinned the Libyan referral.[14] The UN Security Council Resolution not only called for an ICC investigation, but also included political and economic measures, such as: (i) the imposition of an arms embargo; (ii) the imposition of sanctions on high placed regime officials, including travel bans and the freezing of assets; and (iii) humanitarian assistance.[15] Fifteen days after the UN Security Council referral of the Libyan situation to the ICC, the ICC Prosecutor determined that there was a "reasonable basis" to believe that crimes falling under the ICC's jurisdiction had been committed in Libya.[16] In comparison, it took the ICC Prosecutor almost four years to take action in the Darfur situation (UN Resolution 1593 calling for action in the Darfur region was adopted in 2005), whilst it took the UN Security Council over two years to intervene – marginally – in Syria, where government protests broke out about a month after the Libyan protests began. In September 2013, a UN Security Council Resolution was adopted that demanded the destruction of Syria's chemical weapon arsenal;[17] earlier resolutions calling for intervention in Syria had been vetoed by Russia and China.[18]

Geopolitical and economic considerations most likely underpinned the divergent approaches to the conflict in Libya and Syria. Libya produces ten times more oil than Syria and is among the world's largest producers of crude oil. European oil companies could gain a great deal from a Libyan revolution if a pro-Western government would be formed after the conflict. Yet, this could not justify an ICC intervention, since, in general, there is not much to gain in a war-torn country with damaged infrastructure and a weak legal system.[19] Geopolitical considerations most likely were the main contributing factor to the divergent approaches in both conflicts. Whereas Syria could count on the

13 United Nations Security Council Resolution 1970 (2011).

14 See Geert-Jan Knoops, "Prosecuting the Gaddafis: Swift or Political Justice?" *Amsterdam Law Forum* 4/1 (2012).

15 UN Security Council Resolution 1970 (2011), paras. 9, 14, 17–21; see also Knoops, "Prosecuting the Gaddafis."

16 "ICC Prosecutor to open an investigation in Libya," *ICC Press Release*, March 2, 2011, accessed March 4, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/statement%20020311.aspx.

17 S/RES/2118, September 27, 2013.

18 S/2012/538, July 19, 2012; S/2012/77, February 4, 2012.

19 In the beginning of 2014, Libyan rebels tried to sell oil to a North Korean-flagged tanker from a rebel controlled-port, while the Libyan government stated it would bomb the tankers trying to buy oil from the rebels; see Ulf Laessing, "Libya threatens to bomb North Korean tanker if it ships oil from rebel port," *Reuters*, March 8, 2014.

support of Russia and China, Libya was not backed by such support. Russia's strategic interests in Syria contributed to non-intervention as Syria hosts the sole Russian naval base in the Mediterranean, and, moreover, commercial interests played a role, as the Russian weapons industry benefited from the Syrian conflict.[20] Also Syria's ties to Iran, Hezbollah and Hamas, the strong ideology underlying Syria's dictatorship, as well as the military power of Assad, made intervention in Syria risky.[21] These arguments were reinforced by the fact that the intervention in Libya contributed to Russia's reluctance to intervene in Syria. Whereas Russia felt it supported a UN resolution meant to protect Libyan civilians, it was, at the end of the day, freeing the real aim of the operation: a regime change and the overthrow of the Gaddafi regime.[22]

On June 15, 2011, the African Union expressed its disapproval of the NATO attack on Libya stating that: "An attack on Libya or any other member of the African Union without express agreement by the AU is a dangerous provocation that should be avoided given the relaxed international situation in the last 20 years since the release of Nelson Mandela from jail and the eventual freedom of South Africa."[23] The African Union called for dialogue both before and after the UN Resolutions concerning the situation in Libya were adopted; a call that was largely ignored.[24] In particular, the African Union criticized the NATO for bombing Tripoli while peace talks with the late Libyan leader, Colonel Muammar Gadhafi, were pending.[25] On November 17, 2013, the African Union issued a press release in which it expressed its concern with the situation in Libya. The Chairperson of the Commission of the African Union expressed his support to the efforts of the Libyan Government and urged Libyan stakeholders to resolve political differences through dialogue within the framework of the *existing institutions*.[26]

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20 Daniel Treisman, "Why Russia supports Syria's Assad," *CNN*, February 3, 2012, accessed March 5, 2014, http://edition.cnn.com/2012/02/02/opinion/treisman-russia-syria/index.html; Maya Shwayder, "Russian Defense Industry Tops $15 Billion In Sales – New Record," *International Business Times*, January 22, 2013, accessed March 5, 2013, http://www.ibtimes.com/russian-defense-industry-tops-15-billion-sales-new-record-1028950.

21 Knoops, "Prosecuting the Gaddafis," 86.

22 Treisman, "Why Russia supports Syria's Assad."

23 "African leaders oppose NATO over Gaddafi," *Newvision Archive*, June 18, 2011, accessed March 3, 2014, http://www.newvision.co.ug/D/8/12/757904.

24 Id.

25 Id.

26 "African Union deeply concerned by the situation in Libya," *African Union Press Release*, November 17, 2013, accessed March 3, 2014, http://www.peaceau.org/uploads/auc.comm.libya-17.11.2013.pdf.

Furthermore, the ICC prosecution of the former president of Ivory Coast, Mr Laurent Gbagbo illustrates the importance of a balanced prosecutorial policy in terms of even-handedness. Despite indications that both sides allegedly committed war crimes during the clash in 2010 between forces of President Ouattara and that of his predecessor Gbagbo,[27] the ICC Prosecutor opted to only initiate a prosecution against Gbagbo for war crimes and crimes against humanity.[28]

This prosecutorial choice generated criticism on part of the African Union in that the ICC singled out Gbagbo rather than Ouattara; the latter being more pro-western than the nationalistic-minded Gbagbo. Western watchdogs had declared Mr Ouattara the winner of the run-off elections and when the UN Security Council tried to pass a statement that declared Ouattara as the winner of the elections, Russia intervened by blocking the statement, saying that the UN exceeded its mandate.[29] The western role in the elections probably stem from the longing of western states for a pro-western leader in Ivory Coast, such as Ouattara, instead of a nationalistic leader, such as Gbagbo.[30] Ouattara has been labelled as a "puppet," able to meet the West's need for Ivory Coast's resources and Ouattara's presidency was deemed beneficial to western corporations.[31]

These examples suggest that prospective effects of ICC prosecutions on the geopolitical equation should not be underestimated.

3 The Position of Superpowers *vis-à-vis* the ICC

3.1 *Introduction*

The skepticism on part of several States towards the ICC is evidenced by the non-ratification of the Rome Statute by Russia, the United States, China,

27 Human Rights Watch, "They Killed Them Like It Was Nothing. The Need for Justice for Côte d'Ivoire's Post-Election Crimes," *October 2011*.

28 Geert-Jan Knoops and Tom Zwart, "Who is persecuting Laurent Gbagbo? Proceeding with the Gbagbo Case Could Undermine the ICC's legitimacy in Africa," *The New African*, 2013.

29 "Russia 'blocking UN Ivory Coast statement'," *BBC News*, December 8, 2010, accessed March 5, 2014, http://www.bbc.co.uk/news/world-africa-11945363.

30 Nick Thompson, "President-elect: Ivory Coast's Alassane Ouattara," *CNN*, April 11, 2011, accessed March 5, 2014, http://edition.cnn.com/2011/WORLD/africa/04/08/ivory.coast.ouattara/.

31 Ann Talbot, "US, EU prepare military action against Ivory Coast," *World Socialist Website*, December 23, 2010, accessed March 5, 2014, http://www.wsws.org/en/articles/2010/12/ivor-d23.html; David Smith, "Alassane Ouattara reaches summit but has more mountains to climb," *The Guardian*, April 15, 2011.

Israel and other States in the Middle East, such as Syria and Pakistan. This non-ratification primarily stems from fear for politicization of the ICC trials.

3.2 *The United States*

In particular, the position of the U.S. merits attention. In 2000, the Clinton Administration signed, but not ratified the Rome Statute. In May 2002, the Bush Administration 'unsigned' the Rome Statute, indicating that the U.S. did not intend to become a party to the Rome Statute.[32] The main reason for U.S. opposition to the ICC was to preclude prosecution before the ICC of its own soldiers operating abroad. During the Rome Statute negotiations, the U.S. sought a UN Security Council controlled Court and when this plan failed it tried to limit the Court's jurisdiction to nationals of member states.[33] The U.S. pursued a guarantee that its citizens and service members would not be prosecuted before the ICC without U.S. consent.[34] This plan failed since – in absence of a UN Security Council referral – the ICC may exercise jurisdiction once the alleged crime is committed on the territory of a State party or once the crime is committed by a national of a State party.[35] The U.S. also feared that the ICC would be used by U.S. enemies to initiate politically motivated prosecutions against its nationals, as a result of the *proprio motu* power endowed to the ICC Prosecutor.[36]

The U.S. not only withdrew from the Rome Statute, but even actively campaigned *against* the ICC. On August 2, 2002, the American Servicemembers' Protection Act (ASPA) – also referred to as the Hague Invasion Act – was signed into law by President Bush. This Act transpires the U.S. objections to ratifying the Statute:[37]

(i) "Any American prosecuted by the International Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury";

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32 Jess Bravin, "U.S. Accepts International Criminal Court," *Wall Street Journal*, April 26, 2008, accessed March 4, 2014, http://online.wsj.com/news/articles/SB120917156494046579; Anup Shah, "United States and the International Criminal Court," *Global Issues*, September 25, 2005, accessed March 4, 2014, http://www.globalissues.org/article/490/united-states-and-the-icc.

33 Remigius Chibueze, "United States Objection to the International Criminal Court: A Paradox of 'Operation Enduring Freedom'," *Annual Survey of International & Comparative Law* 9/1 (2003): 31.

34 Id. at 32.

35 Article 12 ICCSt.; Chibueze, "United States Objection," 32.

36 Chibueze, "United States Objection," 36.

37 American Servicemembers' Protection Act of 2002, Title II of Public Law 107–2006, approved Aug. 2, 2002, as amended through P.L. 110–181, Enacted January 28, 2008.

(ii) "Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States…";

(iii) "…the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression….senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States."[38]

Furthermore, the Bush Administration sought to enter Bilateral Immunity Agreements (also referred to as: "Article 98" agreements or non-surrender agreements), which prohibit signatories of the agreement to surrender U.S. nationals to the ICC. These immunity agreements do not oblige the U.S. to initiate a domestic investigation or prosecution against its nationals.[39] The U.S. pressured countries to enter such agreements, by cutting military aid to countries who proved unwilling to enter an immunity agreement with the U.S.[40]

Even though the U.S. government under President Bush and Obama distanced itself from ratifying the Rome Statute, it did not invoke its veto within the UN Security Council when the Council voted on the referral of the situation of Sudan and Libya to the ICC.[41] Apparently, the U.S. is unwilling to subject its own citizens to ICC proceedings due to the potential political vulnerability of the proceedings, but it does support to ICC trials when other States are involved.

38 *Ibid.*

39 Irune Aguirrezabal Quijera, "The United States' Isolated Struggle against the ICC," *Coalition for the International Criminal Court*, March 4, 2003, accessed March 5, 2014, http://www.globalpolicy.org/component/content/article/164/28438.html.

40 "America v. the Rest," *The Economist*, July 2, 2003, accessed March 5, 2014, http://www.globalpolicy.org/component/content/article/164/28433.html.

41 It has been said that the Obama administration took a more positive stance to the ICC than the Bush administration, see "General Approach to the ICC," AMICC, accessed July 28, 2014, http://www.amicc.org/usicc/administration.

3.3 *China*

Other States rely on similar reasons to evade ICC-ratification. China participated actively in the Rome Statute negotiations, but, in the end did not ratify the Rome Statute primarily for reasons of disagreement with the Court's jurisdictional system. Most important was China's fear that the Court would become "a tool for political struggle or a means of interfering in other countries' internal affairs."[42] According to China, alleged war crimes and crimes against humanity committed in an *internal* armed conflict should be dealt with by domestic courts.[43]

The (non)acceptance of the jurisdictional system also arose from disagreement with the ICC's complementarity principle. Whereas the Rome Statute reflects the principle that the ICC may only step in where States are "unwilling or unable" to prosecute themselves,[44] China contemplated the view that the Court "should be able to exercise jurisdiction *only with the consent of the countries concerned*."[45] China also disagreed with the *proprio motu* power endowed to the ICC Prosecutor, which could result in an investigation without "checks and balances against frivolous prosecution" and consequently to "the right to judge and rule on State conduct."[46] China is of the opinion that war crimes should be dealt with by national jurisdictions, and, moreover, that the war crimes enlisted in the Rome Statute do not reflect customary international law.[47] Interestingly, China also opines that the ICC's jurisdiction over the crime of aggression "weakens the power of the UN Security Council who should first act upon possible acts of aggression."[48] Thus, according to China not the ICC, but only the UN Security Council should determine whether an act of aggression took place.

Most likely, the Taiwan conflict withholds China from acceding to the Rome Statute in terms of its opposition to interference with internal affairs via the ICC's jurisdiction over war crimes committed in internal armed conflicts.[49]

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42 Bing Bing Jia, "China and the International Criminal Court," *Singapore Year Book of International Law and Contributors* 10 (2006): 1–11; A/CONF.183/SR.3, para. 35.

43 Jia, "China and the International Criminal Court," 10.

44 Article 17(1) ICCSt.

45 A/CONF.183/SR.3, para. 37; emphasis added.

46 A/CONF.183/SR.10, para. 9 (June 22, 1998), cited from: Jia, "China and the International Criminal Court," 5.

47 Jing Guan, "The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?" Penn State International Law Review 28/4 (2010): 705. doi: http://dx.doi.org/10.2139/ssrn.1673615.

48 Id., 743–744.

49 Id., 726–735.

The basis of China's international relations can be found in the Five Principles of Peaceful Coexistence, which were agreed upon by China and India in 1954 and remain relevant today, namely:

– "mutual respect for sovereignty and territorial integrity;
– mutual non-aggression;
– non-interference in internal affairs;
– equality and mutual benefit; and
– peaceful coexistence"[50]

These widely embedded principles may account for China's reluctance to accede to the Rome Statute. The Chinese Minister of Foreign Affairs' statement to the UN General Assembly in 1999 encapsulates the prevalence of sovereignty from a Chinese perspective:

> A country's sovereignty is the prerequisite for and the basis of the human rights that the people of that country can enjoy. When the sovereignty of a country is put in jeopardy, its human rights can hardly be protected effectively.[51]

Reservation as to such ratification may also arise from a legal-cultural differentiation between the modern human rights oriented principles endorsed by the Rome Statute (such as those on defenses in Article 31 or the exclusion of immunities of heads of State in Article 27) and the more State oriented principles as envisioned by the Criminal Law of the People's Republic of China (CCL).

The history of China's criminal law reveals that it only in the last two decades gradually amended its Criminal Code of 1979 towards a more Western oriented type of criminal law. Fundamental notions of justice were cautiously implemented, such as the *nullum crimen nulla poena sine lege* principle, the principle of equality before the law and the principle of proportionality.[52] Consequently, the practice of analogy, in which new categories of crimes were created retrospectively or the 'most appropriate' punishment was imposed, was abolished.[53]

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50 Sonya Sceats with Shaun Breslin, "China and the International Human Rights System," *Chatham House*, October 2012, 6.

51 A/54/PV.8, September 22, 1999, 16.

52 Jianfu Chen, *Criminal Law and Criminal Procedure Law in the People's Republic of China* (Leiden/Boston: Martinus Nijhoff Publishers, 2013), 9.

53 Id. at 13.

An almost 20 percent decrease in the number of crimes that are eligible for the death penalty exemplifies this shift towards a more western approach of criminal law.[54] It was only in November 2013 that the Chinese Supreme Court for the first time in its history enacted guidelines meant to eradicate miscarriages of justice. These guidelines re-emphasize the presumption of innocence, reject the use of evidence obtained through torture, underline the responsibility of the police and prosecutor to prevent miscarriages of justice and putt less emphasis on measuring performance by looking at the (high) number of convictions.[55] Without doubt, such guidelines contribute considerably to preventing miscarriages of justice. More structural problems, such as unsupervised police performance, the lack of judicial independency, the absence of effective remedies and weak defense rights, should be the next phase in this evolutionary process.[56] Instrumental to these judicial reforms were the publicity around some recently discovered wrongful convictions in China, as well as the public statements made by some high placed judicial authorities in China.[57]

A third example of China's shift towards a more western approach of criminal law can be found in the implementation of human rights treaties in China from 1996 onwards.[58] It is said, however, that human rights are a strategic choice in China's foreign policy rather than binding legal obligations.[59] Be this as it may, the observance of human rights treaties reaffirms China's more progressive legal policy.

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54 Id. at 53.

55 Carole McCartney, "Miscarriages of Justice in China Prompt New Guidelines," *The Wrongful Convictions Blog*, August 15, 2013, accessed March 4, 2014, http://wrongfulconvictionsblog.org/2013/08/15/miscarriages-of-justice-in-china-prompt-new-guidelines/; "China Top Court Rules Out Forced Confessions," *VoA News*, November 21, 2013, accessed March 4, 2014, http://www.voanews.com/content/china-top-court-rules-out-forced-confessions/1794726.html.

56 "China tries to curb miscarriages of justice as anger over torture, other abuses, grows," *Fox News* (*Associated Press*), November 23, 2013, accessed March 4, 2014, http://www.foxnews.com/world/2013/11/27/china-tries-to-curb-miscarriages-justice-as-anger-over-torture-other-abuses/.

57 In May 2013, Shen Dyong, the vice-president of the Supreme People's Court said high pressure placed on judges contributed to the high number of wrongful convictions in China; in July 2013 the head of the Guandong Provincial High Court criticized the "continued use of a Soviet-style system in which the courts are undifferentiated from administrative judges," see Stanly Lubman, "What China's Wrongful Convictions Mean for Legal Reform," *The Wall Street Journal*, July 17, 2013, accessed March 4, 2014, http://blogs.wsj.com/chinarealtime/2013/07/17/wrongful-convictions-and-chinas-legal-reform-push/.

58 Sceats with Breslin, "China and the International Human Rights System," 5.

59 Id. at 2.

Thus, China's reluctance from acceding to the Rome Statute, mainly stems from a cultural background endorsing state sovereignty and non-interference.

3.4 *Israel*

Israel signed the Rome Statute on the last day it was open for signature (31 December 2000), a few hours after the U.S. had signed the Statute.[60] However, Israel never ratified the Statute,[61] while on 28 August 2002 Israel – as did the U.S. – 'unsigned' the Rome Statute by filing a communication to the UN Secretary General, reading that:

> …in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998,… Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[62]

Israel advances three main arguments in objecting to the ICC, which all revolve around impartiality, the selection of offenses and national security.[63] Firstly, Israel expressed the view that cases might be brought before the Court for 'political reasons' while the ICC's system of selecting judges would give little hope for the election of an Israeli judge.[64] Secondly, Israel contemplated that the incorporation of "individual or mass transfers as well as deportations of protected persons from occupied territory" as a war crime in the Rome Statute, infringed with existing principles of international criminal law and

60 Stéphanie David, "The ICC and Israel," in "Israel. National Round table on the International Criminal Court: 'Raising accountability of international Criminals'," *International Federation for Human Rights*, January 2007, 34.

61 United Nations Treaty Collection, Rome Statute of the International Criminal Court, accessed March 4, 2014, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

62 Schabas, *An Introduction to the International Criminal Court 3rd ed.*, 27; see also Rule of Law in Armed Conflicts Project, Geneva academy of international humanitarian law and human rights, accessed March 4, 2014, http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=113.

63 Jeff Handmaker, "Running out of steam: Israel's empty objections to the International Criminal Court," *The Electronic Intifada*, January 20, 2004, accessed March 4, 2014, http://electronicintifada.net/content/running-out-steam-israels-empty-objections-international-criminal-court/4958; David, "The ICC and Israel," 34.

64 Handmaker, "Running out of steam"; David, "The ICC and Israel," 34.

was 'politically motivated'.[65] The validity of this argument is questionable, since the crime of enforced displacement was already included in Article 49 of the 1949 Geneva Conventions and is now widely considered as a binding principle of international criminal law.[66] The Israeli Government's objections, however, are said to arise from fear that its policy *vis-à-vis* the Israeli settlements in the Palestinian Occupied Territories would fall within the ambit of the ICC.[67] On the other hand, Israel also criticized the exclusion of certain crimes; it expressed its disappointment with the exclusion of terrorism and drug trafficking from the ambit of the ICC.[68] The exclusion of these crimes stemmed from a lack of political consensus: as yet, there is no internationally agreed common definition of the crime of terrorism.[69] The ICC mandate entails the prosecution of the most heinous international crimes (i.e. genocide, war crimes and crimes against humanity). A third concern of the Israeli Government pertained to national security issues and more specifically the State's right to withhold certain documents from the Court.[70] This fear of infringement with national security issues even found its way into Israeli law. On 28 October 2002, a law proposal was introduced at the Knesset (the Israeli Government) under

65 Handmaker, "Running out of steam"; David, "The ICC and Israel," 34–35.

66 Handmaker, "Running out of steam."

67 Id.

68 Id.

69 UN Security Council Resolution 1566 (adopted on October 8, 2004) defines terrorism as: "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act" (S/RES/1566 (2004)); UN General Assembly Resolution 49/60 (adopted on December 9, 1994) on "Measures to Eliminate Terrorism," contains the following definition: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them"; the STL Appeals Chamber proclaimed that the customary international law definition of terrorism consists of the following three elements: "(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element," Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL Appeals Chamber, Case No. STL-11-01/1, February 16, 2011, para. 85.

70 David, "The ICC and Israel," 34.

the title "Law proposal to prohibit any help to the ICC," which provided that "anyone who would give help to the ICC in a passive or an active way, anyone who would send personal data about an Israeli citizen or an Israeli resident to the ICC might be punished up to 10 years in prison."[71]

In conclusion, it can be said that Israel's arguments for non-ratification seem in line with the arguments of the U.S.; both States oppose to their own nationals standing trials before the ICC. Whereas Israel fears that the situation in the Palestinian Occupied Territories may be considered a war crime under the Rome Statute and that an investigation might negatively impact upon national security, the U.S. fears for the position of its soldiers operating abroad.[72]

4 Conclusion

This chapter illuminated that modesty and relativism is justified when speaking of the impact of the ICC within and on world politics.

The ICC – based upon the legacy of the two *ad hoc* tribunals (ICTY and ICTR) – undeniably disseminates a strong message to the international community that impunity of political leaders for international crimes is not tolerated and "intellectual" perpetration by individuals not adjacent to the "battlefield" will be be prosecuted before the ICC.[73]

On the other hand, the ICC's actual contribution to peace may not be overestimated in view of the responses by the AU to the – in their opinion – "selectivism" of the ICC Prosecutor.[74]

The Achilles heel of the ICC system revolves around the fairness of the selection process of its cases. In particular, the principle of even-handedness requires a critical and at the same time prudent policy of the ICC Prosecutor as to whom to prosecute for crimes committed during an armed conflict; armed conflicts are most often fuelled by two opposing groups. An example thereof is the case in Ivory Coast, where both Gbagbo and Ouattara forces allegedly committed crimes.[75]

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71 Id. at 35.

72 See also Chapter 4 on jurisdiction.

73 Elies van Sliedrecht, "De zaak Basebya" [annotation Basebya case, District Court of The Hague, March 1, 2013, Case No. ECLI:NL:RBDHA:2013:BZ4292], *Ars Aequi* 62 (2013): 938–943.

74 Knoops and Zwart, "Who is persecuting Laurent Gbagbo."

75 Human Rights Watch, "They Killed Them Like It Was Nothing."

As long as this one-sided prosecutorial policy does not anticipate political sensitivities transpired by the views of the AU or States like China, the future ambit of the ICC will probably remain restricted. The challenge to persuade States as the U.S., Russia and China to ratify the Rome Statute is rather ambitious; instead, one could perhaps focus on effective dissemination mechanisms to have some of the ICC substantive law principles – for instance on accessory liability and superior responsibility – being applied within those jurisdictions. After all, when domestic legal systems function in accordance with ICL standards, the ICC remains a dormant institution even for States Parties, due to its jurisdiction based on complementarity.

CHAPTER 12

Trials in Absentia

1 Introduction

Ten years after opening its doors, the International Criminal Court (ICC) finally delivered its first judgment in the case against Mr. Thomas Lubanga Dyilo. One of the main criticisms on the functioning of the ICC and other ICTs, apart from its Africa-oriented prosecutions, has been that (pre-)trial proceedings are quite time consuming and do not deliver swift justice. As a response, the ICTs and the ICC have tried to incorporate measures to enhance the expediency of trials in international criminal law. This Chapter will discuss one of the newest and most controversial measures of expediency in ICL, namely trials in absentia, which mechanism – after having been dormant for years – was re-instated at some ICTs.

2 Trials in Absentia

Trials in absentia entail a criminal trial in the absence of the accused. The roots of trials in absentia can be found in French law in the Criminal Ordinance of 1670, yet, most European countries have some form of trials in absentia. In civil law countries, trials in absentia can be used if the national system abides by the safeguards that are codified in, for instance, the European Convention on Human Rights (ECHR)[1] and the International Covenant on Civil and Political Rights (ICCPR). Trials in absentia are part of criminal procedure in civil law countries but have only been allowed in limited cases in common law countries. In common law systems, trials in absentia can only be used if an accused voluntarily absconds after the start of the trial, during which he or she was present. This difference can be explained by the nature of the criminal proceedings in the two different systems. In common law countries, the proceedings are adversarial but in civil law countries, the proceedings are mainly inquisitorial. Due to the pivotal role within common (adversarial) law countries of the presentation of evidence at trial, whereas in civil law countries the evidence is adduced (through a dossier) in advance – either with or without the presence of the accused – trials within common law systems require more

1 Even though the ECHR is a regional human rights mechanism, it is interesting to incorporate as ICTs often look at ECtHR jurisprudence as well.

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checks and balances. Because the presentation of the evidence at trial plays such a central role in common law countries, the accused is to be afforded more robust safeguards compared to an accused in civil law countries. As ICTs and, moreover, the ICC system intends to combine the common law traits and the civil law traits, it is interesting to ascertain whether trials in absentia have a standing within ICTs.

Recently, scholars started asking themselves whether it would be beneficial and desirable to use trials in absentia for ICTs to prevent any unnecessary lengthy delays.[2]

2.1 *The Legitimacy of Trials in Absentia*

2.1.1 The International Covenant on Civil and Political Rights (ICCPR)

Trials in absentia in international criminal law are controversial, as the right to be present during one's own trial is fundamental, being incorporated in the ICCPR and the ECHR. The ICCPR promulgates, in Article 14(3)(d), that:

> In 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, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.[3]

The United Nations Human Rights Committee (hereinafter: the Committee) has the right to monitor whether the States Parties are adhering to the rights incorporated in the ICCPR. According to the Committee, Article 14 contains three separate rights: the right to be present during one's own trial; the right to defend themselves personally or through counsel; and the right to representation, even when the accused cannot afford this.[4] Two Individual Communications concerning trials in absentia were filed before the Committee.

2 Mark Kersten, "Defendants on the Run – What's a Court to do?" *Justice in Conflict*, April 16, 2013, accessed April 10, 2014, http://justiceinconflict.org/2012/04/16/defendants-on-the-run-whats-a-court-to-do/.

3 United Nations, International Covenant on Civil and Political Rights, March 23, 1976, accessed April 10, 2014, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

4 United Nations Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), accessed April 10, 2014, http://www1.umn.edu/humanrts/gencomm/hrcom32.html.

In *Mbenge v. Zaire*, the Committee reiterated that under Article 14(3) ICCPR, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance; yet, this right was not deemed to be absolute.[5]

> This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14 (3) (a)). Judgment in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defense (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing. (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)).[6]

In *Maleki v. Italy*, the Committee reaffirmed the principle established in *Mbenge v. Zaire*.[7] The Committee also held that the violation of Article 14 ICCPR could be remedied, if the accused had the right to a retrial.[8]

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5 *Mbenge v. Zaire*, United Nations Human Rights Committee, Communication No. 16/1977, March 25, 1983 (eighteenth session), para. 14.1.

6 Id., para. 14.1.

7 *Maleki v. Italy*, United Nations Human Rights Committee, Communication No. 699/1996, July 27, 1999, para. 9.4; "The Committee has held in the past that a trial in absentia is compatible with article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him Communication No. 16/79, (Mbenge v. Zaire). In order for the State party to comply with the requirements of a fair trial when trying a person in absentia it must show that these principles were respected," accessed April 10, 2014, http://www1.umn.edu/humanrts/undocs/session66/view699.htm.

8 Id., para. 9.5.

2.1.2 The European Convention on Human Rights (ECHR)

Trials in absentia have been used by many civil law countries around the world, especially within the European Union. Yet, trials before ICTs are in principle not permitted in absentia, albeit that the STL constitutes an exception,[9] as well as the Nuremberg Tribunal. These trials in absentia can be distinguished from trials in absentia before other ICTs, as the STL and IMT allowed for a trial to commence without the accused being apprehended. In the course of its proceedings, the ICTY and ICTR marked a shift towards allowing trials in absentia, provided that the accused had explicitly waived his or her right to be present. In such cases the accused had, however, been already apprehended by the tribunal.[10] The Rome Statute allows for a confirmation of the charges hearing to be conducted in the absence of the accused, if the accused has waived his or her right to be present[11] or if the accused has "fled or cannot be found and all reasonable steps have been taken to secure his or her appearance."[12] The accused must, however have been informed of the charges and the fact that a confirmation hearing is about to take place.[13] Trials may also be conducted in the absence of the accused, if the accused portrayed disruptive conduct in court.[14] The question merits thought how human rights courts rule on this issue. As an example of a regional human rights treaty, the ECHR and its perspective on trials in absentia will be discussed.

Article 6 ECHR contains the general fair trial rights of the accused.[15] According to Article 6(3)(c) ECHR:

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9 See also Chapter 1.

10 See for example *Nahimana, Barayagwiza and Ngeze v. the Prosecutor*, Judgment, Case No. ICTR-99-52-A, November 28, 2007, paras. 97–99.

11 Article 61(2)(a) ICCSt.

12 Article 61(2)(b) ICCSt.

13 Ibid.

14 Rule 80 (B) ICTR RPE; Article 62(3) ICCSt.

15 European Convention on Human Rights, Council of Europe, as amended on June 1, 2010, accessed April 10, 2014, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf; Article 6 (1) ECHR: "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 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."

> [e]veryone charged with a criminal offence has the following minimum rights: (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.[16]

The European Court of Human Rights (ECtHR) has ruled that trials in absentia are not always in violation of the ECHR, as long as there are sufficient safeguards. Trials in the absence of the accused are only permissible once the accused has unequivocally waived his or her right to be present.[17]

In 1980, the ECtHR promulgated which safeguards are necessary during trials in absentia.[18] In *Artico v. Italy*, the applicant was convicted twice in absentia, without being represented by counsel. The ECtHR held that this was in violation of Article 6(3)(c) ECHR, as everyone has the right to representation, even when tried in absentia.[19] In 1985, the ECtHR dealt with a similar case in *Colozza v. Italy*. The Italian authorities assumed that an accused had fled when the adequate searches of the police remained unsuccessful.[20] In the eyes of the ECtHR, the mere presumption that the accused has fled, is insufficient to decide to try an accused in absentia.[21] According to the ECtHR, when trials in absentia are permitted under national law, the accused should, once he has become aware of the proceedings, be able to obtain, from the same court that had heard the case in first instance, a fresh determination on the merits of the charge.[22] Thus, proceedings that take place in absentia will not always be incompatible with the ECHR, presupposed that the accused may subsequently obtain a retrial, from the court which initially judged him.[23] This right to a retrial should not only be incorporated in the law but, as the ECtHR held, has to be an effective right.

16 *Ibid.*, Article 6(3)(c) ECHR.

17 *Sejdovic v. Italy*, ECtHR Judgment, Appl. No. 56581/00, March 1, 2006, para. 58.

18 *Artico v. Italy*, ECtHR Judgment, Appl. No. 6694/74, May 13, 1980.

19 Id., para. 37.

20 *Colozza v. Italy*, ECtHR Judgment, Appl. No. 9024/80, February 12, 1985, para. 20.

21 Id., para. 28.

22 Id., para. 29; see also *Sejdovic v. Italy*, ECtHR Judgment, Appl. No. 56581/00, March 1, 2006, para. 82.

23 *Krombach v. France*, ECtHR Judgment, Appl. No. 29731/96, February 13, 2001, para. 85; see also Martin Böse, "Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia," *North Carolina Journal of International Law & Commercial Regulation* 37/2 (2011): 489–510 at 498.

2.2 *The Use of Trials in Absentia within ICL*

Trials in absentia were first applied in international criminal law (ICL) during the International Military Tribunal (IMT) at Nuremberg. Article 12 IMT Charter explicitly allowed trials in absentia.[24] One famous example is the case against Martin Bormann. In October 1946, Martin Bormann was tried in absentia for crimes against the peace, war crimes and crimes against humanity during the Nuremberg trials and sentenced to death.[25] Bormann's defense unsuccessfully argued that Bormann, whose whereabouts were unknown, could not be tried because he was already dead.

The use of trials in absentia has not been common in recent years in international law. The Rome Statute of the International Criminal Court (ICC) explicitly prohibits the use of trials in absentia,[26] as well as the Statutes of the *ad hoc* tribunals.[27] However, the creation of the Special Tribunal for Lebanon (STL) and the Bangladesh War Crimes Tribunal seems to depart from the view adopted in the Rome Statute. The Trial Chamber of the Bangladesh War Crimes Tribunal concluded that the United Nations reversed its policy against trials in absentia with the establishment of the STL in 2006.[28] Even though neither the STL or the Bangladesh War Crimes Tribunal is an official international tribunal of the United Nations, it can serve as an example for international and regional tribunals that deal with international crimes. For this reason, it is important to examine the precedents that are set by these tribunals.

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24 Charter of the International Military Tribunal, Article 12, August 8, 1945, accessed April 10, 2014, http://www.uni-marburg.de/icwc/dateien/imtcenglish.pdf; Article 12: "The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."

25 Jewish Virtual Library, Judgment at Nuremberg, accessed April 4, 2014, http://www.jewishvirtuallibrary.org/jsource/Holocaust/JudgeBormann.html.

26 Article 63 (1) ICCSt.: "The accused shall be present during the trial."

27 Article 21(4)(d) ICTYSt.: "[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." (The ICTR has a similar provision, Article 20(4)(d) ICTRSt.).

28 David Bergman, "Azad judgement analysis 1; 'in-absentia' trials and defense inadequacy," *Bangladesh War Crimes Blog*, January 26, 2013, accessed April 10, 2014, http://bangladeshwarcrimes.blogspot.nl/2013_01_01_archive.html.

2.2.1 The Special Tribunal for Lebanon (STL)

On 14 February 2005 a large explosion in downtown Beirut killed 23 people, including the former Lebanese Prime Minister Rafiq Hariri, and injured many others. The explosion came from a car bomb, which was placed near the St. George Hotel, and the result was a crater of at least 10-meters wide and 2 meters deep on the street. There was swift national and international condemnation of the explosion.

In February 2005, the United Nations Secretary-General sent a fact-finding mission to Beirut to investigate the bombing, which was led by Peter Fitzgerald. Its report, published at the end of the mission, recommended the establishment of an independent international investigation. The Security Council established the UN International Independent Investigation Commission (UNIIIC) with Resolution 1595 in April 2005. The mandate of the UNIIIC was to examine the assassination of Rafiq Hariri but this was later expanded to include the investigation of other assassinations that took place before and after the Hariri attack. After several other (political) killings and bombings in Lebanon, the government of Lebanon requested the United Nations Secretary-General to establish a tribunal of 'international character'. In March 2006, the Security Council gave the Secretary-General the mandate to negotiate with the government of Lebanon on the establishment of such a tribunal. The United Nations and the Lebanese government signed an agreement that established the STL on 23 January 2007 but the agreement was never ratified by the Lebanese Parliament.[29]

The STL became operative on 1 March 2009, being an independent, judicial organization; even independent of the United Nations. The primary mandate of the STL is to hold trials for the people accused of carrying out the attack of 14 February 2005.

a *Trials in Absentia*

On the first of February 2012, the Trial Chamber of the STL issued the decision to try the four accused – which were indicted for the attack – in absentia.[30]

29 The Speaker of the Lebanese Parliament refused to hold a vote on the ratification of the agreement. This became an important factor in the jurisdiction and legality challenge of the Defense in June 2012; see *Prosecutor v. Ayyash et al.*, "Decision on the Defense Challenges to the Jurisdiction and Legality of the Tribunal," Case No. STL-11-01/PT/TC, July 27, 2012.

30 *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, "Decision to Hold Trials in Absentia," Case No. STL-11-01/PT/TC, February 1, 2012.

In July 2012, the Trial Chamber decided to uphold this decision.[31] The four accused – Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra – are yet at large and not apprehended by the Lebanese authorities, therefore still not in the custody of the STL. According to Article 22 of the Statute and Rule 106 of the Rules of Procedure and Evidence of the STL, trials in absentia are permitted. Article 22(1) STLSt. states:

> The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

In the case against Ayyash *et al.*, the Trial Chamber Judge held that Article 22(1)(c) STLSt. applies, as the accused cannot be found and the Judge has decided that the Prosecution has taken all reasonable steps to inform the accused.[32] The drafters of the Statute included the practice of trials in absentia after strong insistence of the government of Lebanon. As trials in absentia are part of Lebanese criminal procedure and the STL uses the Lebanese Criminal Code and Code of Criminal Procedure, the drafters finally accepted the use of trials in absentia.

The Statute of the STL incorporates several safeguards for the accused being absent at trial, to compensate this procedural handicap. This seems an antithesis; once one accepts that trials in the presence of the accused are part and parcel of a fair trial, it is difficult to justify this flaw based on certain compensating measures. Article 22(2) STLSt. intends to do so by ensuring that the accused has the right to counsel, either appointed by the accused or, in this case, provided by the Registry, as the accused have failed to appoint counsel of their own choosing. Article 22(3) STLSt. provides the accused with another safeguard, namely the right to a retrial, if the accused is ever apprehended.

b *Criticisms*

The decision of the Trial Chamber to admit trials in absentia was received with great skepticism by many international criminal defense lawyers. In the

31 *Prosecutor v. Ayyash et al.*, "Decision on Reconsideration of the Trial in Absentia Decision," Case No. STL-11-01/PT/TC, July 11, 2012.

32 *Prosecutor v. Ayyash et al.*, "Decision to Hold Trials in Absentia," February 1, 2012.

decision, the Trial Chamber acknowledged that it is preferable to hold trials in the presence of the accused. The President of the STL even stated:

> it is in the best interests not only of the accused, but also of the Tribunal – with its purpose of achieving a fair and efficient trial to establish truth and promote reconciliation within Lebanon – for each accused to be present and to fully participate in his own defence.[33]

However, if the accused cannot be found, and the Prosecution has taken every step necessary to find the accused, trials in absentia are – under the STL system – permissible. Even though the Statute has incorporated several compensatory measures, critics believe that these safeguards are insufficient. Many scholars question whether the right to a retrial is actually an effective right, as the STL is scheduled to close in a few years.[34] As the Statute only provides for a right to a retrial before the STL, and not before the national Lebanese court, this could imply that the effective possibility for a retrial is limited. Furthermore, the defense of the accused argued that it is impossible to introduce an effective defense, as the defense cannot discuss a strategy or possible alibi with the accused.[35] This implies that the defense is dependent on the information received from the cooperating state, in this case Lebanon; yet, the cooperation of Lebanon with the STL-defense cannot serve as a counterbalancing measure.

The STL introduces trials in absentia as the first "international" court since the IMT at Nuremberg. The Statute intends to provide the accused with safeguards to compensate for him/her not being present during their own criminal trial. However, it is questionable whether the additional rights afforded to the accused are effective and whether these safeguards are sufficient.

2.2.1 Bangladesh War Crimes Tribunal

The Bangladesh War Crimes Tribunal was set up by Bangladeshi Parliament, the basis being the International Criminal Tribunal Act of 2009. The International Criminal Tribunals Act was unanimously passed by the government in 1973, authorizing the investigation and prosecution of the persons responsible for

33 *Prosecutor v. Ayyash et al.*, "Decision to Hold Trials in Absentia," February 1, 2012, para. 20.

34 See, for instance, Chris Jenks, "Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon violate Human Rights?" *Fordham International Law Journal* 33/1 (2009): 57–100 at 62.

35 See for example: *Prosecutor v. Ayyash et al.*, "Sabra Motion for Reconsideration of the Trial Chamber's Decision to Hold Trial In Absentia," Case No, STL-11-01/PT/TC, May 23, 2012, para. 29.

genocide, crimes against humanity, war crimes and other crimes under international law committed in 1971. The Act drew heavily from the IMT Charter used at Nuremberg and the resulting principles prepared by the International Law Commission.[36] The IMT at Nuremberg also allowed trials in absentia.[37] In March 2010, the government formed the three-judge panel of the tribunal.

a *Trials in Absentia*

At the Bangladesh War Crimes Tribunal, the accused can be tried in absentia. The Trial Chamber of the Bangladesh War Crimes Tribunal concluded that by incorporating trials in absentia at the STL, the United Nations reversed its policy against trials in absentia.[38] In the International Crimes (Tribunals) Act of 1973, it is not mentioned that the accused has to be present during the trials. Bangladesh has even made a reservation to the ICCPR concerning trials in absentia.[39] Yet, in the Judgment of Mr. Azad,[40] the Trial Chamber held that the provisions of the International Crimes (Tribunals) Act and the Rules provide for adequate compatibility with Article 14 ICCPR.[41] Several of the accused have been tried in absentia before the Tribunal, without any of the safeguards that are mandatory under the ECHR and the ICCPR.

b *Criticisms*

Christof Heyns, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, expressed concern about the fair trial and due process rights of the accused at the Bangladesh War Crimes Tribunal, which included concerns about the use of trials in absentia.[42]

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36 Caitlin Reiger, "Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971," *International Center for Transitional Justice*, 2010, p. 3, accessed April 10, 2014, http://ictj.org/sites/default/files/ICTJ-BGD-NationalTribunal-Briefing-2010-English.pdf.

37 Charter of the International Military Tribunal, 8 August 1945, Article 12, accessed Aprul 10, 2014, http://www.uni-marburg.de/icwc/dateien/imtcenglish.pdf.

38 *Prosecutor v. Abul Kalam Azad,* Judgment, Case No. ICT-BD-05, January 21, 2013, para. 50, accessed April 10, 1014, http://ict-bd.org/ict2/ICT2%20judgment/full_judgement_azad. pdf; see also Bergman, "Azad judgement analysis 1."

39 Suzanna Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation," *Criminal Law Forum* 21 (2010): 191–311 at 230.

40 *Prosecutor v. Abul Kalam Azad*, Judgment, January 21, 2013.

41 Id., para. 15.

42 United Nations Office at Geneva, "Bangladesh: United Nations Experts Warn that Justice for the Past Requires Fair Trials," *News & Media*, February 7, 2013, accessed April 10, 2014, http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/56813FE83E407DCBC1257B0B0051619O?OpenDocument.

Despite the accused being represented by counsel, defense counsels were not permitted to submit all defenses[43] nor were they allowed to submit (exculpatory) evidence.[44] The Bangladeshi government averted several times that the trials of the Tribunals are congruent with the international fair trial standards. Yet, the lack of transparency of these trials has made it difficult for the international community to ascertain whether this is actually true.

In 2011, the judges of the Tribunal adopted several amendments to the International Crimes (Tribunals) Act of 1973, in reaction to the criticisms of the international community. Under the amended rules, the accused will have the right to be presumed innocent, a fair and public hearing with counsel of their choice and the right to apply and be granted bail.[45] The amendments prohibit convicting a person twice for the same crime or requiring the accused to confess guilt.[46] Furthermore, the prosecution now bears the burden of proving beyond a reasonable doubt that the accused committed the crime. The judges also consented to the creation of a victim and witness protection system, which was necessary because counsel of the accused complained that their witnesses were intimidated and threatened.[47] However, Human Rights Watch maintains that the Bangladesh War Crimes Tribunal is, even after these amendments, still not operating in conformity with international standards.

One apparent example of the lack of fair trial rights of the accused at the Tribunal is Article 47(A) of the Constitution which denies the accused before the Tribunal the remedies which are guaranteed by the Constitution.[48] This provision precludes an accused before the Tribunal from having recourse to safeguards against arrest and detention, protections in respect of trial and punishment and the enforcement of their fundamental rights. On the basis of this provision, the Tribunal can convict an accused without affording him any safeguards for a fair trial.

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43 *Ibid.*

44 *Ibid.*

45 Human Rights Watch, "Bangladesh: Guarantee Fair Trials for Independence-Era Crimes. Amendments to Tribunal's Rules Fall Short of International Standards," July 11, 2011, accessed April 10, 2014, http://www.hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes.

46 *Ibid.*

47 Human Rights Watch, "India: Protect Bangladesh War Crimes Trial Witness. Abducted in Bangladesh, Now Detained in India, Risk of Death if Returned," May 16, 2013, accessed April 10, 2014, http://www.hrw.org/news/2013/05/16/india-protect-bangladesh-war-crimes-trial-witness.

48 Human Rights Watch, "Bangladesh: Guarantee Fair Trials for Independence-Era Crimes."

The International Center for Transitional Justice concurs with Human Rights Watch as to the fair trial concerns. In 2010, it published its own report, in which it identified several problems with the Tribunal. For instance, the availability of the death penalty, lack of independence of the process, the limits to the accused's rights and the lack of experience of the judges and prosecutors with international investigations and trials.[49] Notwithstanding the government of Bangladesh and the civil society seeking for justice for past crimes, the process remains controversial in Bangladesh and highly politically charged.

It is evident that the Bangladesh Tribunal for War Crimes does not fulfil the requirements of the ICCPR, even though the Trial Chamber purports that it does comply with international standards. The accused can be prosecuted in their absence, without an unequivocal and voluntary waiver, without the right of an effective representation and without the basic safeguards of due process.

2.2.2 Trials in Absentia due to Public Position

A new approach within the sphere of trials in absentia before ICTs was introduced by the ICC in the William Ruto case. William Ruto, one of the defendants in the Kenyan situation, argued that due to his position as vice-president of Kenya, his presence throughout the full trial would impair his public tasks. Accordingly, he petitioned to the ICC to be released from the requirement to appear before the ICC (at every occasion). The ICC partly granted this request; yet, it held that such release does not prevent the trial from continuing. Furthermore, the ICC contemplated that full absence on part of Ruto was not "in the interests of justice."[50]

The ICC's original RPEs did not provide for the accused's absence during the trial. Yet, in November 2013, during the 12th session of the Assembly of State Parties, Kenya (backed by Botswana, Jordan, the United Kingdom and Liechtenstein) proposed to amend the RPEs.[51] These States Parties requested to rescind the requirement of the accused being present during trial, to allow transcripts and written testimony, rather than *viva voce* testimony, as well as to permit the defendants to be "present" through a video link and their

49 Reiger, "Fighting Past Impunity in Bangladesh," 5.

50 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*, Case No. ICC-01/09-01/11-1186, February 18, 2014, para. 74.

51 Beth Van Schaack, "ICC Assembly of States Parties Rundown," *Just Security*, November 27, 2013, accessed April 22, 2014, http://justsecurity.org/2013/11/27/icc-assembly-states-parties-rundown/.

counsel.[52] The Assembly of State Parties adopted Rule 134 *quater* into the ICC RPE, which allowed for an accused's absence during trial, if he or she has a mandate "to fulfil extraordinary public duties at the highest national level."[53] The Trial Chamber will grant the accused's (written) request if it is in the "interests of justice" presupposed that the "rights of the accused are fully ensured."[54] The introduction of Rule 134 *quater* encountered criticism, as it would contravene with Article 63(1) ICCSt., which requires an accused's presence during trial. According to critics, the Rome Statute was amended through the – simpler – "backdoor" of the RPE, while concessions are being made to the advantage of *inter alia* sitting heads of state and high placed government officials.[55] Yet, Kenya's proposal to amend Article 27 ICCSt., so that incumbent heads of State could be (fully) exempted from prosecution during their time in office, failed.[56]

Shortly after the RPE amendments, the defence team of the Kenyan vice-president Mr. Ruto filed a request to exempt him from attendance at trial.[57]

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52 Beth Van Schaack, "ICC Assembly of States Parties Rundown," *Just Security*, November 27, 2013, accessed April 22, 2014, http://justsecurity.org/2013/11/27/icc-assembly-states-parties-rundown/; States Parties may propose amendments to the RPEs pursuant to Article 51(2)(a) ICCSt. Article 51(2) ICCSt. reads that "such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties."

53 Rule 134 *quater* ICC RPE provides: "(1) An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial; (2) The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time."

54 Rule 134 *quater* ICC RPE.

55 Beth Van Schaack, "ICC Assembly of States Parties Rundown," *Just Security*, November 27, 2013, accessed April 22, 2014, http://justsecurity.org/2013/11/27/icc-assembly-states-parties-rundown/.

56 Beth Van Schaack, "ICC Assembly of States Parties Rundown," *Just Security*, November 27, 2013, accessed April 22, 2014, http://justsecurity.org/2013/11/27/icc-assembly-states-parties-rundown/.

57 *Prosecutor v. Ruto*, "Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134 *quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial," Case No. ICC-01/09-01/11-1124, December 16, 2013.

As said, the Trial Chamber determined that total absence was not "in the interests of justice."[58] The Trial Chamber applied four indicia to balance the competing interests under Rule 134 *quater* ICC RPE:

(i) the interest of the Court to conduct fair, effective and expeditious proceedings,
(ii) the interest of victims in the proceedings conducted in the presence of the accused,
(iii) the interest of the Prosecutor,
(iv) the evidentiary value of the presence of the accused during the testimony of witnesses, on the one hand; and the interest of the State mandating the accused to fulfil extraordinary duties at the highest national level, on the other hand.[59]

As the Trial Chamber ruled, Ruto ought to be present at the time the victims were to be heard in court, during the closing arguments and the delivery of the judgment. More specific, Ruto's presence was deemed mandatory during:

(1) the closing statements of all parties and participants;
(2) the delivery of the judgment;

His presence was, if applicable, also required at:

(3) the sentencing hearing;
(4) the sentencing itself;
(5) the victim impact hearings;
(6) the reparation hearings;
(7) the first five days of the hearings after the judicial recess;
(8) any other attendance upon determination of the Chamber (either *proprio motu* or upon request).[60]

Hence, even though the Rome Statute drafters envisaged the accused being present during trial, RPE amendments have created a legal mechanism

58 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*," Case No. ICC-01/09-01/11-1186, February 18, 2014, para. 74.

59 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*," Case No. ICC-01/09-01/11-1186, February 18, 2014, para. 73.

60 Id., para. 79.

for public officials to be excused from attendance during an ICC trial. The Trial Chamber, however, has wide discretion in either refusing, granting or partly granting such excusal, while the balancing the competing interests.

2.3 Conclusion

Notwithstanding trials in absentia being incorporated in the Statutes of the IMT in Nuremberg, the Bangladesh Tribunals for War Crimes and the Special Tribunal for Lebanon, the analysis in this chapter indicates that these practices of trials in absentia are not in compliance with the principles of the ICCPR, as well as regional human rights treaties, such as the ECHR. The counterbalancing measures these courts introduce to compensate said handicap are not to be seen as effective. Moreover, since the crimes prosecuted before ICTs amount to the most grave charges, only trials conducted in presence of the defendant generate legitimacy within the international community.[61] An argument against the use of trials in absentia in international criminal proceedings is that the nature and unique features of such trials make attendance of the accused indispensable.[62] According to Cassese, five of the features that make attendance indispensable are: (a) the Court is often headquartered far from where the crimes were committed; (b) witnesses may be scattered around the world; (c) there is no investigative judge, which collects evidence for all the parties; (d) there is a lack of an independent international body of investigators; and (e) in many cases the defendant is accused of crimes that were committed many years before.[63]

It would be beneficial for the reputation of international criminal law if cases would be dealt with swiftly; yet, it is essential that the ICTs and the ICC uphold the highest standard of the rights of the accused. One of the major rationales of due process rights is the prevention of miscarriages of justice. The admission of trials in absentia increase the risk of such miscarriages as defense counsel is in most events not able "to master all the necessary evidence in rebuttal of the prosecution's case."[64] After all, the presence of the accused is also vital for the effectuation of the cross-examination of prosecution witnesses.[65]

61 Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 402–403.

62 Id., 403.

63 Id., 403.

64 Antonio Cassese, *International Criminal Law, 2nd ed.*, 403.

65 Id. at 403.

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